

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
www.flsb.uscourts.gov

In re:

CHAPTER 11

PALM BEACH FINANCE PARTNERS, L.P.,
PALM BEACH FINANCE II, L.P.,

Case No. 09-36379-PGH
Case No. 09-36396-PGH
(Jointly Administered)

Debtors.

**LIQUIDATING TRUSTEE'S MOTION FOR ENTRY OF ORDER
APPROVING (I) PRIVATE SALE AND TRANSFER OF VESSEL TO
JEFFREY J. NUCCITELLI FREE AND CLEAR OF LIENS, CLAIMS, AND
ENCUMBRANCES; AND (II) PAYMENT OF CONTINGENCY FEE**

Pursuant to Bankruptcy Rule 6004 and Local Rule 6004-1(D), this proposed use, sale or lease will be deemed approved without necessity of a hearing or order if no objection to the use, sale or lease is filed and served within 21 days from the date of service of this notice.

Barry E. Mukamal, in his capacity as liquidating trustee ("**Liquidating Trustee**") for the Palm Beach Finance Partners Liquidating Trust and the Palm Beach Finance Partners II Liquidating Trust (collectively, the "**Liquidating Trusts**"), by and through undersigned counsel, and pursuant to 11 U.S.C. §§ 105, 363, and Fed. R. Bankr. P. 2002, 6004, 6006 and 9013, and Local Rules 2002-1(C)(2), 6004-1(A) and (D), and 9013-1, files this Motion for Entry of an Order Approving (i) Private Sale and Transfer of Vessel to Jeffrey J. Nuccitelli ("**Mr. Nuccitelli**") Free and Clear of Liens, Claims, and Encumbrances; and (ii) Payment of Contingency Fee (the "**Motion**"). In support, the Liquidating Trustee states as follows:

Jurisdiction and Factual Background

1. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. § 1408 and 1409. The statutory bases for the relief sought herein are sections 105(a) and 363 of Chapter 11 of the Title 11 of the United States Bankruptcy Code.

2. Prepetition, Palm Beach Finance Partners, L.P. and Palm Beach Finance II, L.P. (collectively, the “*Debtors*”) operated as hedge funds. Together, David Harrold and Bruce Prevost managed the Debtors’ fundraising and investment activities.

3. On November 30, 2009, the Debtors filed voluntary petitions under Chapter 11 of the Bankruptcy Code. By subsequent Order of this Court, the cases are jointly administered.

4. On January 28, 2010, the Court entered the Agreed Order Directing Appointment of Chapter 11 Trustee and Denying United States Trustee's Motion to Convert Cases to Cases under Chapter 7 [ECF No. 100].

5. On January 29, 2010, the United States Trustee appointed the Liquidating Trustee as Chapter 11 Trustee of both of the Debtors’ estates [ECF No. 107].

6. On October 21, 2010, this Court entered its Order Confirming Second Amended Plan of Liquidation [ECF No. 444] (the “*Plan*”), thereby, *inter alia*, creating the Liquidating Trusts and appointing the Liquidating Trustee as liquidating trustee for the Liquidating Trusts.

7. On March 10, 2011, the Liquidating Trustee filed his Motion to Approve Settlement with Bruce and Colleen Prevost [ECF No. 604] (the “*Settlement Motion*”).

8. By Order dated April 13, 2011, the Court approved the Settlement Motion [ECF No. 631] (the “*Settlement Order*”). Pursuant to the Settlement Order, the Liquidating Trustee

was given authority to, *inter alia*, take possession of and auction a 2006 Sea Ray 290 SLX (the “*Vessel*”), with the net proceeds going to the Liquidating Trusts.

9. By Order dated September 13, 2011 [ECF No. 754] (the “*Auctioneer Order*”), this Court approved the employment and retention of Eric Rubin (“*Mr. Rubin*”) and Moecker Auctions, Inc. (“*Moecker*”; and together with Mr. Rubin, the “*Auctioneer*”) to assist the Liquidating Trustee in selling the Vessel and handling all tasks relating thereto. More specifically, the Auctioneer Order permitted the Auctioneer to take possession of and inspect the Vessel, market the Vessel for sale, and conduct an auction relating to the Vessel, if and to the extent necessary.

