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

In re:

PALM BEACH FINANCE PARTNERS, L.P., a Delaware limited partnership, *et al.*,[1]

Case No. 09-36379-BKC-PGH
Chapter 11 Cases
(Jointly Administered)

Debtors.
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**DEBTORS' OMNIBUS RESPONSE IN OPPOSITION TO THE (I) 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 DEBTOR, (II) 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, AND (III) OBJECTION OF GEOGG VARGA, AS JOINT OFFICIAL LIQUIDATOR FOR PALM BEACH OFFSHORE LTD. AND PALM BEACH OFFSHORE II LTD. TO THE DEBTORS' MOTION FOR AN ORDER ESTABLISHING PROCEDURES FOR MONTHYL AND INTERIM COMPENSATION AND REIMBURSEMENT OF EXPENSES FOR PROFESSIONALS**

Palm Beach Finance Partners, L.P. ("Fund I") and Palm Beach Finance II, L.P. ("Fund II," with Fund I, the "Funds" or "Debtors"), by undersigned special counsel,[2] hereby respond to

[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).

[2] Per prior Order of the Court, Berger Singerman, P.A. ("BSPA") is currently serving as special counsel to the Debtors. A final hearing on the Debtors' Application to retain BSPA as general bankruptcy counsel is set for January 28, 2010.

Geoffrey Varga's (i) Omnibus Objection[3] (D.E. 67) to the Debtors' applications to retain (a) Trustee Services, Inc. as interim management (D.E. 8), (b) BSPA as Debtors' general bankruptcy counsel (D.E. 6), (c) Thomas, Alexander & Forrester, LLP ("TAF") as Debtors' special litigation counsel (D.E. 7), (d) Gonzalo R. Dorta, P.A. ("GRD") as Debtors' special litigation counsel (D.E. 11), (ii) the UST's Objection (D.E. 66) to the Debtors' retention of BSPA as Debtors' general bankruptcy counsel, and (iii) Mr. Varga's Objection (D.E. 68) to the interim compensation procedures motion (D.E. 9) and state:

## I. Preliminary Statement

1. Mr. Varga's objection to the retention of TSI is unfounded as it presumes, wrongly, that there exists a disinterestedness requirement contained in section 363(b) of the Bankruptcy Code, the statutory basis for TSI's proposed retention. This is the precise reason why the UST announced that it would *not* object to the Debtors' application to retain TSI. Even if such a requirement existed under Code section 363(b) (which it does not), the objection would still be unfounded as it further presumes, wrongly, that Mr. Welt has a *personal* interest in respect of the approximate $10,000.00 claim previously asserted by Lewis B. Freeman & Partners, Inc. ("LBFP"). However, if Mr. Welt were to assert that claim (the "LBFP Claim"), he would not be doing so personally; he would be doing so solely in his *representative or fiduciary capacity*. And if he were to review the LBFP Claim, he would similarly be doing so in his *representative or fiduciary capacity* . For that reason, Mr. Varga's (and the UST's) objection to BSPA's retention as general bankruptcy counsel is wide of the mark.

2. Moreover, the objections by Mr. Varga and the UST presume, wrongly, that the application to retain BSPA contemplates its representation of Mr. Welt when, in fact, BSPA will,

[3] The titles of the pleadings filed by Mr. Varga, the Joint Official Liquidator for Palm Beach Offshore Ltd. and Palm Beach Offshore II Ltd. ("Mr. Varga") and the U.S. Trustee (the "UST") are being abbreviated for ease of reference.

if the application is granted, represent *the Debtors*. Alternatively, if the Court finds that there is a conflict because of BSPA's representation of Mr. Welt in his representative or fiduciary capacity as Receiver over LBFP, and as proposed general bankruptcy counsel to the Debtors, then the conflict can be resolved by appointment of conflicts counsel or by Mr. Varga (or any other creditor or party-in-interest) objecting to the LBFP Claim pursuant to section 502 of the Bankruptcy Code.

