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., a Delaware limited partnership, *et al.*,[1]	Case No. 09-36379-BKC-PGH
	Jointly Administered
Debtors.	

OMNIBUS OBJECTION OF GEOFF VARGA, AS JOINT OFFICIAL LIQUIDATOR FOR PALM BEACH OFFSHORE LTD. AND PALM BEACH OFFSHORE II LTD. TO THE DEBTORS' APPLICATIONS FOR APPROVAL, ON AN INTERIM AND FINAL BASIS, OF EMPLOYMENT OF: 1) BERGER SINGERMAN, P.A. AS COUNSEL FOR DEBTORS IN POSSESSION; 2) THOMAS, ALEXANDER & FORRESTER, LLP AS SPECIAL LITIGATION COUNSEL TO THE DEBTORS; 3) TRUSTEE SERVICES, INC. AS INTERIM MANAGEMENT FOR THE DEBTORS; AND 4) GONZALO R. DORTA, P.A. AS SPECIAL LITIGATION COUNSEL TO THE DEBTORS
(Hearing on Applications Set for 9:30 a.m. on January 28, 2010)

Geoff Varga, in his capacity as Joint Official Liquidator ("Liquidator") of Palm Beach Offshore Ltd. and Palm Beach Offshore II Ltd., by and through his undersigned counsel, hereby objects to the Applications for Approval, on an Interim and Final Basis, of Employment, *Nunc Pro Tunc* to the Petition Date, of the following: 1) Berger Singerman, P.A. ("Berger Singerman") as Counsel for Debtors in Possession (the "Berger Singerman Application") [D.E. 6]; 2) Thomas, Alexander & Forrester, LLP ("TAF") as Special Litigation Counsel to the Debtors (the "TAF Application") [D.E. 7]; 3) Trustee Services, Inc. ("TSI") as Interim Management for the Debtors (the "TSI Application") [D.E. 8]; and 4) Gonzalo R. Dorta, P.A. ("Dorta," and together

[1] The address and last four digits of the taxpayer identification number for each of the Debtors follows in parenthesis: (i) Palm Beach Finance Partners, L.P., 3601 PGA Blvd, Suite 301, Palm Beach Gardens, FL 33410 (TIN 9943); and (ii) Palm Beach Finance II, L.P., 3601 PGA Blvd, Suite 301, Palm Beach Gardens, FL 33410 (TIN 0680).

with Berger Singerman, TAF and TSI, the "Professionals") as Special Litigation Counsel to the Debtors (the "Dorta Application" and collectively, the "Applications") [D.E. 11], and in support thereof, states as follows:

PRELIMINARY STATEMENT

1. The Professionals who seek to be retained by the Debtors are encumbered by a web of irreconcilable conflicts, most of which are rooted in their connections to, and in some instances, representation of, a group of the Debtors' limited partners – vaguely referred to in the Applications as the "Steering Committees" – who are now in control of the Debtors (although the extent of this control is unclear).

2. For more than a year, the Debtors have had no business operations, no employees, no tangible assets and no prospects for reorganizing through the Chapter 11 bankruptcy process.

3. There is also a spate of issues raised by the participation of these Professionals in finalizing a settlement agreement with the Debtors' general partners on the eve of filing the Chapter 11 filings, and the use of the cash derived from the settlement to, in part, pay the Professionals' and other attorneys' outstanding fees and to advance additional cash for fees that the Professionals expect they will earn during the course of the Debtors' bankruptcy proceedings. Of significant concern, although the Debtors have sought to compromise certain claims they have against various third parties – admittedly the only real asset category held by the Debtors – the Debtors have received no consideration for the settlement and have not reflected any value from the settlement in their schedules.[2]

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[2] During the 341 Meeting of these Debtors, held on Wednesday, January 6, 2010, the Debtors' CRO (as defined below) and his counsel testified that the value of the Settlement Agreement (as defined below) to

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4. The web of conflicts is so confusing that Berger Singerman has struggled to explain them and has, to date, filed three supplemental declarations attempting to clarify the firm's initial disclosures which were filed in connection with their Application (*see* footnote 3, *infra*, and associated text). But, each subsequent disclosure has presented even more troubling facts.

5. For these reasons (which are detailed below) the Liquidator, as the most significant stakeholder in these proceedings, objects to, and requests that the Court deny each of the Applications.

PROCEDURAL BACKGROUND

6. The Liquidator represents the interests of Palm Beach Offshore Ltd. and Palm Beach Offshore II Ltd. (collectively, the "Offshore Funds"), which are the largest unsecured creditors of the Debtors. Collectively, the Offshore Funds are owed over $700 million under demand promissory notes (the "Notes"), representing practically all of the claims against the Debtors.

