

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
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IN RE: Chapter 11
PALM BEACH FINANCE PARTNERS, L.P., Case No. 09-36379-BKC-PGH
PALM BEACH FINANCE II, L.P. Case No. 09-36396-BKC-PGH
(Jointly Administered)
Debtors.

**JOINDER OF STEERING COMMITTEES
IN DEBTORS' OMNIBUS RESPONSE (DE 76) 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 (DE 67),
(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 (DE 66)**

The STEERING COMMITTEES (the "Committees") for PALM BEACH FINANCE PARTNERS, L.P., PALM BEACH FINANCE II, L.P. (hereafter the "Debtors"), comprised of representatives of the Debtors' limited partners, by and through undersigned counsel, hereby join in the Debtors' Omnibus Response (DE 76) in Opposition to the (a) Omnibus Objection of Geoff Varga (DE 67) and (b) The United States Trustee's Objection (DE66),¹ and respectfully state as follows:

1. The Committees directly represent over *\$1.1 billion* of investment claims in this case. They have been ceded general partnership control of the Debtors and they have deliberately investigated and determined to retain certain professionals of their choice in this case. Absent

¹ The titles of these pleading are shortened for ease of reference.

clear and unequivocal adverse interests, the Committees' choice of professionals to maximize this estate should be respected.

2. The Committees join in the Debtors' Omnibus Response (DE 76) in Opposition to the (I) Omnibus Objection of Geoff Varga (DE 67) and the United States Trustee's Objection to Debtors' Application for Employment (DE 66). The Committees would supplement the joinder as set forth herein.

Undisputed Relevant Underlying Facts

3. The underlying facts in connection with the matters pending before the court have been reiterated and repeated in at least five pleadings: (a) the Declaration of Kenneth A Welt (DE 10); (b) The United States Trustee Motion to Convert these Cases to Cases Under Chapter 7 or in the Alternative Motion to Appoint Chapter 11 Trustee (DE 34); (c) The United States Trustee Objection to Debtors Application for Employment of Berger Singerman, P.A. (DE 66); (d) The Omnibus Objection of Geoff Varga (DE 67); (e) Debtors Omnibus Response to the Omnibus Objection of Geoff Varga; and (f) the Joint Stipulation of Facts (DE 81). Accordingly, in the interests of brevity and expedience, the Committees desire only to highlight those particular underlying facts relevant to the specific issues at hand.

4. On October 13, 2008, Douglas Kelley, the Receiver (and thereafter Chapter 11 Trustee) for the Petters Companies retained Berger Singerman, P.A. ("BSPA") to file suggestions of bankruptcy in various cases pending in South Florida. The filing of these Notices effectively stayed the six matters of concern.² In consideration of these services, BSPA received a retainer of \$5,000.00 which remains in trust and payments of \$2,951.53 and \$990.80. The

² Apparently stay orders were entered in all of the matters except for Gregory A. Kuzniar vs. Thomas J. Petters, Palm Beach Circuit Court, (Case No.: 502008 ZA 033855XXX MB (AA), wherein there has been no activity for over a year since the Suggestion was filed.

Chapter 11 Trustee of the Petters bankruptcy has not tasked BSPA with any further requests or responsibilities. BSPA is not a creditor in the Petters bankruptcy.

5. The Debtors, however, are creditors in the Petters bankruptcy, and prepetition, through the law firm of Fulbright & Jaworski, LLP, filed claims of \$1.1 billion in the Petters bankruptcy case.

6. The Committees were formed in October, 2008, by virtue of the relinquishment of and ceding of control by the Debtors' common general partner (Palm Beach Capital Management, L.P., hereafter the "Prior General Partner") to various limited partner representatives selected by the limited partner group, who in turn delegated their authority to the Committees "consisting of representatives of each of the participating private investment funds" with specific authority to retain counsel and consultants, and to investigate and pursue claims and legal actions. The Committees indisputably have the greatest stake in the success of this bankruptcy proceeding.

7. After formation, the Committees initiated an action against the Offshore Funds in Minnesota through Fulbright & Jaworski seeking, *inter alia*, a determination that the Offshore Funds' claims were in the nature of equity, like the claims of the limited partners, and not debt. Thereafter, in December, 2008, TAF was retained in lieu of Fulbright & Jaworski. BSPA was retained in March, 2009.

8. On June 5, 2009, the Committees retained Lewis B. Freeman ("Freeman") to serve as Chief Restructuring Officer ("CRO"). Thereafter, Freeman continued the retentions of TAF and BSPA.