3. Mr. Varga's objections to the Debtors' retention of TAF as special litigation counsel is wide of the mark as it is premised upon *potential* claims by the Steering Committees against TAF for pre-bankruptcy word which, as the Court pointed out at the first day hearings, are present in every case. If the existence of such potential claims is the standard to be met, then no professionals could ever be retained by a bankruptcy estate.

4. The Court should summarily reject Mr. Varga's objection to the retention of GRD as special litigation counsel because there is no substantive discussion in his Objection relating to GRD. Mr. Varga objects *not* to GRD's retention but to the method of payment, *i.e.*, Mr. Varga argues that payment should be on an hourly as opposed to a contingency fee basis. However, the form of payment proposed for TAF and GRD, a combined 40% contingency fee to be split among professionals, was recently approved in this district in another special litigation counsel retention, interestingly involving TAF. *In re Peninsula Mortgage Bankers Corp.*, Case No. 05-15121-BKC-RAM (Bankr. S.D. Fla. Mar. 28, 2008) (D.E. 894) (approving a 40% combined contingency fee to be split between TAF and Genovese, Joblove & Battista, P.A. for claims being asserted against auditor Kaufman & Rossin). There can be no challenge, and none is asserted, to proposed counsel's qualifications—they are the very same law firms that, after a jury trial, obtained a judgment *in excess of $500 million* against BDO Seidman, LLP.

5. Mr. Varga's objection to the motion seeking approval of interim compensation procedures is wide of the mark for several reasons, it is asserted strategically and not in good faith. Nevertheless, the Debtors, in a show of their good faith, and to avoid further litigation over what should be a non-issue since the relief sought is specifically provided for in the Court's Local Rules, will withdraw the motion without prejudice to seeking leave of Court at some future date to be able to file applications for compensation and reimbursement of expenses on less than the 120-day period contemplated by the applicable provisions of the Bankruptcy Code.

## II. Background

6. On or about September 24, 2008, the Federal Bureau of Investigation, together with the Internal Revenue Service-Criminal Investigation Division and the United States Postal Inspector, executed one or more search warrants at the location from which management decisions were made for certain entities owned and/or controlled by Thomas J. Petters (collectively, the "Petters Entities").

7. On or about October 2, 2008, the United States of America initiated civil and criminal proceedings in the United States District Court, District of Minnesota, against, among others, Thomas J. Petters ("Mr. Petters") and the Petters Entities concerning allegations of a massive Ponzi scheme (the "Petters Fraud").[4] Through the Civil Case, the District Court appointed Douglas Kelley ("Mr. Kelley") as the receiver for Mr. Petters and all of his wholly-owned entities, including the Petters Entities.

8. On or about October 11, 2008, in his capacity as Receiver, Mr. Kelley filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court, District of Minnesota, for the Petters Entities (collectively, the "Bankruptcy Case"). Mr. Kelley was appointed and continues to serve as Chapter 11 Trustee in the Bankruptcy Case.

[4] Case No. 08-SC-5348 (ADM/JSM) (the "Civil Case") and Case No. CR 08-364 (RHK/AJB).

9. On or about October 13, 2008, BSPA was retained by Mr. Kelley, in his capacity as Receiver over Thomas J. Petters, Petters Consumer Brands, LLC, Petters Group Worldwide, LLC, Polaroid Consumer Electronics Europe, B.V., Polaroid Consumer Electronics, LLC, Polaroid Corporation, and Polaroid Latin America I Corporation in limited and procedural matters in connection with certain cases pending in the U.S. District Court, Southern District of Florida, and Broward and Palm Beach County, Florida Circuit Courts, to prepare and file suggestions of bankruptcy.[5] With one exception, after suggestions of bankruptcy were filed, all of the matters were stayed and administratively closed. The one exception is the matter before the Palm Beach Circuit Court (Case No. 502008CA033855XXXXMB (AA)); however, while this matter remains pending, the last and only action undertaken by BSPA was the filing of a suggestion of bankruptcy on December 8, 2008.

