

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

In re:

CHAPTER 11

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

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

Debtors.

**LIQUIDATING TRUSTEE'S MOTION FOR APPROVAL OF SETTLEMENT
WITH THE NEWMAN PARTIES AND PAYMENT OF CONTINGENCY FEE**

Any interested party who fails to file and serve a written response to this motion within 21 days after the date of service stated in this motion shall, pursuant to Local Rule 9013-1(D), be deemed to have consented to the entry of an order in the form attached to this motion. Any scheduled hearing may then be cancelled.

Barry E. Mukamal, in his capacity as liquidating trustee ("*Liquidating Trustee*") for the Palm Beach Finance II Liquidating Trust ("*Liquidating Trust*"), by and through undersigned counsel, and pursuant to *Fed. R. Bankr. P.* 9019, seeks an Order from this Court approving a settlement of claims that could be asserted against the Newman Family Revocable Trust Dated December 11, 1998 ("*Newman Trust*") and Gregory S. Newman, solely in his capacity as trustee for the Newman Trust (Mr. Newman and the Newman Trust are collectively referred to as the "*Newman Parties*"). In support of this relief, the Liquidating Trustee states the following:

I. Factual Background

A. *The Pre-Petition Activities of PBF II*

1. The Liquidating Trust is the successor to Palm Beach Finance II, L.P. ("*PBF II*").

2. PBF II was formed to lend monies in purchase financing transactions supposedly brokered by Thomas Petters and his company, Petters Company, Inc. (“*PCI*”) in the consumer goods business. The idea was that PBF II and other lenders would supply bridge financing to PCI and then later, once goods were received by a particular big box retailer, the retailer would remit the payment to the lender or PCI.

3. In reality, PBF II’s investments in PCI were worthless - PCI’s purchase and financing transactions were fictitious and part of an elaborate, multi-billion dollar *ponzi* scheme perpetrated by Mr. Petters, Deanna Munson a/k/a Deanna Coleman, Robert White and others. No retailer ever made any payment on the purchase and sale of goods because the deals never existed.

4. On September 24, 2008, federal agents raided Mr. Petters’ offices. Thereafter, Mr. Petters’ companies were placed into federal receivership. Ultimately, Mr. Petters was convicted of his crimes and sentenced to 50 years in prison. Other persons complicit in the fraud were sentenced to prison sentences as well.

5. On November 30, 2009 (“*Petition Date*”), PBF II commenced a Chapter 11 bankruptcy case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Florida (“*Bankruptcy Court*”).

6. On October 21, 2010, the Bankruptcy Court entered its Order Confirming Second Amended Plan of Liquidation [ECF No. 444], creating the Liquidating Trust and appointing the Liquidating Trustee as liquidating trustee.

B. Transfers Made to the Newman Parties

7. The Newman Parties made a brief limited partnership investment in PBF II. In particular, on February 21, 2006, the Newman Parties forwarded \$2,000,000.00 to PBF II. On February 28, 2006,

the Newman Parties withdrew the entire principal amount of their investment. Shortly thereafter, the Newman Parties made a multi-million dollar investment in another Palm Beach hedge fund.

8. Based on a cash in, cash out analysis, the Newman Parties received a profit in the amount of \$9,850.00 (“*Profit Distribution*”) with respect to the limited partner investment in PBF II.

II. Settlement Terms

9. The key aspects of the stipulation of settlement between the parties (“*Stipulation*”) are the following:¹

- a) Upon approval of the Stipulation, the Newman Parties will pay (or cause to be paid) \$17,500.00 to the Liquidating Trust (“*Settlement Payment*”).
- b) The parties shall exchange mutual, general releases; and
- c) The Newman Parties shall not be entitled to any distribution from the PBF II bankruptcy estate.

III. Relief Requested

10. The Liquidating Trustee seeks an Order from this Court (a) approving the Stipulation and (b) approving the Contingency Fee (as defined below).