9. In August, 2009, the Offshore Funds sued Debtor Palm Beach Finance II, L.P. in Delaware seeking, *inter alia*, a determination that its claims were in the nature of debt and not

equity. The Debtor, Palm Beach Finance II, L.P., was represented in that action by Richards, Layton & Finger, P.A.

10. On October 15, 2009, in connection with the receivership of Lewis B. Freeman Partners, Inc. ("LBFP"), Freeman resigned as CRO for Debtors and the following day, the Debtors appointed Kenneth A. Welt ("Welt") as the new CRO. Thereafter, Welt continued the retentions of TAF and BSPA.

11. On or about November 6, 2009, Welt entered into a negotiated conditional Settlement Agreement with the Prior General Partner and affiliates. The settlement involved \$3 million in cash and \$2 million in securities and is subject to court approval. Approximately \$500,000.00 of the funds were set aside to cover outstanding pre-petition services and to provide retainers to the CFO, BSPA, and TAF in this case.

12. This case was filed on November 30, 2009. Prior to filing this case, the Debtors filed an action against the accounting firm of Kaufman, Rosin & Co., P.A., in Miami-Dade County Circuit Court claiming negligent audits. Since the filing of this case, the Debtors have filed an action against U.S. Bank, N.A. and M&I Marshall & Ilsley Bank, alleging that the Banks were involved in the Petters fraud.

PURPORTED ISSUES WITH REGARD TO BSPA AND TAF REPRESENTATIONS

13. Committees' Choice. It should be emphasized that the Committees represent \$1.1 billion of investment/debt in these cases. The Committees who have taken control of these Debtors have met and determined to retain BSPA, TAF and Trustee Services, Inc., which employs Welt, in these proceedings. The Debtor has a right to choose its own counsel and has done so in this case. The Court should pay particular deference to a debtor's right to choose its own counsel. *In re Gilbertson's Restaurants LLC* 2004 WL 1724878, 3 (Bankr. N.D.Iowa 2004)

In balancing the likelihood of an impropriety and the importance of honoring a debtor's right to counsel of its own choosing, the scale tips in favor of the latter. *In re White Glove, Inc.* 1998 WL 226781 (Bkrcty.E.D.Pa.,1998). Debtor has a right to choose its own counsel *In re Franklin Sav. Corp.* 169 B.R. 212, 214 (Bkrcty.D.Kan.,1994) The debtor's right to choose qualified counsel should be disturbed only in the rarest cases. To proceed otherwise would undermine the basic trust between the attorney and client necessary to the adversarial system and objective fairness of the proceedings. *See Creative Restaurant*, 139 B.R. 902, 910 (Bankr. W.D. Mo 1992) (noting that the relationship between the attorney and client is highly confidential, demanding personal faith, thus only in the rarest cases will the trustee be deprived of the privilege of selecting counsel). *Vergos v. Timber Creek, Inc.* 200 B.R. 624, 628 (W.D.Tenn.,1996).

12. Likewise the Debtor has chosen a CRO. There is a strong presumption in Chapter 11 cases that the debtor-in-possession should be permitted to remain in control of the corporation absent a showing of need for the appointment of a trustee, *In re Intercat, Inc.*, 247 B.R. 911, 920 (*Bankr.S.D.Ga.2000*)(citing 7 Lawrence King, Collier on Bankruptcy § 1104.02 (15th Ed.1998) It is also noted that, with regard to the CRO, the Committees have reserved the right to terminate the CRO. The Committees have \$1.1 billion at stake in this case. These Debtors have at least \$1.8 billion in investments/claims involved in this case. The Debtors have the right, indeed the obligation, to seek out qualified and competent reorganization counsel and a restructuring officer. The application to retain Trustee Services, Inc. has been made under 11 U.S.C. § 363(b), a procedure acknowledged by Southern District Bankruptcy Courts repeatedly. This case should not devolve into a turf war over who should represent the Debtors' interests, and it should not devolve into a strategic skirmish to gain leverage in connection with the eventual disposition of an equity/debt dispute between the Debtors and the Offshore Funds. Debtors in general, and

especially these Debtors who have been betrayed to the tune of over \$1.1 billion, should have the right to seek vindication through a CRO and counsel of their choice.

13. Law Firm Representations Regarding the Petters Fraud.

- BSPA represented Receiver Kelley in filing suggestions of Bankruptcy in various actions in Southern Florida

- a. The Receiver Kelley Representation in the Petters Bankruptcy. No one, not even the Offshore Funds, would suggest that the ministerial task of filing Suggestions of Bankruptcy on behalf of Receiver/Trustee Kelley constituted a conflict sufficient to conclude that BSPA is adverse to the interests of the Debtors. Indeed, by staying the actions against the Petters Companies' Chapter 11 it sets the stage for an organized judicially approved distribution to legitimate creditors, including the Debtors herein, as compared to distribution by "race to judgment."