10. In connection with the representation by BSPA of Mr. Kelley in his capacity as Receiver over certain entities and persons identified in the preceding paragraph, BSPA was retained by Mr. Kelley pursuant to an engagement letter dated October 13, 2008 pursuant to which BSPA received (i) a retainer in the amount of $5,000 on November 17, 2008, which retainer it continues to hold today, and (ii) payments 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 source of the retainer and payments received by BSPA was Central America Holding, LLC ("Central"), whose manager was Thomas J. Petters. Mr. Kelly was

[5] *Spedag Americas, Inc. v. Petters Griup Worldwide, LLC, et al.*, Case No. 07-80576-CIV-JOHNSON (S.D. Fla.); *Evolutech Comercio E Servico, Ltda., et al. v. Petters Consumers Brands, LLC, et al.*, Case No. 08-22459-CIV-LENARD/GARBER (S.D. Fla.); *Idefoto, S.A. v. Polaroid Latin America Corporation*, Case No. 08-22750-CIV-MARTINES/BROWN (S.D. Fla.); *RAF, S.A. de C.V. v. Polaroid Latin America Corporation*, Case No. 08-22751-CIV-JORDAN (S.D. Fla.); *Denise Brookins v. A Pawn & Jewelry and Polaroid Corporation*, Broward County Circuit Court, Case No. COCE08015252 (49); and *Gregory A. Kuzniar v. Thomas J. Petters*, Palm Beach County Circuit Court, Case No. 502008CA033855XXXXMB (AA).

appointed Receiver for Central. In connection with its representation of Mr. Kelley in his capacity as Receiver, BSPA was not owed any monies for fees or reimbursement of expenses as of November 30, 2009, the date the Debtors filed their Chapter 11 cases, nor is BSPA owed any money as of the date of the submission of this Omnibus Response.

11. Effective as of October 29, 2008, Palm Beach Capital Management, L.P, the Debtors' common general partner ("PBCM LP"), and the limited partners of Fund I under that certain *Agreement of Limited Partnership* dated as of June 25, 2004 entered into that certain *Amendment Agreement to Amended and Restated Limited Partnership Agreement* pursuant to which, among other things, PBCM LP delegated to appointees of the limited partners of Fund I (the "Fund I LP Representatives") all of PBCM LP's power and authority deemed necessary or desirable by the Fund I LP Representatives to pursue investigations and recovery of losses and assets from third parties in connection with the Petters Fraud.

12. Effective as of October 29, 2008, PBCM LP and the limited partners of Fund II under that certain *Agreement of Limited Partnership* dated as of June 25, 2004 entered into that certain *Amendment Agreement to Agreement of Limited Partnership* pursuant to which, among other things, PBCM LP delegated to appointees of the limited partners of Fund II (the "Fund II LP Representatives") all of PBCM LP's power and authority deemed necessary or desirable by the Fund II LP Representatives to pursue investigations and recovery of losses and assets from third parties in connection with the Petters Fraud.

13. On or about December 22, 2008, the Funds, through their respective Steering Committees, retained TAF to act as counsel in connection with the investigation and prosecution of claims against third parties in order to recover losses suffered in connection with the Petters Fraud.

14. On or about March 2, 2009, the Funds, through their respective Steering Committees, retained BSPA to act as special bankruptcy counsel and co-counsel to TAF and in connection with restructuring matters.

15. On or about April 1, 2009, BSPA obtained from Mr. Kelley, in his capacity as Receiver, a waiver of any conflict of interest concerning Petters Group Worldwide, LLC or any of its affiliates that might be occasioned by BSPA's representation of each of the Funds.

16. On or about June 5, 2009, on behalf of each of the Funds, PBCM LP executed those certain *Certificates of General Partner Resolutions and Incumbency* pursuant to which, *inter alia*, PBCM LP ratified (i) the appointment of the Funds' Steering Committees, and (ii) the authority to retain Lewis B. Freeman ("Mr. Freeman") to serve as Chief Restructuring Officer ("CRO") for each of the Funds.

17. On or about July 12, 2009, the Funds, through then-CRO Mr. Freeman, retained TAF to investigate and pursue claims against third parties arising from the Petters Fraud.

18. On or about July 28, 2009, the Funds, through then-CRO Mr. Freeman, retained BSPA to serve as counsel in connection with restructuring matters. This engagement letter provided, in part, that it superseded the previously executed March 2, 2009 engagement letter referred to in ¶14, *supra*.