Terms of the Proposed Sale to Mr. Nuccitelli

10. For nearly six months, since entry of the Auctioneer Order, the Auctioneer has been actively engaged in efforts to market and sell the Vessel. On March 8, 2012, the Auctioneer, on behalf of the Liquidating Trusts, and Mr. Nuccitelli executed a Purchase Agreement (the “*Purchase Agreement*,” a true and correct copy of which is attached hereto as Exhibit 1), wherein Mr. Nuccitelli has agreed to purchase the Vessel, free and clear of all liens, claims, and encumbrances for \$44,750.00 (the “*Purchase Price*”). Pursuant to the Purchase Agreement, \$9,000.00 of the Purchase Price has already been paid to the Auctioneer as a deposit (the “*Deposit*”) and the remainder of the Purchase Price shall be paid upon approval of the sale by this Court.

11. Pursuant to the Plan and the Settlement Order, all monetary consideration received in conjunction with the sale of the Vessel will be allocated and apportioned among the Liquidating Trusts as follows: 18% to Palm Beach Finance Partners Liquidating Trust and 82% to the Palm Beach Finance Partners II Liquidating Trust.

12. Also, pursuant to the Plan, this Court's Order Approving the Trustee's Motion to Approve Hybrid Form of Compensation [ECF No., 223] (the "**Compensation Order**"), and the Settlement Order, Meland Russin & Budwick, P.A. ("**MRB**") is entitled to a fee of ten percent (10%) for any affirmative recovery received by the Liquidating Trusts, including receipt of any funds from the sale of the Vessel, without further order of the Court (the "**Contingency Fee**").

13. The Liquidating Trustee believes that the Purchase Price is reasonable and therefore the proposed sale to Mr. Nuccitelli pursuant to the Purchase Agreement should be approved. The Auctioneer has spent nearly six months marketing the Vessel through various means, including web-based advertising in publications for boat sales, personal solicitations to contacts known to be in the market, and other direct marketing efforts to individuals, brokers and dealers in the boat market. The Purchase Agreement represents the highest and best offer received to date as a result of these considerable efforts. Moreover, the Purchase Price is only \$250.00 less than the value that was estimated for the Vessel in the Settlement Motion.

Sales Free and Clear of Liens - 11 U.S.C. § 363

14. The Liquidating Trustee, after proper notice, may sell property of the Debtors' estates subject to provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules of this Court.

15. Section 363(b) of the Bankruptcy Code provides in relevant part that a trustee "after notice and a hearing, may use, sell or lease, other than in the ordinary course of business, property of the estate." Sales of this nature are generally approved when the trustee demonstrates that the sale constitutes an exercise of sound "business judgment."¹

¹ See *In re Condere Corp.*, 228 B.R. 615 (Bankr. S.D. Miss. 1998); see also *WBQ P'Ship v. Virginia*, 189 B.R. 97 (Bankr. E.D. Va. 1995).

16. The Liquidating Trustee believes that the business judgment standards have been met in this matter. Specifically, the Purchase Price is reasonable in light of the estimated value of the Vessel as set forth by the Liquidating Trustee in the Settlement Motion. Moreover, the Auctioneer has sufficiently marketed the Vessel and obtained a willing buyer of the Vessel for approximately the same amount as was estimated to be the value of the Vessel in the Settlement Motion, despite the depressed recreational boat market as well as the fact that the Vessel is in need of some certain repairs and aesthetic improvements. The Liquidating Trustee believes, therefore, that the sale of the Vessel to Mr. Nuccitelli pursuant to the Purchase Agreement is in the best interests of the Liquidating Trusts, their creditors and interest holders, and should be approved.