7. The Debtors issued the Notes to the Offshore Funds which, along with the equity investments of the Debtors' investors, were subsequently directed to Petters Company, Inc. (the "Petters Company"), in exchange for notes. The Petters Company was an entity owned and controlled by Thomas J. Petters ("Petters") who was recently convicted by a federal jury in

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the Debtors is likely limited to cooperation from certain settling parties, as the settlement proceeds have been allocated or otherwise transferred to various parties, including the proposed Professionals.

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Minnesota of masterminding a $3.65 billion Ponzi scheme.[3]

8. On November 30, 2009 (the "Petition Date"), Palm Beach Finance Partners, L.P. and Palm Beach Finance II, L.P. (the "Debtors") each filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). By order dated December 1, 2009, the Court approved the joint administration of these cases [D.E. 19].

9. The Debtors are currently not operating and have not operated for over a year. *See* United States Trustee's Motion to Convert Cases to Cases Under Chapter 7 or, in the Alternative, Motion to Appoint Chapter 11 Trustee and Request for Expedited Hearing (the "Motion to Convert") ¶ 2 [D.E. 34]. During the 341 Meeting, the CRO was unable to provide an exact date on which the Debtors' operations ceased, but stated that the operations likely ceased in September, 2008 when the Petters Fraud (defined below) was discovered.

10. The Chapter 11 petitions were accompanied by the following Applications, each seeking approval for the retention of professionals. The Applications consist of:

> (i) **Berger Singerman Application**, with the accompanying Declaration of Paul A. Avron, as Proposed Counsel for Debtors-in-Possession ("Avron Decl.") [D.E. 6], pursuant to which the Debtors seek to retain Berger Singerman as counsel for Debtors-in-Possession *nunc pro tunc* to the Petition Date.[4]

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[3] For information concerning Petters' December 2, 2009, criminal conviction, *see, e.g.*, "*Tom Petters found guilty of Ponzi scheme fraud*" Reuters, Dec. 2, 2009, and Susan Carey, "*Petters Found Guilty of Fraud*" THE WALL STREET JOURNAL, Dec. 2, 2009.

[4] On December 9, 2009, Berger Singerman filed the Supplemental Declaration of Paul A. Avron on Behalf of Berger Singerman as Proposed Counsel for Debtors-in-Possession ("Supp. Avron Decl.") [D.E. 29]. On December 15, 2009, Berger Singerman filed the Second Supplemental Declaration of Paul A. Avron on Behalf of Berger Singerman as Proposed Counsel for Debtors-in-Possession ("Second Supp. Avron Decl.") [D.E. 45]. On December 22, 2009, Berger Singerman filed the Third Supplemental Declaration of Paul A. Avron on Behalf of Berger Singerman as Proposed Counsel for Debtors-in-Possession ("Third Supp. Avron Decl.") [D.E. 62].

(ii) **TAF Application**, with the accompanying Declaration of Steven W. Thomas, as Proposed Special Litigation Counsel to the Debtors-in-Possession ("Thomas Decl.") [D.E. 7], pursuant to which the Debtors seek to retain TAF as special litigation counsel *nunc pro tunc* to the Petition Date.[5]

(iii) **TSI Application**, with the accompanying Declaration of Kenneth A. Welt in Support of the Debtors' Application for Order Authorizing Retention of TSI *Nunc Pro Tunc* to Petition Date ("TSI Welt Decl.") [D.E. 8], pursuant to which the Debtors seek to retain TSI as interim management for the Debtors *nunc pro tunc* to the Petition Date.[6]

(iv) **Dorta Application**, with the accompanying Declaration of Gonzalo R. Dorta, on behalf of Gonzalo R. Dorta, P.A., as Proposed Special Litigation Counsel to the Debtors-in-Possession ("Dorta Decl.") [D.E. 11], pursuant to which the Debtors seek to retain Dorta as special litigation counsel *nunc pro tunc* to the Petition Date.

11. On December 10, 2009, the United States Trustee filed the Motion to Convert. The Court conducted a Preliminary Hearing on the Motion to Convert on December 17, 2009 and an evidentiary hearing on the Motion to Convert has been scheduled for January 28, 2010.

