

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

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IN RE: : CHAPTER 11
: :
PALM BEACH FINANCE PARTNERS, LP, : CASE NO. 09-36379-BKC-PGH
PALM BEACH FINANCE II, LP, : CASE NO. 09-36396-BKC-PGH
: (Jointly Administered)
Debtors. :

**UNITED STATES TRUSTEE’S OBJECTION TO DEBTORS’ APPLICATION FOR
EMPLOYMENT OF BERGER SINGERMAN, P.A. AS ATTORNEYS FOR THE
DEBTORS-IN-POSSESSION *NUNC PRO TUNC* TO THE PETITION DATE (DE #6)**

Donald F. Walton, United States Trustee for Region 21, in furtherance of the administrative responsibilities imposed pursuant to 28 U.S.C. §586(a), files this objection to the “Debtors’ Application for Approval, on an Interim and Final Bases, of Berger Singerman, P.A., as Counsel for Debtors in Possession Nunc Pro Tunc to the Petition Date” (DE #6) (hereafter “Application”) as attorneys for the Debtors and in support states as follows:

PRELIMINARY STATEMENT

1. The United States Trustee objects to the retention of Berger Singerman, P.A. as Debtors’ general bankruptcy counsel under 11 U.S.C. §§327(a) and (c) due to fact Berger Singerman represents a interest adverse to the bankruptcy estates resulting in a conflict of interest.

BACKGROUND

2. On November 30, 2009, the Palm Beach Finance Partners, LP and Palm Beach Finance II, LP (collectively, the “Debtors”) filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The cases have been subsequently jointly administered by order entered December 1, 2009.

3. The Debtors have no operations, have no funds on hand and have no bank accounts.

4. On November 30, 2009, Debtors filed the Application, seeking the retention of Berger Singerman, P.A. (“Applicant”) as bankruptcy counsel for the Debtors under 11 U.S.C. § 327 (DE #6).

5. Attached to the Application, the Applicant filed a “Declaration of Paul A. Avron on Behalf of Berger Singerman, P.A. as Proposed Counsel for Debtors-in-Possession” (“Declaration”). Since the filing of the Application, Applicant has filed three further supplemental affidavits.

6. In the Declaration, the Applicant states, under penalty of perjury the following:

- As of the petition date, Applicant represented the Steering Committees for each of the Debtors through engagement letters dated March 2, 2009.
- Applicant represented the Debtors pre-petition through engagement letters dated July 28, 2009 signed by Lewis B. Freeman, acting as Chief Restructuring Officer for the Debtors.
- On October 15, 2009, Lewis B. Freeman resigned as Chief Restructuring Officer of the Debtors.
- On October 16, 2009, Kenneth A. Welt was appointed state court Receiver for Lewis B. Freeman and Partners, Inc. (“LBFP”).
- Since October 16, 2009, Applicant has represented and continues to represent Mr. Welt in his capacity as Receiver of LBFP.
- Mr. Welt was retained by the Debtors as Chief Restructuring Officer of the Debtors.
- On November 12, 2009, Mr. Welt retained Applicant to represent the Debtors in connection with restructuring matters.
- Pre-petition, Applicant received fees for work incurred in representing the Steering Committees in the amount of \$34,029.16.

7. On December 9, 2009, Applicant filed a “Supplemental Declaration of Paul A. Avron on Behalf of Berger Singerman, P.A. as Proposed Counsel for Debtors-in-Possession” (DE #29) (“First Supplemental Declaration”). In the First Supplemental Declaration, Applicant provided additional

information, stating under penalty of perjury the following:

- As of December 9, 2009, Applicant was owed fees and expenses in the aggregate amount of \$129,622.24 for work completed representing Mr. Welt as Receiver of LBFP for the period October 16, 2009 through December 8, 2009.
- LBFP is a pre-petition creditor of the Debtors' estates in the amount of \$10,536.18.

8. On December 15, 2009, Applicant filed a "Second Supplemental Declaration of Paul A. Avron on Behalf of Berger Singerman, P.A. as Proposed Counsel for Debtors-in-Possession" (DE #45) ("Second Supplemental Declaration"). In the Second Supplemental Declaration, Applicant stated under penalty of perjury that it was retained as local counsel to represent Douglas Kelley in his capacity as Receiver of the Petters related matters, with the last action being taken by Applicant occurring on December 8, 2008.