19. On or about October 15, 2009, in conjunction with the filing of a voluntary proceeding in the Miami-Dade County Circuit Court to dissolve his firm, LBFP (the "State Court Dissolution Proceeding"),[6] Mr. Freeman resigned his position as CRO for each of the Funds.

20. On or about October 16, 2009, Kenneth A. Welt ("Mr. Welt") was appointed Receiver over LBFP in connection with the State Court Dissolution Proceeding. Mr. Welt

[6] *In re: The Dissolution of Lewis B. Freeman & Partners, Inc.*, Case No. 09-75907 CA 23.

continues to serve in his fiduciary or representative capacity as Receiver over LBFP in connection with the State Court Dissolution Proceeding.

21. On or about October 30, 2009, Mr. Welt, in his fiduciary or representative capacity as Receiver over LBFP, retained BSPA as his counsel in connection with receivership matters *nunc pro tunc* to October 16, 2009. BSPA continues to serve as counsel to Mr. Welt in his fiduciary or representative capacity as Receiver over LBFP.

22. On or about November 6, 2009, PBCM LP, on behalf of each of the Funds, executed those certain *Certificates of General Partner Resolutions and Incumbency* pursuant to which, *inter alia*, PBCM LP ratified (i) the appointment of the Funds' Steering Committees, and (ii) the authority to retain Mr. Welt as CRO for each of the Funds.

23. On or about November 11, 2009, each of the Funds, through Mr. Welt, in his capacity as CRO, ratified the retention of TAF by the Funds to investigate and pursue claims against third parties to recover losses suffered in connection with the Petters Fraud.

24. On or about November 12, 2009, each of the Funds, through Mr. Welt, in his capacity as CRO, ratified the retention of BSPA by the Funds to act as counsel to the Funds in connection with restructuring matters.

25. On November 30, 2009 (the "Petition Date"), the Funds, through Mr. Welt, in his capacity as CRO for each of the Funds, filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

26. On December 2, 2009, the Bankruptcy Court conducted "first-day" hearings in the Debtors' chapter 11 cases. After these hearings concluded, Mr. Welt and BSPA were advised that LBFP had issued invoices directed to the Debtors in the total amount of $10,536.18. Subsequently, Mr. Welt, in his capacity as the Funds' CRO, conducted an investigation into

these invoices. His investigation included speaking to Mr. Freeman, Mr. Freeman's counsel, Robert Schatzman, Esq., and Steven W. Thomas, Esq. Each of the foregoing advised Mr. Welt that the invoices were issued in error because the arrangement between the Debtors and LBFP was that no fees in excess of the $40,000.00 paid to Mr. Freeman on or about July 22, 2009 and deposited into an LBLF bank account could be accrued until additional money came into the estate through litigation or otherwise, including a settlement that was being negotiated by the Debtors, through their respective Steering Committees, and several persons and entities including PBCM LP, the Funds' common general partner. No money came into the estate before Mr. Freeman resigned. As a result of his investigation, Mr. Welt concluded that no monies were owed to LBFP by the Debtors as of the Petition Date, and Mr. Welt listed the $10,536.18 debt to LBFP on Schedule F to each of the Debtors' schedules as disputed. Based on facts available to him, Mr. Welt does not intend to file a Proof of Claim against either of the Debtors' estates on behalf of LBFP in respect of the LBFP Claim.

## III. Argument

### A. The Court should overrule Mr. Varga's objection to the retention of TSI

27. Mr. Varga's objection to the retention of TSI as interim management is unfounded as it presumes, wrongly, that there is a requirement of disinterestedness where the application to retain TSI is made pursuant to section 363(b) of the Bankruptcy Code which, unlike section 327(a), does not contain such a requirement. This is precisely why the UST announced that it would not object to the Debtors' application to retain TSI.