12. On December 11, 2009, the Court entered Interim Orders: (i) Approving in Part and Denying in Part the Employment of Berger Singerman as Counsel for the Debtors-in-Possession *Nunc Pro Tunc* to the Petition Date [D.E. 37] (Berger Singerman is currently retained on an interim basis as special counsel to the Debtors pursuant to section 327(e)); (ii) Approving the Employment of TSI as Interim Management for the Debtors *Nunc Pro Tunc* to the Petition Date [D.E. 38]; (iii) Approving in Part the Employment of TAF as Special Litigation Counsel to the Debtors *Nunc Pro Tunc* to the Petition Date [D.E. 40] (TAF is currently retained on an interim basis as special counsel to the Debtors pursuant to section 327(e) on a rates and hours

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[5] On December 9, 2009, TAF filed the Supplemental Declaration of Steven W. Thomas, on behalf of TAF, as Proposed Special Litigation Counsel to the Debtors-in-Possession ("Supp. Thomas Decl.") [D.E. 30].

[6] On December 9, 2009, TSI filed the Supplemental Declaration of Kenneth A. Welt in Support of the Debtors' Application for Order Authorizing the Retention of TSI ("Supp. TSI Welt Decl.") [D.E. 31].

basis – as opposed to the proposed 33% contingency fee);[7] and (iv) Approving in Part the Employment of Dorta as Special Litigation Counsel to the Debtors *Nunc Pro Tunc* to the Petition Date [D.E. 41] (Dorta is currently retained on an interim basis as special counsel to the Debtors pursuant to section 327(e) on a rates and hours basis – as opposed to the proposed 7% contingency fee).

13. A final hearing on the Applications is scheduled for January 28, 2010.

FACTUAL BACKGROUND

14. The various Applications and documents filed in these cases, especially the "Declaration of Kenneth A. Welt in Support of the Debtors' Chapter 11 Petitions and Request for First Day Relief" ("Welt Decl.") [D.E. 8], disclose the following facts:

a. The Debtors are limited partnerships that were nominally managed by Bruce F. Prevost, David W. Harrold, Palm Beach Capital Management, L.P. ("PBCM LP") and Palm Beach Capital Management L.L.C. (collectively, the "General Partners"). *See* Welt Decl. ¶ 1. Palm Beach Capital Management L.L.C. was also the Investment Manager of the Offshore Funds.

b. The Debtors were formed for the purpose of soliciting funds from third parties which the Debtors then "invested" with the Petters Company. *See* Welt Decl. ¶ 10.

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[7] Although this Omnibus Objection focuses primarily on the conflicts and resultant lack of disinterestedness that should bar the retention of the named Professionals, the Liquidator also objects to the proposed contingency fee arrangement that the Steering Committees negotiated with TAF and Dorta whereby those Professionals are poised to receive 40% of any recoveries plus, in the case of Dorta, 100% of costs incurred. Any retention of those Professionals has to be evaluated for purposes of determining the reasonableness of the terms of such retention. The Liquidator submits that the proposed terms are unreasonable and that TAF and Dorta should be required (if their Applications are approved by the Court) to accept compensation on an hourly basis for work actually performed for the Debtors' estates.

c. The monies solicited and obtained by, among others, the Debtors from third parties, were lost through what appears to have been a massive Ponzi scheme undertaken by Petters and others working with him (the "Petters Fraud"). *See* Welt Decl. ¶¶ 10, 12-15.

d. In addition to the criminal prosecution of Petters, the Petters Company and several related entities are the subject of a civil forfeiture proceeding filed by the United States of America in the United States District Court for the District of Minnesota (District Court Case No. 08-SC-5348 (ADM/JSM)) (the "Petters District Court Action") and, in addition, they are debtors in Chapter 11 cases pending in the United States Bankruptcy Court for the District of Minnesota (jointly administered under Case No. 08-45257) (the "Petters Chapter 11 Cases, and collectively, the "Petters Cases"). *See* Welt Decl. ¶ 11.

e. Pursuant to an engagement letter dated October 13, 2008, Berger Singerman was retained by Douglas Kelley ("Kelley"). Kelley is (i) the court appointed Receiver of Petters and related entities (the "Petters Receiver") in the Petters District Court Action and (ii) the Chapter 11 Trustee of the Petters Company and related entities (the "Petters Trustee") in the Petters Chapter 11 Cases. *See* Second Supp. Avron Decl. ¶ 2; Third Supp. Avron Decl. ¶ 2.

f. Kelley, in his capacity as the Petters Receiver, has paid Berger Singerman: (i) the sum of $5,000 on November 17, 2008 as a retainer; and (ii) additional sums for services rendered between October 11, 2008 and February 11, 2009 in the amounts of (A) $2,951.53 on March 31, 2009, and (B) $990.80 on October 27, 2009. The funds paid by Kelley to Berger Singerman came from Central America Holding, LLC, one of the entities over which Kelley was appointed Receiver in the Petters District Court Action. *See* Third Supp. Avron Decl. ¶ 2.