14. Law Firm Representations of the Committees. Summarily, BSPA and TAF prior representations in connection with the Petters fraud were the following:

- TAF and BSPA have represented the Debtors through the Committees
- TAF and BSPA have represented the Debtors through Freeman as CRO
- TAF and BSPA have represented the Debtors through Welt as substituted CRO

- a. The Representation of Debtors Through the Committees. As indicated, after the Prior General Partner abdicated control to the limited partner representatives, the limited partner representatives formed the Committees, which were specifically tasked with the authority to retain professionals and to investigate and pursue Debtor claims. They retained TAF and BSPA. The Committees today literally are the ownership and management of the Debtors. The U.S. Trustee and the Offshore Funds suggest that this prepetition representation of the Debtors as

a result of Committee action renders the professionals “adverse” and prohibited by 11 U.S.C. § 327(a). As apparently discussed at prior hearing in this case, if the Debtors’ prepetition representation (as facilitated by Committees’ actions) renders the professionals “adverse,” then the vast majority of Debtors before this Court would be unable to retain counsel of their choice. The logic of this analysis would require every Chapter 11 Debtor to seek completely new counsel the moment they file a Chapter 11 case and there would be a new learning curve and due diligence *after* the Chapter filing. There is little logic to this argument.

b. The Representation of Debtors through Freeman as CRO. There is little or no difference between the arguments associated with the BSPA and TAF representation of the Debtors through Committee action, and their representation of the Debtors through Freeman as CRO. The Committees have members situated around the country who are investment advisors, fund advisors, etc. It is unrealistic to expect the Committees to be involved on a day-to-day basis in all of the decisions and issues associated with the reorganization and restructure of these Debtors. Accordingly, the Steering Committee has chosen a Chief Restructuring Officer to handle the day-to-day operations of the Debtors. To suggest that there is an adverse relationship now because the proposed Chapter 11 professionals were retained by the prepetition CRO to investigate and pursue Debtor claims, makes little sense. The law firms were doing exactly what they were retained to do by the Committees from inception. Their representation from inception was to investigate and prosecute Debtor claims. Their representation of the Debtors through the CRO did not change. It belies logic and reason to suggest that their efforts on behalf of the prepetition Debtors, who determined to select a CFO to manage the day-to-day effort, renders them adverse post petition.

c. The Representation of Debtors Through Welt as CFO. Again, there is no difference in the representation of Debtors merely because the CFO was replaced. The law firms continued to represent the best interests of the Debtors, to investigate and prosecute the claims of the Debtors.

15. Law Firm Representation in LBFP Receivership.

- BSPA represents the LBFP Receivership, Welt as Receiver.

a. BSPA representation of the LBFP Receivership, Welt as Receiver. Much has been written by the U.S. Trustee and the Offshore Funds concerning this representation and the prospect of a \$10,000 claim of LBFP against the Debtors. The U.S. Trustee states “Applicant (BSPA), in this case, cannot serve two masters when they are in direct conflict with each other.” The Offshore Funds state “(BSPA) 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.” Apparently, the U.S. Trustee and the Offshore Funds are of the belief that a \$10,000.00 LBFP claim against the Debtors establishes an irreconcilable conflict; that BSPA as counsel to the Debtors might possibly subordinate its efforts to investigate and object to the LBFP claim in favor of the LBFP estate; that approximately \$1.8 billion in investment/claims in this case will be adversely affected. There are, of course, logical responses to this argument:

- i. It is typical and common when alleged conflicting allegiances might arise to obtain conflicts counsel, and BSPA has clearly stated that they would seek conflicts counsel; and
- ii. It now appears that LBFP may *not* have a claim because apparently, after investigation, it appears that LBFP limited its fees

to \$40,000 for services pre-Chapter 11, which were paid. *See*, Debtor's Response (D.E. 76) page 9. The LBFP claim is scheduled in this case as disputed. If and when LBFP files a proof of claim in this case, or indeed should any potential conflict arise, the proposed professionals will seek to authorize conflicts counsel in the matter.

- iii. Finally, there is substantial precedent for the proposition that a law firm representing a debtor is not adverse merely because it may also represent a creditor of the debtor. *Tri-State Financial, LLC v. Lovald*, 525 F.3d 649 (8th Cir. 2008) certiorari denied 129 S.Ct. 630, 172 L.Ed.2d 610.