17. The Liquidating Trustee proposes to sell the Vessel free and clear of all liens, claims, and encumbrances pursuant to section 363(f) of the Bankruptcy Code with such encumbrances, if any, attaching to the sale proceeds in their order of priority. Section 363(f) permits the such a sale when any one of the following conditions is met:

- (1) applicable non-bankruptcy law permits sale of such property free and clear of such an interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or
- (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.²

The language of § 363(f) is disjunctive so that a sale free and clear of liens, claims, and encumbrances may be approved if any of the aforementioned conditions are met.³

² See 11 U.S.C. §363(f); see also generally 3 Collier on Bankruptcy ¶ 363.06 (15th Ed. 2003).

³ *Id.*; see also *In re Heine*, 141 B.R. 189 (Bankr. D.S.D. 1992).

18. Notably, the Liquidating Trustee does not believe that there are any liens, claims or encumbrances on the Vessel. The Liquidating Trustee has possession of the Vessel's original title, which says "NONE" in the area under which any lienholders are to be listed. Moreover, a recent search of the Florida Department of Highway Safety and Motor Vehicles (the "*DMV*") records performed by the Auctioneer (with which the Vessel is registered), revealed no such liens, claims or encumbrances. Finally, the Liquidating Trustee has conferred with Mr. Prevost, who has represented as follows: (i) there was never a mortgage or other loan relating to the Vessel; (ii) all costs associated with the Vessel were timely paid by Mr. Prevost when due; and (iii) to the best of his knowledge, there are no outstanding claims relating to the Vessel for any goods and services provided thereto. As such, the Liquidating Trustee believes that no valid liens, claims, or encumbrances currently exist with respect to the Vessel. Moreover, in an abundance of caution, the Liquidating Trustee is providing notice of the Motion to all parties that Mr. Prevost was able to identify that may have provided goods or rendered services to the Vessel during the approximately six (6) years that he owned it, thereby giving such entities an opportunity to object to the proposed sale in accordance with this Motion.

19. As a result, the Liquidating Trustee believes that, absent any such objections being filed in response hereto, the proposed sale of the Vessel can be approved free and clear of any liens, claims and encumbrances pursuant to section 363(f) of the Bankruptcy Code.

Adequate and Reasonable Notice of the Sale Will be Provided

20. The Trustee will serve the Motion upon all parties-in-interest as required by Bankruptcy Rule 2002(c)(1) and Local Rule 6004-1(A) and (D). Such notice will conform to the requirement of Bankruptcy Rule 2002(c)(1) and Local Rule 6004-1(B) as the Motion contains the terms and conditions of the sale of the Vessel. All notified parties will have twenty-one (21)

days (the “**Objection Deadline**”) from the date of service of the Motion to object to the proposed sale of the Vessel. Consistent with his fiduciary duties, the Liquidating Trustee will consider any such offers.

21. In the event a party objects to the proposed sale of the Vessel by the Objection Deadline, the Liquidating Trustee will entertain other offers to sell the Vessel, starting at a purchase price of forty-five thousand, seven-hundred and fifty dollars (\$45,750), with minimum bid increments of one-thousand dollars (\$1,000), or increments as otherwise decided in the business judgment of the Liquidating Trustee, at a time designated by the Liquidating Trustee prior to the hearing on this Motion.

22. The proposed terms to Mr. Nuccitelli enumerated in paragraphs 10 above shall be equally applicable to any other purchaser. In addition, the Liquidating Trustee will only consider additional offers to purchase the Vessel that meet the following criteria:

- a. A written offer served upon counsel for the Liquidating Trustee via email at jwasserstrom@melandrussin.com on or before 4:00 p.m. on the Objection Deadline;
- b. A deposit of nine thousand dollars (\$9,000) payable by bank cashier’s check or wire transfer into the non-interest bearing escrow account of Meland Russin & Budwick, P.A., by the Objection Deadline;
- c. Financial information sufficient for the Liquidating Trustee to determine, using his business judgment, that the prospective purchaser is reasonably likely to be able to consummate the transaction; and
- d. Such other information as is reasonably requested by the Liquidating Trustee.