11. Federal Rule of Bankruptcy Procedure 9019 provides in relevant part that [o]n motion . . . and after a hearing on notice to creditors; the debtor . . . and to such other entities as the Court may designate, the Court may approve a compromise or settlement.”

12. Approval of a settlement in a bankruptcy proceeding is within the sole discretion of the Court and will not be disturbed or modified on appeal unless approval or disapproval is an abuse of discretion. *In re Arrow Air*, 85 BR 891 (Bankr. S.D. Fla. 1988).

¹ A copy of the Stipulation is attached as Exhibit 1. To the extent the terms of the agreement differ with the terms set forth in this Motion, the agreement shall control.

13. The standards for approval are well settled and require the Court to inquire into the reasonableness of the proposed settlement. *See, e.g., Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968); *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983); *Florida Trailer and Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). The inquiry need only determine whether the settlement falls below the lowest point of the range of reasonableness. *See W.T. Grant Co.*, 699 F.2d at 608; *see also In re Martin*, 91 F.3d 389 (3rd Cir. 1996); *In re Louise's Inc.*, 211 B.R. 798 (D. Del. 1997) (setting forth considerations by the Court for approval of a settlement, including: (i) the probability of success in litigation, (ii) the likely difficulties in collection; (iii) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (iv) the paramount interest of the creditors.

A. *The Stipulation Ought to be Approved*

14. Based upon the above legal principles, the Liquidating Trustee asserts that the Stipulation falls well above the lowest point of the range of reasonableness and thus, should be approved.

Probability of success in litigation

15. The return of the Profit Distribution is not an issue of dispute between the parties.

16. Instead, the primary issue in this litigation is whether the Liquidating Trustee could claw back the *principal* amount of the investment returned to the Newman Parties.

17. The Liquidating Trustee would assert that the Newman Parties knowingly invested in PBF II and changed their outlook on the investment shortly thereafter.

18. Conversely, the Newman Parties would contend that the investment in PBF II was a mutual mistake from inception.

19. Based on an exchange of information between the parties and a review of PBF II's records, from an evidentiary standpoint, it is likely that the Newman Parties will prevail with respect to

their claim of mutual mistake. As such, the Liquidating Trustee has significantly discounted the value of his return of capital claim.

Collectability

20. Collectability is not a meaningful consideration.

Complexity of litigation and attendant expense, inconvenience and delay

21. This is a meaningful consideration that militates in favor of approval of the Stipulation.

22. In sum, although many of the claims outlined above are typical claims litigated before this Court, they still potentially require retention of experts and extensive fact discovery before a trial could take place. Coupled with the factual hurdles to the Liquidating Trustee's claims, the result of these efforts will be substantial fees of professionals that could exceed any recovery.

23. The Stipulation addresses these concerns. The parties avoid litigating fact specific claims, with the attendant expense and delay of litigation being nullified.

Paramount interest of creditors

24. The Settlement Payment represents a full recovery of the Profit Distribution and a waiver of any potential or corresponding claim. Although the Stipulation also results in the Liquidating Trustee waiving a significant return of capital claim, this result is justified in light of the significant evidentiary issues that the Liquidating Trustee would face in asserting such claim. Moreover, the Stipulation gives certainty to the estate and avoids the risk, expense and delay attendant with litigation. As such, the Stipulation is in the paramount interest of PBF II's creditors and should be approved.

B. The Contingency Fee Ought to be Approved

25. Pursuant to the Plan and this Court's Order Approving the Trustee's Motion to Approve Hybrid Form of Compensation [ECF No. 223], Meland Russin & Budwick, P.A. ("**MRB**") is entitled to

a contingency fee of 10% for any affirmative recovery it obtains on behalf of the Liquidating Trust without further order of the Court (“*Contingency Fee*”).

26. As such, MRB requests that the Contingency Fee be paid from the Settlement Payment without further Order from this Court.