9. A further additional disclosure was filed by Applicant on December 22, 2009, entitled the "Third Supplemental Declaration of Paul A. Avron on Behalf of Berger Singerman, P.A. as Proposed Counsel for Debtors-in-Possession" (DE #62) ("Third Supplemental Declaration"). In this Third Supplemental Declaration, Applicant provided the following information under penalty of perjury:

- Applicant was retained by Mr. Kelley in his capacity as Receiver pursuant to an engagement letter dated October 13, 2008.
- Applicant received a retainer for its representation of Mr. Kelley in the amount of \$5,000.00.
- Applicant received payment for services rendered to Mr. Kelley for services rendered between October 11, 2008 and February 11, 2009. Applicant was paid \$2,951.53 on March 31, 2009 and \$990.80 on October 27, 2009.
- Applicant is still holding the \$5,000.00 retainer and has not applied it to fees incurred.

10. Debtors filed their schedules on December 15, 2009 (Case No. 09-36379, DE #48 and Case No. 09-36396, DE #19). Mr. Welt signed the Schedules and Statement of Financial Affairs as

Chief Restructuring Officer. Both Debtors list on their respective Schedules F the following unsecured claim:

Lewis B. Freeman
c/o Kenneth A. Welt, Receiver
1776 North Pine Island Road, Suite 102
Plantation, FL 33322
Amount of claim \$10,536.18

In both cases, the Debtors listed the claim as Disputed.

11. On January 5, 2010, Mr. Welt appeared and testified on behalf of the Debtors as their Chief Restructuring Officer. When asked, Mr. Welt testified that he had yet not conducted any investigation as to the existence of any claims the Debtors may have against LBFP.

OBJECTION

12. A debtor in possession has all the rights and powers of a trustee and is obligated to perform all the functions and duties of a trustee. 11 U.S.C. §1107(a).

13. Bankruptcy Code Section 327 governs the employment of professionals by a debtor in possession. Section 327 states as follows:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraiser, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

...

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

14. Pursuant to 11 U.S.C. §101(14), a disinterested person is defined to be "a person that

(A) is not a creditor, an equity security holder, or insider;

- (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and
- (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.”

15. The Court has an independent duty to ensure that counsel employed pursuant to §327(a) is disinterested and does not represent an interest adverse to the estate. *In re Git-n-Go, Inc.*, 321 B.R. 54 (Bankr. N.D.Ok. 2004). “Conflicts of interest are prohibited by Sections 327(a) and 328(c) of the Bankruptcy Code...These provisions create an ongoing duty on the part of all professionals hired by the estate to avoid conflicts of interest.” *In re Creative Desperation, Inc.*, 415 B.R. 882, 896 (Bankr. S.D.Fla. 2009).

16. While the Bankruptcy Code does not define “adverse interest,” courts have held that a representation by counsel between parties that have competing interests results in a conflict in interest and an adverse interest to the estate. An adverse interest would include “an economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant...or...a predisposition under the circumstances that render such a bias against the estate.” *In re Prince*, 40 F.3d 356, 361 (11th Cir. 1994) quoting, *In re Roberts*, 46 B.R. 815, 822-823 (Bankr. D.Utah 1985). See also, *In re Rusty Jones, Inc.*, 134 B.R. 321 (Bankr. N.D.Ill. 1991); *In re Rivers*, 167 B.R. 288 (Bankr. N.D.Ga. 1994). “An actual conflict exists if there is ‘an active competition between two interests, in which one

interest can only be served at the expense of the other.” *Id* at 58., citing *In re BH & P, Inc.*, 103 B.R. 556, 563 (Bankr. D.N.J. 1989), *aff’d* in pertinent part, 119 B.R. 35 (D.N.J. 1990).

17. The United States Trustee submits that the facts clearly demonstrate that the representation by Applicant of both the Debtors and the Receivership¹ result in an actual conflict of interest. Applicant admits in its First Supplemental Declaration that it represents a creditor of this estate, that being Kenneth Welt as Receiver for LBFP. The Debtors’ schedules filed with the Court and signed by Mr. Welt under penalty of perjury disclose that Mr. Welt, as Chief Restructuring Officer of the Debtor, disputes that claim held by the Receivership. Furthermore, Mr. Welt testified at the §341 meeting of creditors that he had not made an investigation as to the existence of any claims the Debtors may hold against LBFP. The mere fact that the Debtors dispute the claim of LBFP raises an actual dispute between the parties. Applicant as counsel for both the Debtors and the Receivership, cannot litigate against itself. The amount of the claim is irrelevant. “The purpose of section 341(a) of Title 11 of the United States Code is to ensure impartiality in bankruptcy representation.” *Roberts* at 826-27. Applicant, in this case, cannot serve two masters when they are in direct conflict with each other².