g. The Debtors are creditors of the Petters Chapter 11 Cases and Kelley is the Petters Trustee. Importantly, the greatest potential asset of the Debtors' estates is the $1.1 billion claim that the Debtors filed in the Petters Chapter 11 Cases, cases controlled by Kelley who has previously retained the services of Berger Singerman. Therefore, Berger Singerman holds an interest adverse to the estates (11 U.S.C. §327(a)) as it has divided loyalties and has a direct conflict of interest on matters for which they are to be engaged in the Debtors' bankruptcy cases.

h. Shortly after Petters' indictment, the management of the Debtors was delegated to a group of the Debtors' limited partners. This transfer of control was affected when the General Partners and the limited partners of the Debtors entered into "Amendment Agreements" to their respective Limited Partnership Agreements (the "Amendment Agreements"). Pursuant to the Amendment Agreements, effective October 29, 2008, the General Partner of each Debtor delegated to appointees of the limited partners of each Debtor (the "Representatives") the General Partners' "power and authority deemed necessary or desirable by the [Representatives] to pursue investigations and recovery of losses and assets" from the Petters Company and related entities. The Amendment Agreements also contemplated the formation of a Steering Committee for each Debtor, on which Steering Committees the respective Representatives were entitled to serve as members (collectively, the "Steering Committees"), and gave the Steering Committees the authority to retain, instruct and communicate with legal counsel, and to investigate, prosecute and settle the Debtors' respective claims and legal actions related to the Petters Fraud. *See* Welt Decl. ¶¶ 28, 29.

i. On or about December 22, 2008, TAF was engaged by each Steering Committee to investigate and pursue claims against third parties arising from the losses suffered by the Debtors in connection with the Petters Fraud. *See* Supp. Thomas Decl. ¶ 2.

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j. By an engagement letter dated March 2, 2009, Berger Singerman was also retained by the Steering Committees to act as special bankruptcy counsel and co-counsel with TAF. *See* Avron Decl. ¶ 4(A).

k. On or about April 22, 2009, the Steering Committees filed proofs of claim in the Debtors' names in the Petters' Chapter 11 Cases; the aggregate amount of those claims is approximately $1.1 billion. *See* Welt Decl. ¶ 19.

l. On June 5, 2009, the General Partners, on behalf of each Debtor executed a "Certificate of General Partner Resolutions and Incumbency." These resolutions ratified the appointment of the respective Steering Committees and granted the Debtors the authority, upon the recommendation and consent of the Steering Committees, to retain Lewis B. Freeman ("Freeman") to serve as Chief Restructuring Officer ("CRO") for each entity and further, authorized Freeman to employ professionals, including his own firm, Lewis B. Freeman & Partners, Inc. ("LBFP"). *See* Welt Decl. ¶¶ 30, 31; Supp. Thomas Decl. ¶ 3.

m. By engagement letters dated July 12, 2009, Freeman, in his capacity as CRO for the Debtors, retained TAF to investigate and pursue claims against third parties arising from losses related to the Petters Fraud. *See* Supp. Thomas Decl. ¶ 4.

n. On July 21, 2009, TAF received a fee of $60,000 for the services it rendered to the Steering Committees. The source of the funds for this payment is unknown, but the funds appear to have been delivered to TAF by the General Partners. *See* Thomas Decl. ¶ 6.

o. At about the same time, on or about July 22, 2009, Freeman received $40,000 for his services. This payment to Freeman was made by a check issued from TAF's IOLTA Trust Account and subsequently, was deposited into a LBFP bank account. The source of these funds is unknown. Despite the payment to Freeman, his firm – LBFP – is a creditor of

the Debtors and claims to be owed an additional $10,536.18. *See* Supp. TSI Welt Decl. ¶ 2; Supp. Avron Decl. ¶ 5.

p. By an engagement letter dated July 28, 2009, Freeman, acting as CRO for the Debtors, retained Berger Singerman to act as counsel for the Debtors. This engagement letter provided, in part, that it superseded Berger Singerman's engagement by the respective Steering Committees (described in paragraph j above). *See* Supp. Avron Decl. ¶ 6.

q. The following day, July 29, 2009, Berger Singerman received a $40,000 payment from TAF's IOLTA Trust Account (the same account TAF used to make payments to Freeman and his firm). Although the $40,000 was ostensibly for services to be rendered to the Debtors, Berger Singerman applied $34,029.16 of the payment to satisfy outstanding invoices owed by the Steering Committees; the balance of $5,970.84 was held by Berger Singerman as a retainer for services to be provided by the firm to the Debtors. Berger Singerman later issued monthly invoices to the Debtors which were paid from the funds held in trust by Berger Singerman as follows: $1,646.84 on October 23, 2009, and a second payment in the amount of $324.02 on October 23, 2009. Berger Singerman applied the funds it was holding against these pre-Petition Date fees leaving a trust balance of $3,999.98. *See* Avron Decl. ¶¶ 9, 10.