28. Mr. Varga asserts that the foregoing argument is a "blatant manipulation" of the Bankruptcy Code. Varga Objection, ¶18. However, it is entirely appropriate to use section 363(b) as the statutory basis to retain TSI as interim management, including providing the services of

Mr. Welt as CRO as that statue has been used as the basis to approve such retentions in numerous cases within this district, including by this Court. *See, e.g., In re First NLC Financial Servs., LLC, et al.*, Case No. 08-10632-BKC-PGH (Bankr. S.D. Fla. Feb. 21, 2008); *In re Levitt and Sons, LLC, et al.*, Case No. 07-19845-BKC-RBR (Bankr. S.D. Fla. Nov. 14, 2007); *In re Puig, Inc., et al.*, Case No. 07-14026-BKC-RAM (Bankr. S.D. Fla. July 20, 2007); *In re Piccadilly Cafeterias*, Case No. 03-27976-BKC-RBR (Bankr. S.D. Fla. Oct. 31, 2003); *In re AT&T Latin America Corp., et al.*, Case No. 03-13538-BKC-RAM (Bankr. S.D. Fla. June 11, 2003). And Code section 363(b) indisputably does not contain a disinterestedness requirement.

29. Even if a disinterestedness requirement existed under Code section 363(b) (which it does not), Mr. Varga's objection to TSI's retention would still be unfounded as it presumes that Mr. Welt has a personal interest in respect of the LBFP Claim that was asserted by LBFP. Mr. Welt, however, if he were asserting (and reviewing) the LBFP Claim would be doing so in his representative or fiduciary capacity as Receiver and CRO which obviates any disinterestedness issue. The distinction between interests held by an individual in a fiduciary or representative capacity versus interests held by an individual in a non-fiduciary or non-representative capacity, *i.e.*, personal interests, is recognized in case law construing the Code's definition of disinterestedness. For example, the predecessor to Code section 101(14)(C) (formerly denominated as section 101(14)(E)), has been referred to as "the 'catch all clause' in the definition of 'disinterested person,' [which] implicates *only personal interests of the trustee, not actions undertaken as a fiduciary*." *Modanlo v. Ahan (In re Modanlo),* 2006 WL 4606303, *5 (Bankr. D. Md. Aug. 16, 2006) (Emphasis added). Thus, even viewing Mr. Welt, in his capacity as Receiver, as asserting a claim on behalf of LBFP he is not a "creditor" of the

Debtors, nor does he hold an interest adverse, let alone "materially adverse," to the estates as contemplated by the Bankruptcy Code.[7]

30. Similarly, in affirming the bankruptcy court's rejection of a challenge by related creditors to a District Court appointed receiver also serving as Chapter 11 trustee based on an alleged lack of disinterestedness, *i.e.*, essentially that the receiver would be predisposed to favor the interests of the receivership over the bankruptcy estates, the district court explained that "[c]ourts have interpreted [the definition of disinterestedness set forth in Code section 101(14)(C)[8]] to apply only to personal interests of the trustee and *not to the interests attributed to a trustee in his or her representative or fiduciary capacity*." *Ritchie Special Credit Inv., Ltd. v. U.S. Trustee*, 415 B.R. 391, 398 (D. Minn. 2009) (Emphasis added). In short, because Mr. Welt serves in a fiduciary or representative capacity as Receiver over LBFP, and as CRO of the Debtors, he is a disinterested person as contemplated by Code section 101(14).

31. To reiterate, Mr. Welt is not the party subject of the applicable retention application, it is TSI, and that retention is sought pursuant to Code section 363(b) which does not contain a disinterestedness requirement. In other words, Mr. Welt is one step removed from the TSI retention application, premised on Code section 363(b), and his retention is therefore not predicated upon a finding that he is disinterested. Based on the foregoing, the Court should overrule Mr. Varga's objection to the Debtors' retention of TSI as interim management, including providing the services of Mr. Welt as CRO.

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[7] Mr. Varga makes passing reference to the indemnification provisions in the TSI engagement letter, and states that no independent or disinterested party was involved in the negotiation of same. Varga Objection ¶ 38. However, the TSI engagement letter was counter-signed by Neal Greenberg in his capacity of Chairman of the Steering Committees for each of the Funds made up of representatives of the Debtors' respective limited partners and there is no allegation, at least not yet, by Mr. Varga that Mr. Greenberg has a conflict of interest.