WHEREFORE, the Liquidating Trustee requests that this Court enter an Order (similar in form to the Order attached as Exhibit 2) (1) approving the Stipulation; (2) approving payment of the Contingency Fee and (3) granting such other relief this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on April 2, 2013, a true and correct copy of the foregoing was served via the Court’s Notice of Electronic Filing on those parties listed on the attached Exhibit 3, and via U.S. Mail to the parties listed on the matrix attached as Exhibit 4, and Kristopher E. Pearson, Esq., Stearns Weaver, 150 West Flagler Street, Ste. 2200, Miami, FL 33130.

s/ Jonathan S. Feldman
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Florida Bar No. 12682
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3200 Southeast Financial Center
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*Attorneys for Barry E. Mukamal,
Liquidating Trustee*

STIPULATION OF SETTLEMENT

April 1, 2013

This Stipulation of Settlement ("**Stipulation**") is entered into on ~~March 28, 2013~~ by and between (a) Barry E. Mukamal, in his capacity as liquidating trustee ("**Liquidating Trustee**") of the Palm Beach Finance II Liquidating Trust ("**Liquidating Trust**") and (b) Newman Family Revocable Trust Dated December 11, 1998 and Gregory S. Newman, individually and as Trustee of the Newman Family Revocable Trust (collectively, the "**Newman Parties**") (the Liquidating Trustee and the Newman Parties are at times individually referred to as a "**Party**" or collectively, the "**Parties**"). The terms of this Stipulation are as follows:

RECITALS

- A. On November 30, 2009 ("**Petition Date**"), Palm Beach Finance II, L.P. ("**PBF II**") commenced a Chapter 11 bankruptcy case by filing a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Florida ("**Bankruptcy Court**");
- B. On October 21, 2010, the Bankruptcy Court entered its Order Confirming Second Amended Plan of Liquidation [ECF No. 444], creating the Liquidating Trust and appointing the Liquidating Trustee as liquidating trustee.
- C. The Liquidating Trustee, on behalf of the Liquidating Trust, filed an adversary proceeding against the Newman Parties, Adv. Case No. 11-2876-PGH that seeks to recover certain transfers made by PBF II to or for the benefit of the Newman Parties ("**Litigation**");
- D. The Newman Parties expressly deny the claims asserted in the Litigation;
- E. The Liquidating Trustee and the Newman Parties have engaged in discussions in an attempt to resolve any and all issues, including the claims asserted in the Litigation;
- F. To avoid the continued expense and risk of adverse outcome arising from the Litigation, as well as incurring costs and expenses associated therewith, among other reasons, the

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Parties have agreed to resolve the Litigation pursuant to the terms and conditions of this Stipulation.

NOW, WHEREFORE, it is stipulated, consented to and agreed, by and among the Parties as follows:

1. **No admission of liability.** The Parties acknowledge that this Stipulation is a compromise and settlement of a controversy. No Party admits, and each expressly denies, any liability on its part.

2. **Entire agreement.** This Stipulation constitutes the entire agreement and understanding between the Parties with respect to the subject matter hereof and there are no other stipulations, agreements, representations, or warranties other than those specifically set forth herein. All prior agreements and understandings between the Parties concerning the subject matter hereof are superseded by the terms of this Stipulation.

3. **Settlement Payment.** In full and final settlement of the Litigation, the Newman Parties shall pay (or cause to be paid), within 7 days from the date of the entry of a final, non-appealable Order by the Bankruptcy Court approving this Stipulation, a sum of \$17,500. This payment may be made via (i) wire transfer pursuant to written instructions to be provided by the Liquidating Trustee or his counsel or (ii) check made payable to "Barry E. Mukamal, Liquidating Trustee" and delivered to Jonathan S. Feldman, Esq., Meland Russin & Budwick, P.A., 200 South Biscayne Blvd., Suite 3000, Miami, Florida 33131.