r. Through July 2009, the collective payments made to Berger Singerman and TAF totaled $100,000.00, paid as follows: $40,000.00 to Berger Singerman and $60,000.00 to TAF. The source of these funds is unexplained, except for a reference to the payments pursuant to the Settlement Agreement and Release, discussed below, which was not signed until almost four months later. *See* Avron Decl. ¶ 9; Thomas Decl. ¶ 6.

s. On October 16, 2009, Mr. Freeman resigned as CRO due to the filing of a voluntary dissolution proceeding for LBFP in the Miami-Dade County Circuit Court (the "LBFP

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Dissolution Proceeding"). That same day, Kenneth A. Welt ("Welt") was appointed as Receiver of LBFP. *See* Avron Decl. ¶ 4(A); Supp. Avron Decl. ¶ 2.

t. Following his appointment, Welt retained Berger Singerman, *nunc pro tunc* to October 16, 2009, to represent him in his capacity as the Receiver in the LBFP Dissolution Proceeding. As of the date of this Objection, Berger Singerman continues to represent Welt in that capacity. *See* Supp. Avron Decl. ¶ 2.

u. Following Freeman's resignation as the Debtors' CRO, David Harrold ("Harrold"), in his capacity as the President of PBCM LP, engaged TSI to provide interim management services for the Debtors, which included Welt's services as CRO. Welt was later appointed as CRO of both Debtors as evidenced by Certificates of General Partner Resolutions and Incumbency that were signed by Harrold and dated on or about November 10, 2009.[8] *See* Supp. TSI Welt Decl. ¶ 7; Supp. Avron Decl. ¶ 9.

v. Following this appointment, Welt hired both Berger Singerman and TAF. *See* Avron Decl. ¶ 4(A); Thomas Decl. ¶ 5. By engagement letters dated November 11, 2009, Welt retained TAF to investigate and pursue claims against third parties arising from the losses suffered by the Debtors in connection with the Petters Fraud. *See* Supp. Thomas Decl. ¶ 8. By engagement letters dated November 12, 2009, Welt retained Berger Singerman to act as counsel to the Debtors in connection with restructuring matters. *See* Supp. Avron Decl. ¶ 10.

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[8] In the Avron Declaration, Avron disclosed that "On November 12, 2009, Berger Singerman was retained by each of the Debtors, through substitute Chief Restructuring Officer Kenneth A. Welt," who Berger Singerman has represented since October 16, 2009. Avron Decl. ¶ 4(A). However, in the Supplemental Declaration of Avron, Mr. Avron disclosed that "To correct the error in the purported appointment of [Trustee Asset Recovery, Inc.] as Chief Restructuring Officer *Certificates of General Partner Resolutions and Incumbency* dated November 10, 2009 were executed by David Harrold, solely in his capacity as the President of [PBCM LP]…clarifying that Kenneth A. Welt, individually, was being appointed as CRO for each of the Debtors." Supp. Avron Decl. ¶ 9. Therefore, the exact date of Mr. Welt's appointment as CRO is unknown.

w. Only two days after Harrold retained TSI and Welt, the parties entered into a settlement of the Debtors' claims against Harrold and the General Partners. On or about November 13, 2009, a Settlement Agreement and Release dated November 6, 2009 (the "Settlement Agreement") was entered into among Harrold, Bruce Provost, PBCM LP, Palm Beach Capital Management, LLC, Palm Beach Capital Corporation, the Debtors (by and through their Steering Committees) and Welt. *See* Welt Decl. ¶ 34.

x. Pursuant to the Settlement Agreement, *inter alia*, Harrold and the other General Partners are to be released from any claims against them. In return, the General Partners agreed to (i) make a payment of cash in the amount of $3 million and various securities of questionable value,[9] (ii) assign all claims they might have against any third party or entity in any way relating to the Petters Fraud; and, (iii) cooperate in any litigation relating to the Petters Fraud. *See* Welt Decl. ¶ 34, n. 8.

y. As a result of the payments made under the Settlement Agreement, on November 16, 2009, Berger Singerman and TAF each received a payment of $200,000.00 which was again paid from TAF's IOLTA Trust account. *See* Avron Decl. ¶ 10; Thomas Decl. ¶ 6.

z. Berger Singerman has applied $37,479.40 of its payment to satisfy pre-Petition Date fees and expenses. The resulting balance of $166,520.58 is being held as security for fees that may ultimately be awarded in the Debtors' bankruptcy cases. *See* Avron Decl. ¶ 10.

aa. On November 30, 2009, Welt filed the voluntary Chapter 11 petitions. *See* Welt Decl. ¶ 9.