Relief Requested

23. As outlined above, the Liquidating Trustee respectfully requests that the Court enter an order, substantially in the form attached hereto as Exhibit 2, approving the proposed sale of the Vessel to Mr. Nuccitelli free and clear of liens, claims, and encumbrances, pursuant to the Purchase Agreement. Moreover, given Mr. Nuccitelli's interest in proceeding expeditiously, which the Liquidating Trustee fully supports, the Liquidating Trustee requests that the Court waive the ten-day stay of the effectiveness of the Sale Order consistent with Rule 6004(h) of the Bankruptcy Rules.

24. Finally, in accordance with the Plan, the Compensation Order and the Settlement Order, the Liquidating Trustee also requests that the Court approve the payment to MRB of the Contingency Fee from the Purchase Price without further Order from this Court.

WHEREFORE, the Liquidating Trustee respectfully requests that this Court enter an Order: (i) authorizing the sale of the Vessel to Mr. Nuccitelli free and clear of liens, claims, and encumbrances, with all liens, claims and encumbrances, if any, to attach to the sale proceeds; (ii) approving payment of the Contingency Fee; (iii) authorizing the Liquidating Trustee to execute any and all documents necessary to consummate the sale of the Vessel; and (iv) granting any and all further relief as the Court deems just and proper.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on March 15, 2012, via the Court's Notice of Electronic Filing on those parties listed on the attached Exhibit 3; via U.S. Mail to the parties listed on the matrix attached as Exhibit 4.

s/ Jessica L. Wasserstrom
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*Attorneys for Barry E. Mukamal,
Liquidating Trustee*

Purchase Agreement 2006 Sea Ray 290 SLX

THIS AGREEMENT made the 8th day of March, 2012, by and between
Jeffrey J Nuccitelli & Eric Rubin (Moecker Auctions).

Scope of Agreement:

Purchase of 2006 290 Sea Ray SLX to:

Jeffrey J Nuccitelli
422 Sundance Trail
Webster NY 14580
585 737 0730
jeffnuch@gmail.com

Hull ID: SERR 2864B606

Engine ID:
Port:ow622658
Stbd:ow622667

Survey completed by: Ed Cozzi- Performance Marine Surveyors



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SLX_Nuch-PMS-03120

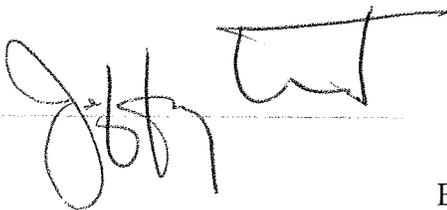
Purchase Price:

1. 2006 Sea Ray 290 SLX: \$44,750. Invoice # 2727 (\$44,750). Title will be clean and free of liens. Wire Transfer of \$9,000 on 3/8/2012 from Jeffrey J Nuccitelli (M&T Bank) to: Moecker Auctions Trust Account: #005496260585.
2. Final Payment after approval from Trustee for notice of sale. If this does not occur- Full deposit from Moecker will be refunded back to Jeffrey J Nuccitelli.
3. Condition and Contents of boat must match the same as it was for Marine Surveyors 3-2-2012 at time of full payment. If not- Deposit will be send back to Jeffrey J Nuccitelli and sale will be voided.

Signed this _____ day of _____, 20____
20____

Signed this 8th day of March 2012, _____

Seller _____

Buyer: 



3613 North 29th Ave
 Hollywood, FL 33020
 Office: 954-252-2887 Fax: 954-252-2791
www.moeckerauction.com

Date	Invoice #:
3/8,2012	2727

Buyer:
JN Manne c/o Mr. Jeffrey Nuccitelli 422 Sundance Trail Webster, NY 14580 585-737-0730

Re: 2006 Sea Ray XLS 290 Boat

DATE	ITEM DISCRPTION	Qty.		UNIT PRICE	TOTAL
3/8-12	2006 29' 6" Sea Ray XLS 290. Hull ID#: SERR2864B606 Engine Hours: Starboard = 152. Port = 148 <i>Being sold as is where-is</i>	1		\$44,750.00	\$44,750.00
				DEPOSIT	\$9,000.00
Balance due upon court approval					\$35,750.00

Please make checks payable to Moecker Auctions, Inc.
 3613 North 29th Ave
 Hollywood FL 33020

Everyone at Moecker Auctions, Inc. thanks you for your business! Please let us know if we may be of help in the future!