16. Trustee Services, Inc. as CFO. Likewise, the U.S. Trustee and Offshore Funds argue that the Committee's choice of Trustee Services, Inc. which employs Welt, as CFO should be overruled because Welt allegedly does not have sufficient history to this case.³ The argument is specious and ignores the obvious: (a) Trustee Services, Inc. is the choice of the Debtors through the Committees, Committees duly constituted and representative of over one billion dollars in equity investment; (b) Any panel trustee appointed to this case will be that much more behind the learning curve. Welt has been involved as CRO for these Debtors now since October 16, 2009, about three months. He has had an opportunity to learn much about this case, and the Petters fraud; (c) It is undisputed that Welt is also a highly respected panel trustee who, as well as anyone in South Florida, has the sophistication to handle a case such as this.

³ That, combined with the fact that this case does not involve an operating business, presumably provides grounds for conversion or for the appointment of a Chapter 11 Trustee. This Joinder however concerns only the Objections to retentions of professionals.

17. Welt as Receiver of the LBFP Receivership. The position of the U.S. Trustee and the Offshore Funds is the same as to Welt as LBFP Receiver as it is to BSPA as counsel to the LBFP Receivership. Summarily, conflicts counsel should be appointed in each case only if it appears there is really an issue. At this point, it would appear that the prospect of a conflict may be moot.

18. Offshore Funds. As indicated, the Debtors were scrapping pre-petition with the Offshore Funds in Minnesota and Delaware over the issue of whether the Offshore Funds claims are properly in the nature of debt or equity. The Minnesota action was filed by the Committee's prior counsel, Fulbright & Jaworski. The Delaware action is being defended by Richards, Layton & Finger, P.A. and is, of course, now stayed. Is it possible that the Offshore Funds' opposition to the retention of TAF, BSPA and Trustee Services as CRO, derive from the positions that the Debtors took prepetition? Whether those issues are settled or litigated in this Court is a matter for another day, and will be determined on notice to all parties with a right to be heard. Clearly, the Committees' position is not predicated upon who sits as CRO and who sits in counsel seat. The issue ought not be tied to Debtor's choice of CRO and counsel. The issue will be before the Court in due time.

19. The Prior General Partner Proposed Settlement (the "Proposed General Partner Settlement"). Without having the benefit of, and the understanding of, all of the factors and considerations involved in the Proposed General Partner Settlement, the U.S Trustee and the Offshore Funds appear at this juncture to be troubled by it. Initially and obviously, that settlement is not before this Court at this time, and the U.S. Trustee and the Offshore Funds will have every opportunity to explore the terms, conditions, and details of this settlement and will have every opportunity to object to this settlement. It is not before this court at the present time.

The settlement may have significant benefits and should be ventilated and understood at the appropriate time. Initial dissatisfaction or concern with this proposed settlement, is not a basis to object to the retention of professionals.

CONCLUSION

20. The Committees, who represent \$1.1 billion of investment debt in this case, in discharge of their obligations to investigate and pursue claims, and to retain professionals of choice, have determined that they desire to retain BSPA, TAF and Trustee Services, Inc. in this case. The Committees believe that these professionals are highly qualified. The Committees have made their choice, and respectfully suggest to the Court that under our bankruptcy code, the Debtors choice should be presumptively allowed and granted due deference absent substantial irreconcilable adverse interests. The only substantive, and not strategically infused alleged disqualifying consideration involved in this matter concerns the prospect, now remote, of there being a \$10,000 claim against these estates by the LBFP receivership estate because Welt is the Receiver in that case and BSPA represents Welt as Receiver in that case. However, it now appears there may be no such claim and, if/when one is asserted, BSPA has committed to carve out of its retention any such potential conflict. The Committee believes that it would be unreasonable and intemperate to override the wishes and desires of \$1.1 billion of equity debt in order to avoid a remote, technical \$10,000 issue that could, should, and will be readily resolved with the substitution of a conflicts counsel if the issue arises.

21. The Committee also believes that all issues regarding (a) the Offshore Funds debt/equity claims; and (b) the Proposed General Partner Settlement remain for subsequent development, analysis, ventilation, review and determination before this Court. These issues should not be pre-judged in the context of retention applications.

22. It is respectfully requested that the Court consider and respect the Debtors' and Committees' choice of professionals in this case.

WHEREFORE, for the reasons set forth hereinabove, it is respectfully requested that the Objections to retention of professionals filed by the U.S. Trustee and the Offshore Funds be overruled, and that TAF, BSPA and Trustee Services, Inc. as CRO be retained *nunc pro tunc* to the Petition date, and any other relief that the Court deems appropriate in the premises.

Respectfully submitted,

Geoffrey S Aaronson P.A.

s/Geoffrey S Aaronson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 20, 2010, the foregoing was served by the Court's CM/ECF service on all interested parties.

s/Geoffrey S Aaronson
Geoffrey S Aaronson