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[9] The Settlement Agreement contemplates that the $5 million is a combination of $3 million cash and a purported $2 million in securities valued as of September 30, 2009. The $3 million in cash is being used to fund professional and attorneys' fees such as Berger Singerman, TAF, and CRO Welt. *See* Welt Decl. ¶ 34, n. 8.

bb. Except for a request for joint administration, the Debtors have not sought any relief in the "main" bankruptcy cases beyond the Applications and a related motion to approve interim compensation arrangements for the Professionals.

cc. Furthermore, none of the above was ever brought to the attention of, nor was consultation had with, the Liquidator, who, as noted above, represents the overwhelming majority, in value, of the Debtors' creditors.

BASIS FOR OBJECTIONS

15. The Bankruptcy Code contains detailed provisions concerning the employment of professional persons and their compensation. *See In re Cutler Mfg. Corp.*, 95 B.R. 230, 231 (Bankr. M.D. Fla. 1989) (noting the numerous Bankruptcy Code provisions concerning employment and compensation of professionals). Foremost among these is section 327(a), which imposes a 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. Section 327(a) provides in part:

> [T]he trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327(a).

17. Section 327(a) therefore conditions the employment of professionals upon a finding that the professional satisfies a two part test: (1) the professional must be disinterested; and (2) must not hold an interest adverse to the estate. 11 U.S.C. §327(a). The determination of whether a professional meets these standards is made only after a full disclosure of the facts. *In re Keller Fin. Services of Florida, Inc.*, 243 B.R. 806, 812-13 (Bankr. M.D. Fla. 1999).

18. Berger Singerman, TAF and Dorta each seek to be retained as counsel to the Debtors under section 327, and are therefore subject to this standard. The Debtors argue that by making an application pursuant to 11 U.S.C. § 363(b) to approve the retention of TSI (and not Mr. Welt, individually) to manage the Debtors' affairs, whether or not section 327's "disinterested" standard is met is irrelevant. *See* Debtors' Response in Opposition to United States Trustee's Motion to Convert Cases to Cases under Chapter 7 or, in the Alternative, Motion to Appoint Chapter 11 Trustee [D.E. 44] p. 9, ¶¶ 20 and 21. Such a blatant manipulation of the Bankruptcy Code provisions governing the retention of professionals runs afoul of the Bankruptcy Code's inclusion of a disinterestedness standard requirement in the Code when written. In light of the facts presented in these cases, the "disinterestedness" (or lack thereof) of Mr. Welt should be imputed to his company, TSI, and there should be no deference given to the "business judgment" of the Debtors – who in any event are ostensibly being "run" by Mr. Welt.

1. The Disinterested Requirement

19. The first requirement of section 327 is that the proposed professional must be a "disinterested person" – as defined by section 101(14) of the Bankruptcy Code – which is a person who is "not a creditor, an equity shareholder, or an insider" and does not have "an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders" for "any reason." 11 U.S.C. § 101(14); *see also Keller Fin. Services*, 243 B.R. at 812 ("Section 327 imposes two express requirements. First, the professional must be a disinterested person, as defined in § 101(14) of the Bankruptcy Code, and second, the professional must not hold or represent an interest adverse to the estate") (internal citations omitted).

2. The Absence of an Interest Adverse to the Estate

20. In addition to being disinterested, the statute requires that a professional not have an "interest adverse to the estate," a term that is not defined in the Bankruptcy Code. However,

the courts have consistently held that a person holds or represents such an adverse interest if he possesses 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)(citations omitted); *see also In re J.S. II, L.L.C.*, 371 B.R. 311, 321-22 (Bankr. N.D.Ill. 2007) ("[I]t is more productive to ask whether a professional has 'either a meaningful incentive to act contrary to the best interests of the estate and its sundry creditors-an incentive sufficient to place those parties at more than acceptable risk-or the reasonable perception of one.'").

3. Analysis

(a) ***Professionals' Representation of Different Parties Related to Debtors – Interests of Various Clients Not Aligned with Interests of Debtors***

21. The cash transfers to various Professionals on the eve of filing the Debtors' bankruptcy petitions are not the only events that occurred to support the Liquidator's position that the interests of the Professionals are adverse to the estates. There were prior cash transfers and a web of interlocking engagements that create similar, but independent, conflicts.