PROPOSED

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
www.flsb.uscourts.gov

In re:

CHAPTER 11

PALM BEACH FINANCE PARTNERS, L.P.,
PALM BEACH FINANCE II, L.P.,

Case No. 09-36379-PGH
Case No. 09-36396-PGH
(Jointly Administered)

Debtors.

**ORDER APPROVING LIQUIDATING TRUSTEE'S MOTION FOR ENTRY OF
ORDER APPROVING (I) PRIVATE SALE AND TRANSFER OF VESSEL TO
JEFFREY J. NUCCITELLI FREE AND CLEAR OF LIENS, CLAIMS, AND
ENCUMBRANCES; AND (II) PAYMENT OF CONTINGENCY FEE**

THIS CAUSE came before the Court upon the Liquidating Trustee's Motion for Entry of an Order Approving (i) Private Sale and Transfer of Vessel to Jeffrey J. Nuccitelli ("**Mr. Nuccitelli**") Free and Clear of Liens, Claims, and Encumbrances; and (ii) Payment of Contingency Fee [ECF No. ____] (the "**Motion**").¹ The Court, having reviewed the Motion, and

¹ All capitalized terms not defined in this Order shall have the meaning ascribed to such term as set forth in the Motion.

noting that a Certificate of No Response and Request for Entry of Order has been filed, finds that notice of the Motion is sufficient to comply with Bankruptcy Rule 2002(c)(1) and Local Rule 6004-1(A) and (D) and any other applicable notice requirement. Accordingly, it is:

ORDERED and **ADJUDGED** as follows:

1. The Motion is **GRANTED**.
2. The Liquidating Trustee's sale of the Vessel² to Mr. Nuccitelli, pursuant to 11 U.S.C. § 363 of the Bankruptcy Code, free and clear of all liens, claims and encumbrances, is approved on the terms and conditions set forth in the Motion and this Order.
3. The Vessel shall be sold to Mr. Nuccitelli for a total purchase price of \$44,750.00 and pursuant to the terms and in the manner set forth in the Motion and this Order.
4. The Purchase Price will be allocated and apportioned among the Liquidating Trusts as follows: 18% to Palm Beach Finance Partners Liquidating Trust and 82% to the Palm Beach Finance Partners II Liquidating Trust (the "*Pro Rata Allocation Formula*").
5. The stay of orders authorizing the use, sale, or lease of property as provided in Fed. R. Bankr. P. 6004(h) is waived and shall not apply to this Order, such that this Order shall be immediately effective and subject to enforcement.
6. MRB's Contingency Fee in the amount of \$4,475.00 is approved. The Liquidating Trustee is authorized and directed to make payment of the Contingency Fee without the need of further Court Order, in accordance with the Pro Rata Allocation Formula, promptly upon receipt of the Purchase Price.
7. The Court shall retain exclusive jurisdiction to construe, interpret, and enforce the terms of this Order.

² Capitalized terms utilized but not otherwise defined herein shall have the meaning ascribed to such terms in the Motion.

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Submitted By:

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Attorneys for the Liquidating Trustee

Copies Furnished To:

Jessica L. Wasserstrom, Esquire, is directed to serve copies of this Order on all parties in interest and to file a Certificate of Service.

Mailing Information for Case 09-36379-PGH

Electronic Mail Notice List

The following is the list of **parties** who are currently on the list to receive email notice/service for this case.

- Geoffrey S. Aaronson gaaronson@aspalaw.com, tdmckeown@mckeownpa.com; sbeiley@aspalaw.com; dlinder@aspalaw.com
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Frank Carruth
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