[8] Section 101(14)(C) provides that a person is disinterested if he "does not have an interest *materially adverse* to the interest of the estate or any of the 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." 11 U.S.C. § 101(14)(C) (Emphasis added).

**B. The Court should overrule Mr. Varga's and the UST's objection to the retention of BSPA and TSI**

**(i) Varga's objection**

32. Because Mr. Welt has no personal interest in the LBFP Claim, and in light of the fact that were he to assert it against the Debtors' estates he would be doing so in his representative or fiduciary capacity, the fact that BSPA represents Mr. Welt as Receiver over LBFP does not preclude a finding that BSPA is disinterested regarding its proposed representation of the Debtors. Moreover, as explained above, the objections by Mr. Varga and the UST presume, wrongly, that the application to retain BSPA contemplates its representation of Mr. Welt when, in fact, BSPA will, if the application to retain it is granted, represent the Debtors. Alternatively, if the Court finds that there is a conflict because of BSPA's representation of Mr. Welt as Receiver over LBFP, and as proposed general bankruptcy counsel to the Debtors, then the conflict can be resolved by appointment of conflicts counsel, or by Mr. Varga (or any other creditor or party-in-interest) objecting to the LBFP Claim pursuant to section 502 of the Bankruptcy Code. As explained below, there are no conflict issues regarding TAF and the application to retain that firm, as well as GRD, should be approved on the terms and conditions proposed in the respective retention applications.

33. Mr. Varga makes reference to payments to TSI, TAF and BSPA shortly before the filing of these Chapter 11 cases as purportedly supporting his objection to the Debtors' retention of these firms. Varga Objection, ¶21. However, those payments were made as retainers and contingent fees based on previously executed engagement letters and pursuant to the terms of a Settlement Agreement entered into by and between the Funds and the General Partners (as defined in Mr. Varga's objection, ¶14(a)) such that the payments have no bearing on the propriety of the proposed retentions. Mr. Varga also raised questions about the source of other

payments made to TSI, TAF and BSPA, as well as LBFP through Mr. Freeman. *Id.*, ¶14(n), (o) and (r). However, Mr. Varga's counsel posed a question at the 341 meeting through which he sought (and obtained) confirmation that the funds paid into TAF's trust account in anticipation of and after consummation of the Settlement Agreement were property of the Debtors as payments were made by the General Partners in respect of claims that the Debtors have or may have against them. Thus, M. Varga knows full well the source of payments of fees and retainers to TSI, TAF, BSPA (and LBFP, through Mr. Freeman). Thus, it is unclear why Mr. Varga purports to not know the source of the foregoing payments other than to raise as many arguments as possible in the hope that at least one will be accepted by the Court.

34. Mr. Varga makes numerous references to the Settlement Agreement, *e.g.*, *id.*, ¶¶14(x), (y), 26, 30, 32 and 33, questioning the propriety of same. However, the Debtors have not yet sought this Court's approval of that Settlement Agreement (because Mr. Varga, through counsel, refused to consent to BSPA seeking such approval of same until after the final hearing on the Debtors' application to retention it as general bankruptcy counsel). Mr. Varga's references to the Settlement Agreement are not only premature by his own admission but irrelevant to the propriety of the retention of any of the professionals whose employment is being sought by the Debtors. To the extent relevant, the Court should be aware that the Funds' respective Steering Committees, which consist of representatives of the Debtors' respective limited partners, approved the settlement, as did Mr. Welt.

35. Mr. Varga makes reference to a misstatement by Mr. Welt at the 341 meeting, his description of the Steering Committees as a "quasi" creditors committees, *id.*, ¶27; however, as has been explained to Mr. Varga, and in pleadings filed in these cases, including in the preceding paragraph, the Steering Committees are made up of limited partners of the Debtors who

represent the Debtors' other limited partners. Mr. Varga also makes reference to potential claims by the Steering Committees against BSPA and TAF, *id.*, ¶28; however, as the Court explained, and as stated above, if the standard to retain professionals was the existence of potential claims based upon the rendering of pre-bankruptcy services then no estate professionals who represented the pre-bankruptcy debtor could ever be retained.