4. **No entitlement to distribution.** The Newman Parties agree that they shall not be entitled to any monetary distribution whatsoever from the Liquidating Trust or PBF II. To the extent the Newman Parties have scheduled or filed any proof of claim or proof of interest in the PBF II bankruptcy case, such claim or interest shall be deemed disallowed in its entirety and be stricken.

5. **Releases**

A. For purposes of this Stipulation, the term “*Claims*” shall mean any obligations, claims, causes of action, demands of any type that a party may presently have, may have or have had in the past, upon or by reason of any matter, cause or thing whatsoever, including without limitation any and all obligations, causes of actions and demands of any kind whatsoever, at law or in equity, indirect, derivative, or direct, known or unknown, discovered or undiscovered.

B. Upon approval of this Stipulation by final order of the Bankruptcy Court and payment of all sums owing under Paragraph 3 of this Stipulation, the Liquidating Trustee, on behalf of the Liquidating Trust and PBF II, waives, releases and holds harmless, now and forever, the Newman Parties, spouses, employees, agents, beneficiaries, co-trustees, heirs and assigns from any and all Claims that the Liquidating Trustee, the Liquidating Trust or PBF II may have against the Newman Parties; provided that nothing herein shall be deemed to release, waive or otherwise limit any rights or obligations arising out of this Stipulation. The scope of this release shall not impact, impair or alter in any manner any Claims whatsoever that the Liquidating Trustee, on behalf of the Liquidating Trust or PBF II, may have against any parties other than the Newman Parties, including but not limited to Claims against any alleged concurrent or consecutive tortfeasors, if any.

C. Upon approval of this Stipulation by final order of the Bankruptcy Court and payment of the all sums owing under Paragraph 3 of this Stipulation, the Newman Parties waive, release and hold harmless, now and forever, the Liquidating Trustee, the Liquidating Trust and PBF II from any and all Claims that the Newman Parties may have against the Liquidating Trustee, the Liquidating Trust or PBF II; provided that this provision does not release, waive or otherwise limit any rights or obligations arising out

of this Stipulation.

8. **Authorization to bind.** The individuals signing below represent and warrant that they have the authority to execute this Stipulation on behalf of the applicable Party and bind them to its terms.

9. **Review/No Duress.** Each of the Parties acknowledges that he, she or it has read all of the terms of this Stipulation, has had an opportunity to consult with counsel of his, her or its own choosing or voluntarily waived such right, and enters into those terms voluntarily and without duress.

10. **Attorneys' fees and costs.** Each Party shall bear its own attorneys' fees and costs in connection with the negotiation of this Stipulation and motions and orders as may be necessary to obtain the approval of this Stipulation by the Bankruptcy Court; provided that in the event of any litigation between the Parties under this Stipulation or arising as a result of a default under this Stipulation, the prevailing Party shall be entitled to reasonable attorneys' fees and costs related thereto, including, but not limited to, those incurred at all trial and appellate levels.

11. **No waiver of modification.** This Stipulation and any of the specific items, covenants, and conditions contained herein, may not be waived, changed, altered or modified except by an instrument in writing signed by the Party against whom enforcement of such change is sought.

12. **Effective date.** This Stipulation shall be effective upon execution by all of the Parties hereto, subject only to approval of this Stipulation by final order of the Bankruptcy Court and payment of the settlement payment referenced in paragraph 3. Upon it becoming effective, this Stipulation shall be binding on all of the Parties' successors or assigns.

13. **No effect.** If the Bankruptcy Court does not approve this Stipulation, then the Stipulation shall be of no further force or effect, and the Parties shall be restored to their rights as

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they existed prior to the execution of this Stipulation. Notwithstanding the foregoing, if the Bankruptcy Court does not approve this Stipulation because any of the Parties have failed to provide the Bankruptcy Court with adequate information to rule on the merits of the Stipulation, the Parties will use their best efforts to seek reconsideration of any order declining to approve the Stipulation, or to file an amended motion to approve the Stipulation.