22. Pursuant to the October 29, 2008 Amendment Agreements, the General Partner of each Debtor relinquished management of their respective duties to the Representatives who formed Steering Committees for each Debtor to manage the affairs of the Debtors. In December, 2008 and March, 2009, the Steering Committees retained TAF and Berger Singerman, respectively as counsel to represent their interests.

23. On June 5, 2009, the General Partners of each Debtor ratified the respective Steering Committees and on behalf of the Debtors, authorized the Steering Committees' retention of Freeman as CRO for each Debtor and Freeman's retention of professionals,

including Freeman's company, LBFP. Thereafter, in July, 2009, Freeman, in his capacity as CRO for the Debtors, retained TAF and Berger Singerman as counsel for the Debtors.

24. In October 2009, Welt was appointed Receiver for LBFP. Welt immediately retained the Berger Singerman to represent him as Receiver for LBFP, which representation of Welt as Receiver for LBFP is continuing today.

25. On November 10 or 12, 2009, Harrold, as President of General Partner, PBCM LP retained TSI to manage the Debtors, which retention included Welt serving as the Debtors' CRO.

26. Meanwhile, over a period of time, the Steering Committees, through Berger Singerman and TAF as their legal representatives (at a time when the firms were representing the Debtors through CRO Freeman and Welt), negotiated and entered into the Settlement Agreement wherein full and complete releases were given to the General Partners and it was agreed that the entry of Bar Orders (injunctions barring third parties from bringing claims against the General Partners) would be sought by the CRO after the Debtors filed for bankruptcy protection. After Harrold retained TSI, Welt signed the Settlement Agreement as Receiver for the CRO (Freeman) and thereafter, much of the cash proceeds paid by the General Partners pursuant to the Settlement Agreement ended up in the hands of the Professionals.

27. During the 341 Meeting, Mr. Welt referred to the Steering Committees as the "quasi creditors' committee." Accordingly, you had the creditors (with the exclusion of the Offshore Funds) negotiating a settlement with the Debtors, with TAF and Berger Singerman representing both sides of the transaction – an irreconcilable and fatal conflict of interest to their proposed retention here.

28. Furthermore, it appears that the authority given to the Steering Committees by the General Partners transformed that entity into a general partner, with the obligations and liabilities associated with such status. As such, the Debtors and/or creditors may hold claims against the Steering Committees, which claims TAF and Berger Singerman could not pursue on behalf of the Debtors due to their representation of the Steering Committees.

29. Finally, adding insult to injury, from October 13, 2008 through an unknown date in 2009, Berger Singerman represented Kelley (the Trustee and Receiver for the various Petters entities) in at least one matter pending in Florida. Berger Singerman received payments on invoices for services performed on behalf of Kelley through October 27, 2009 (though the firm claims their representation of Petters ended in early 2009 and their respective clients waived any conflicts). Notwithstanding, the Debtors are creditors of the Petters bankruptcy estate, holding claims of approximately $1.1 billion. Berger Singerman's representation of both the Debtors and Kelley is an irreparable conflict of interest – which conflict cannot be waived to enable Berger Singerman to be retained as general bankruptcy counsel for the Debtors.

30. Based upon the foregoing, the Applications of Berger Singerman and TAF must be denied by the Court. The sole motivation for filing these Chapter 11 cases appears to be obtaining Court approval of the Settlement Agreement that only benefits the various Professionals who seek to be retained, excludes the estates' creditors from any potential benefit, and insulates the various intertwined Professionals and settling parties from clawback claims and other potential liability.

(b) ***Adverse Interest of Professionals – Economic Interest in Settlement Agreement Being Approved by Court***

31. In addition, Berger Singerman and TAF are each tainted by their connections to the Steering Committees, as well as their involvement and economic interests in the Settlement

Agreement with the Debtors' General Partners.

32. The Professionals that the Debtors propose to retain have already benefitted financially from the Settlement Agreement and therefore have much to lose if that settlement is not approved by this Court. There is substantial reason to question its terms, which not only release the Debtors' claims against the General Partners, but if approved, requires litigation bar orders (the "Bar Orders") be entered by the Court in each case providing the General Partners with "third-party releases" and protecting them from all claims of third parties. Such drastic relief is even more disturbing in light of the fact that the settlement has not resulted in any payment to the Debtors' estates.

33. In consideration for the Bar Orders and releases, the Settlement Agreement contemplates payment to the Debtors by the General Partners of a combination of $3 million cash and $2 million in securities of questionable value. Of the $3 million cash, $1.4 million has been used to fund professional and attorneys' fees for the benefit of Berger Singerman, TAF, Welt and TSI, and Holland & Knight. Although $500,000 has been allocated for the Debtors, it is only paid if the Court approves the broad Bar Orders. The remainder of approximately $1.1 million is held in escrow and its status is unclear.