36. Next, Mr. Varga refers to BSPA's representation of Mr. Kelley in his capacity as Receiver and how, according to Mr. Varga, that representation constitutes a conflict in respect of claims being asserted by the Funds against the Petters-related entities' bankruptcy estates for which Mr. Kelley serves as Chapter 11 Trustee. *Id.*, ¶¶14(g) and 29. As explained above, the only work performed by BSPA for Mr. Kelley was the preparation and filing of suggestions of bankruptcy, and with one exception, after those forms were filed, all of the matters were stayed and administratively closed. As further explained above, the one exception is a matter before the Palm Beach Circuit Court; however, while this matter remains pending, the last and only action undertaken by BSPA was the filing of a suggestion of bankruptcy on December 8, 2008. Moreover, notwithstanding Mr. Varga's assertion, to the extent there is a conflict (which there is not because the drafting and filing of suggestions of bankruptcy regarding suits filed in Florida against entities subject of Mr. Kelley's receivership is irrelevant to a claim by the Debtors against the Petters-related Chapter 11 debtors which claim, by the way, was not filed by BSPA), it was expressly waived by Mr. Kelley, ¶15, above.

37. Lastly, Mr. Varga argues that BSPA's and TAF's representation of the Steering Committees and their economic interests in the Settlement Agreement raise conflicts of interest. Varga Objection, ¶¶31-35. The crux of this argument is that BSPA and TAF have an economic incentive to push for approval of the Settlement Agreement because if it is not approved the

funds BSPA and TAF received must be returned to the General Partners. *Id.*, 35. Mr. Varga misunderstands the Settlement Agreement. If the Settlement Agreement is not approved, or if the bar order contemplated therein is not entered in a form ultimately determined to be consistent with the applicable terms of Settlement Agreement, the General Partners can void the Settlement Agreement; however, the monies received by the Debtors' professionals are not to be returned under the Settlement Agreement so there is no risk of non-payment for services rendered through that time. While there may be a risk to the Debtors' professionals, if retained, that risk does not concern the Settlement Agreement but, instead, would result if there is no successful prosecution of claims by TAF and GRD against third parties as with every contingency fee case approved in bankruptcy

38. Based on the foregoing, the Court should overrule Mr. Varga's objection to the proposed retention of TSI, BSPA, TAF and GRD.

**(ii) The UST's objection**

39. In its objection, the UST states that BSPA admits that it is laboring under a conflict of interest. UST Objection, ¶19. This statement is wrong. BSPA denies that such a conflict exists. The fact that Mr. Welt possesses no personal (or adverse) interest in either the LBFP receivership estate or the Debtors' estates because he is functioning in representative or fiduciary capacities in both cases, *see Ritchie Special Credit Inv., Ltd., supra,* 415 B.R. at 398 ("[c]ourts have interpreted [the definition of disinterestedness set forth in Code section 101(14)(C)] to apply only to personal interests of the trustee and *not to the interests attributed to a trustee in his or her representative or fiduciary capacity*."); *Modanlo, supra*, 2006 WL 4606303, *5 (explaining that the definition of disinterested person implicates "only personal interests of the trustee, not actions undertaken as a fiduciary."), means that BSPA is not

representing conflicting interests (even if the Court were to conclude, as each of Mr. Varga and the UST implies, that BSPA is representing Mr. Welt in his individual capacity).

40. *In re Big Mac Marines, Inc.*, 326 B.R. 150 (8th Cir. BAP 2005), cited by the UST, is not controlling and is factually distinguishable. There, proposed Chapter 11 counsel represented the largest creditors who, unlike Mr. Welt, were the sole shareholders of the debtor, and unlike LBFP's approximate $10,000 claim, which is infinitesimal when compared to the approximate $1.1 billion lost by the Debtors in the Petters Fraud. Also, there was a common third party bank that was a creditor in both the debtor's chapter 11 case as well as the shareholders' individual chapter 11 cases (in which the bank held personal guarantees issued by the shareholders for a loan made to the corporate debtor), and that was part of the conflict analysis undertaken by the court. Moreover, the debtor filed a Chapter 11 plan that favored the shareholders over the debtor's other creditors. Lastly, and of note, the court explained that if the shareholders completed prosecution of an adversary proceeding they filed against the bank and withdrew their claim against the debtor then it appeared that proposed counsel would not have a conflict.