¹Mr. Welt as Receiver for LBFP has a fiduciary obligation to ensure that all assets and potential causes of action are fully maximized and collected for the benefit of the creditors of LBFP. As Chief Restructuring Officer of the Debtors, Mr. Welt has the same fiduciary obligation to creditors of these bankruptcy estates.

²The United States Trustee recognizes that the employment of the Applicant as counsel for the Debtors while they also represent a disputed unsecured creditor in the same case may also be a potential conflict of interest. Due to the fact Mr. Welt is also a fiduciary to the creditors of LBFP as a result of his appointment as Receiver of LBFP and Applicant has unpaid fees owed for work conducted for Mr. Welt as Receiver, the Court should review the employment with a heightened level of scrutiny to ensure that the integrity of the bankruptcy system is maintained and no conflicts exist.

18. Furthermore, pursuant to 11 U.S.C. §327(c), upon objection filed by the United States Trustee or a creditor and upon the finding of an actual conflict of interest, the Court must deny approval of employment of bankruptcy counsel under §327(a). While there may be situations allowing for counsel to represent both a Debtor and a creditor, such as allowing counsel to represent parties in matters unrelated to the bankruptcy proceeding or if there exists a large bankruptcy case “where every competent professional in a particular field is already employed by a creditor or party in interest,” the facts in this proceeding do not rise to the level of such an exception. The Debtors are not operating and will be merely conducting litigation to recover funds. While these cases may have a potentially large recovery value, there has been little interest by investors or creditors other than the largest unsecured creditor, Palm Beach Offshore Limited and Palm Beach Offshore II Limited. It would not be difficult for Debtors to find bankruptcy counsel that meet the requirements of sections §§327(a) and (c).

19. Applicant admits it has a conflict in interest. Applicant’s request to represent the Debtors should be denied. *In re Big Mac Marine, Inc.*, 326 B.R. 150 (B.A.P. 8th Cir. 2005). In *Big Mac Marine*, counsel for the Debtor represented both the Debtor and the largest creditor in the case, who were also the shareholders. Upon objections filed by the United States Trustee and the secured creditor in the case, the bankruptcy court held that counsel could not represent both parties without having conflicting allegiances and denied approval. Later, counsel sought to have the order denying approval of employment vacated and filed a fee application. The bankruptcy court refused to vacate the order and denied the request for fees. On appeal, the Bankruptcy Appellate Panel for the 8th Circuit affirmed the bankruptcy court, holding that counsel had an actual conflict of interest at the

time and could not represent the debtors under section 327(c). “If employed as counsel for the Debtor, he would also have an obligation to represent all Debtor’s creditors and objectively analyze the validity of the...claims, or indeed to being a creditor at all...Multiple representation in these two cases was out of the question.” *Id* at 154-55.

20. The same facts apply to this case. Applicant needs to objectively analyze claims of all parties, including claims held by the estate. Applicant cannot objectively determine whether the claim held by LBFP is valid or whether this estate has a claim against LBFP when it is counsel for both entities.

CONCLUSION

21. The facts are not disputed. Applicant represents Mr. Welt as Receiver of LBFP as general counsel. LBFP is listed on the Debtors’ schedules with a disputed unsecured claim in the amount of \$10,536.18. Applicant seeks approval to represent the Debtors as general bankruptcy counsel pursuant to 11 U.S.C. §327(a). Applicant has an actual conflict of interest and therefore is not disinterested. Pursuant to §327(c), upon objection filed by the United States Trustee or a creditor, if the Court finds an actual conflict of interest, the Court must deny approval of employment of counsel.

WHEREFORE, the United States Trustee objects to Debtor's application to employ counsel and respectfully requests the Court enter an Order denying Debtors' application for employment of counsel and to grant such other relief as the Court deems just and proper.

DONALD F. WALTON
United States Trustee
Region 21

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' APPLICATION FOR EMPLOYMENT OF BERGER SINGERMAN, P.A. AS ATTORNEYS FOR THE DEBTORS-IN-POSSESSION *NUNC PRO TUNC TO THE PETITION DATE (DE #6)*** was electronically filed with the Court using the CM/ECF system, which sent notification to all parties of interest participating in the CM/ECF system.

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I further hereby certify that a true copy of the attached was sent via U.S. mail, properly addressed and with correct postage to the following:

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I hereby certify that I am admitted to the Bar of the State of Florida and the I am excepted from additional qualifications to practice in this Court pursuant to Local Rule 9011-4 pertaining to attorneys representing the United States government.

DONE this the 8th day of January, 2010.

_____/s/
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