14. **Controlling law.** This Stipulation shall in all respects be construed in accordance with the laws of the State of Florida applicable to contracts made and to be performed wholly within the State of Florida and by federal law to the extent the same has preempted the laws of the State of Florida.

15. **Counterparts.** This Stipulation may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same Stipulation. Delivery of an executed counterpart of a signature page to this Stipulation by facsimile shall be effective as delivery of a manually executed counterpart of this Stipulation.

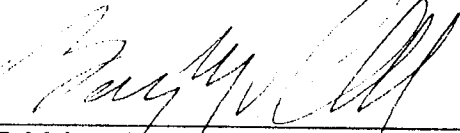
16. **Construction.** This Stipulation shall be deemed to have been jointly drafted by the Parties, and in construing and interpreting this Stipulation, no provision shall be construed and interpreted for or against any of the Parties because such provision or any other provision of the Stipulation as a whole is purportedly prepared or requested by such Party.

17. **Jurisdiction.** The Bankruptcy Court shall retain exclusive jurisdiction to enforce the terms of this Stipulation.

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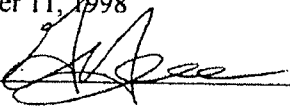
STIPULATED AND AGREED TO BY:



Barry E. Mukamal, Liquidating Trustee

Date: 4/1/13

Newman Family Revocable Trust Dated
December 11, 1998

By: 

Date: 3/26/13



Gregory S. Newman

Date: 3/26/13

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

In re:

CHAPTER 11

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

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

Debtors.

**ORDER GRANTING LIQUIDATING TRUSTEE'S MOTION
FOR APPROVAL OF SETTLEMENT WITH THE NEWMAN PARTIES
AND PAYMENT OF CONTINGENCY FEE [ECF NO. █████]**

THIS CAUSE came before the Court upon the Liquidating Trustee's Motion for Approval of Settlement with The Newman Parties and Payment of Contingency Fee [ECF No. █████] (the "**Motion**"). The Court, having reviewed the Motion and noting that a Certificate of No Response and Request for Entry of Order has been filed, finds that the notice of the proposed compromise and settlement is sufficient to comply with Bankruptcy Rules 9019 and 2002(a)(3), Local Rule 9013-1(D) and any other applicable notice requirement, and accordingly, it is:

ORDERED as follows:

1. The Motion is **GRANTED**.
2. The Settlement is **APPROVED**.
3. The Newman Parties shall pay (or cause to be paid) \$17,500.00 (the “*Settlement Payment*”) within 20 days from the date of the entry of this Order. The Settlement Payment may be made via (i) wire transfer pursuant to written instructions to be provided by the Liquidating Trustee or his counsel or (ii) check made payable to “Barry E. Mukamal, Liquidating Trustee” and delivered to Jonathan S. Feldman, Esq., Meland Russin & Budwick, P.A., 200 South Biscayne Blvd., Suite 3200, Miami, Florida 33131.
4. To the extent the Newman Parties have any scheduled claim or proof of interest or have filed a proof of claim or proof of interest in the PBF II bankruptcy case, such claim or interest is deemed disallowed in its entirety.
5. The Court retains jurisdiction to enforce the terms of the Settlement.

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6. MRB's Contingency Fee in the amount of \$1,750.00 is approved and the Liquidating Trustee is authorized to pay this amount upon funding of the Settlement Payment.

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Submitted By:

s/ Jonathan S. Feldman, Esq.

Jonathan S. Feldman, Esquire

Florida Bar No. 12682

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Attorneys for the Liquidating Trustee

Copies Furnished To:

Jonathan S. Feldman, Esquire, is directed to serve copies of this Order on all parties in interest and to file a Certificate of Service.

Mailing Information for Case 09-36379-PGH

Electronic Mail Notice List

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

- Geoffrey S. Aaronson gaaronson@aspalaw.com, tdmckeown@mckeownpa.com;sbeiley@aspalaw.com
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EXHIBIT 3

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by and through David Harrold, its officer
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