41. Based on the foregoing, the Court should overrule the UST's objection to the proposed retention of BSPA as general bankruptcy counsel.

**C. <u>The Court should overrule Mr. Varga's objection to the retention of GRD.</u>**

42. The Court should summarily reject Mr. Varga's objection to GRD's retention as special litigation counsel. There is a complete absence of substantive discussion relating to GRD in Mr. Varga's objection. Other than identifying GRD as proposed special counsel, the only discussion of any substance whatsoever goes not to the propriety of the proposed retention but instead the method of payment, *i.e.*, Mr. Varga argues that payment should be on an hourly as

opposed to a contingency fee basis.

43. As to the form of compensation issue, the form of payment proposed for TAF and GRD, *i.e.*, a combined 40% contingency fee to be split among them, was recently approved in this district by Judge Mark in another special litigation counsel retention. *In re Peninsula Mortgage Bankers Corp.*, Case No. 05-15121-BKC-RAM (Bankr. S.D. Fla. Mar, 28, 2008) (D.E. 894) (approving a 40% combined contingency fee to be split between TAF and Genovese, Joblove & Battista, P.A. for claims being asserted against auditor Kaufman & Rossin which, in fact, is a defendant in a pre-bankruptcy lawsuit filed by proposed special counsel here). There can be no challenge, and none is asserted, as to proposed counsel's qualifications—they are the very same law firms that, after a jury trial, obtained a judgment in excess of $500 million against BDO Seidman, LLP.

44. Based on the foregoing, the Court should overrule Mr. Varga's objection to GRD's retention as special litigation counsel and approve the terms of that retention, as well as that of TAF, as being consistent with Judge Mark's approval of the same fee structure—a 40% contingent fee to be shared as special litigation co-counsel representing a bankruptcy estate.

**D. The Court should overrule Mr. Varga's objection to the proposed interim compensation procedures as moot as the Debtors are withdrawing the motion seeking that relief.**

45. Mr. Varga's objection to the motion seeking approval of interim compensation procedures is wide of the mark for several reasons, it is asserted strategically and not in good faith. Nevertheless, the Debtors, in a show of their good faith, and to avoid further litigation over what should be a non-issue since the relief sought is specifically provided for in the Court's Local Rules, will withdraw the motion without prejudice to seeking leave of Court at a future date to be able to file applications for compensation and reimbursement of expenses on less than

the 120-day period contemplated by the applicable provisions of the Bankruptcy Code. As such, the Court should overrule Mr. Varga's objection as moot.

## IV. Conclusion

46. Based on the foregoing the Court should approve the Debtors' retention of (i) BSPA as general bankruptcy counsel, (ii) TSI as interim management, including providing the services of Mr. Welt as CRO, and (iii) TAF and GRD as special litigation counsel.

**I HEREBY CERTIFY** that I am admitted to the Bar of the United States District Court for the Southern District of Florida, and that I am in compliance with the additional qualifications to practice before this Court as set forth in Local Rule 2090-1(A).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been served via CM/ECF and Electronic Mail upon Heidi A. Feinman, Esq., Office of the U.S. Trustee, 51 S.W. First Ave., Room 1204, Miami, FL 33130 (heidi.a.feinman@usdoj.gov); Edward J. Estrada, Reed Smith, LLP, Counsel for Mr. Varga, 599 Lexington Ave., 22nd Floor, New York, NY 10022 (eestrada@reedsmith.com); and Lynn Maynard Gollin, Esq., Tew Cardenas, LLP, Co-Counsel for Mr. Varga, Four Seasons Tower, 15th Floor, 1441 Brickell Ave., Miami, FL 33131 (lmg@tewlaw.com) on this 13th day of January, 2010.

*/s/ Paul A. Avron*
Paul A. Avron