34. The record in this proceeding reflects that, just prior to the Petition Date, $500,000.00 was wired to TAF. Of the $500,000.00 (apparently paid by the General Partners as part of the proposed settlement), $200,000.00 was paid to Berger Singerman as a retainer in connection with the Debtors' bankruptcy filing, $100,000.00 was paid to TSI and $200,000.00 was paid to TAF as a retainer in connection with its anticipated role as the Debtors' special litigation counsel.

35. The Professionals are entitled to retain the funds received only if the Court approves the terms of the Settlement Agreement and permits it to take effect, including the entry of the Bar Orders by the Court in the respective Debtor's bankruptcy cases. Therefore, approval of the Settlement Agreement will have significant consequences on creditors of these bankruptcy estates. The imposition of injunctions through the Bar Orders will prevent creditors from asserting their own claims against the General Partners. There are substantial jurisdictional and due process issues associated with such extra-ordinary relief, particularly outside a plan of reorganization. Such releases are contrary to the economic interests of the Debtors' creditors. If the Settlement Agreement is not approved, it will be contrary to the economic interests of the Professionals. The Professionals' economic interests in this regard are clearly adverse because, the Professionals have a meaningful incentive not to act in the best interests of the estates and their creditors. Therefore, the Applications fail to meet the standards dictated by section 327 of the Bankruptcy Code and should be denied by the Court. *See In re J.S. II, L.L.C.*, 371 B.R. at 321-22.

(c) ***Welt's Conflict as Receiver and CRO***

36. The "Declaration of Kenneth Welt in Support of the Debtors' Application for Order Authorizing Retention of Trustee Services, Inc. *Nunc Pro Tunc* to the Petition Date" [D.E. 8] states in paragraph 3 that TSI does not hold or is not involved in any engagements adverse to the Debtors and is a disinterested person as defined under 11 U.S.C. §101(14). This clearly is not a correct statement. Welt is not disinterested and that fact should be imputed to his company, TSI, because he will be the party at TSI primarily performing services and, as CRO, making decisions for the Debtors. *See* TSI Application ¶ 4.

37. The record indicates that LBFP asserts a claim against the Debtors, collectively, in the amount of $10,536.18. Welt, in his role as receiver of LBFP, is an unsecured creditor in

these cases and therefore holds an interest adverse to the Debtors. In any event, as the State Court-appointed Receiver of LBFP he has a fiduciary duty to maximize the returns to the creditors of LBFP and prosecute that claim. But, as CRO of these estates, Welt has an obligation to review claims and determine whether the creditors hold valid claims and dispute those that appear questionable. He cannot serve as the CRO here because he would hold fiduciary duties in two entities that may assert claims against one another. Accordingly, Welt fails to meet the statutory definition of a disinterested person. *See* 11 U.S.C. § 101(14)(A)("disinterested person … is not a creditor ….").

38. Additionally, TSI and Welt's engagement letter includes an indemnification provision which is intended to fully protect TSI and Welt from liability for any wrongdoing or mismanagement of the Debtors' affairs. The Debtors (CRO Welt) agreed to indemnify Welt and TSI – not a single independent or disinterested party was involved in negotiating the broad terms of TSI's engagement letter.

39. Welt's conflicting roles as Receiver of LBFP and the CRO of the Debtors creates a direct and irreconcilable conflict, and therefore he, as Receiver of LBFP, has "an actual or potential dispute in which the estate is a rival claimant." *In re Prince,* 40 F.3d at 361. He, therefore, has an interest adverse to the estates and cannot be retained by the Debtors.

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CONCLUSION

40. Through their pre-petition representations, actions, and due to their own financial interests, the Professionals here are irreparably conflicted and unable to be retained as counsel to the Debtors – in any capacity. Both Berger Singerman and TAF represented the "quasi creditors' committee" in the negotiation of the Settlement Agreement, and as counsel to the Debtors they would be tasked with determining whether the Settlement Agreement is in the best interest of the estate, which cannot be an impartial examination due to their divided loyalties. Of course, Berger Singerman and TAF cannot serve as both counsel to the Debtors and the "quasi creditors' committee." Similarly, because of the ongoing representation of LBFP, Welt cannot serve as CRO of these Debtors – he cannot represent both a creditor of the Debtors and the Debtors themselves.

41. For the foregoing reasons, the Liquidator respectfully objects to the approval of the Berger Singerman Application, the TSI Application, the TAF Application and the Dorta Application and requests the entry of an order denying the Applications.

I, Lynn Maynard Gollin, hereby certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this Court set forth in Local Rule 2090-1(A).

Respectfully submitted,

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