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

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[2]

Palm Beach Finance Partners, L.P. and Palm Beach Finance II, L.P. (collectively, the "Debtors"), by undersigned counsel,[3] submit this response in opposition to the *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") (D.E. 34) filed by the United States Trustee (the "UST"), and state:

I. Background

1. On November 30, 2009, the Debtors filed their Chapter 11 bankruptcy cases which are being jointly administered by prior order of the Court. Kenneth A. Welt ("Mr. Welt"),

[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] This response shall also serve as the brief in support of the pending applications to retain undersigned counsel (D.E. 6) and Trustee Services, Inc. ("TSI") (D.E. 8) discussed at the December 2, 2009 first day hearings and/or as contemplated by the order approving Berger Singerman, P.A.'s retention on an interim basis (D.E. 37, ¶5(b)).

[3] Berger Singerman, P.A. is presently serving as special counsel pending a final hearing on the *Debtors' Application for Approval on an Interim and Final Basis, of Employment of Berger Singerman, P.A. as Counsel for Debtor In Possession Nunc Pro Tunc to the Petition Date*. (D.E. 6)

in his capacity as the Debtors' Chief Restructuring Officer, caused the Debtors to file these Chapter 11 cases.

2. As explained at the first day hearings conducted by the Court on December 2, 2009 and/or in the *Declaration of Kenneth A. Welt in Support of the Debtors' Chapter 11 Petitions and Request for First Day Relief* (the "First Day Declaration") (D.E. 10), the Debtors, who never had employees since they were effectively run by the General Partners (as defined below), are hedge funds that, because of massive losses suffered in connection with what has been referred to as the "Petters Fraud," are no longer operating. As further explained, the thrust of these Chapter 11 cases is having special litigation counsel[4] pursue claims against third parties, and the projected exit strategy from bankruptcy is a Chapter 11 liquidating plan.

3. As a result of the Patters Fraud, Steering Committees comprised of representatives of the Debtors' limited partners were formed for each of the Debtors. Subsequent to their formation, on June 5, 2009, Lewis B. Freeman ("Mr. Freeman") was appointed as Chief Restructuring Officer for each of the Debtors. In connection with or as a result of the voluntary filing of a state court dissolution proceeding by Lewis B. Freeman & Partners, Inc. ("LBFP"),[5] Mr. Freeman, on October 15, 2009, resigned as Chief Restructuring Officer for each of the Debtors. Supplemental declarations filed by each of undersigned counsel (D.E. 29) and Mr. Welt (D.E. 31), respectively, confirmed that there exists a claim, reflected in an invoice issued by LBFP dated November 23, 2009 in the amount of $10,536.18, against the Debtors.

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[4] Proposed special litigation counsel, each of which have been retained on an interim basis, are the law firms of Thomas, Alexander & Forrester, LLP (D.E. 40) and Gonzalo R. Dorta, P.A. (D.E. 41)

[5] *In re: The Dissolution of Lewis B. Freeman & Partners, Inc.,* Case No. 09-75907 CA 23 (the "State Court Dissolution Proceeding").

4. Subsequent to Mr. Freeman's resignation as Chief Restructuring Officer for each of the Debtors, on November 6, 2009, Mr. Welt was appointed as replacement or substitute Chief Restructuring Officer for each of the Debtors. The partnership resolutions authorizing Mr. Welt's appointment as Chief Restructuring Officer of the Debtors provided, in part, that the Chief Restructuring Officer "shall have all of the powers delegated to the Steering Committee[s], and whether or not delegated to the Steering Committee[s], the powers to: (i) run the day to day affairs of the Partnership[s], … and (iii) retain counsel and other professionals of its choosing to pursue and resolve claims that the Partnership[s] ha[ve] or may have with respect to any third parties, including with respect to efforts to investigate and recover losses … subject only to the [requirement that the Chief Restructuring Officer report to the Steering Committees with respect to material matters concerning the Partnerships, including any bankruptcy proceedings]." Thus, the management of the Debtors was, after this resolution, solely in the hands of Mr. Welt subject only to reporting to the Debtors' respective Steering Committees.

5. Previously, pursuant to that certain *Agreed Order Appointing Receiver* dated October 16, 2009 entered by the state court in the State Court Dissolution Proceeding, Mr. Welt was appointed as Receiver over LBF and continues in that capacity today. Undersigned counsel represents Mr. Welt, solely in his fiduciary or representative capacity as Receiver over LBFP, in the State Court Dissolution Proceeding.

6. On or about November 6, 2009, the Debtors, by and through their respective Steering Committees, entered into that certain *Settlement Agreement and Release* with Palm Beach Capital Management, L.P. ("PBCM LP"), the Debtors' common general partner, its principals, Bruce Prevost and David Harrold, Palm Beach Capital Corp., the general partner of PMCP LP, and Palm Beach Capital Management, L.L.C., the Debtors' common investment

manager (collectively, the "General Partners"). The crux of the Settlement Agreement is that in return for cash ($3 million) and securities (valued at $2 million as of September 30, 2008), the Debtors will seek to obtain a litigation bar order in favor of the General Partners.

7. As undersigned counsel previously explained to the UST, the definition "CRO's Receiver," highlighted in the Motion to Convert was in error and will be corrected in an amended Settlement Agreement before it is submitted to this Court for consideration through a Rule 9019 motion. The foregoing title suggests, incorrectly, that Mr. Welt was Receiver over Mr. Freeman; however, Mr. Welt is the Receiver over LBFP. While Mr. Freeman is the principal of LBFP, the *only* subject of the receivership in the State Court Dissolution Proceeding is LBFP.

8. One of the first day papers filed with the Court was an application to retain TSI as interim management for the Debtors, including providing the services of Mr. Welt as Chief Restructuring Officer.[6] The statutory basis for the proposed retention is section 363(b) of the Bankruptcy Code.

9. The Debtors have not opened DIP bank accounts because, after monies paid to professionals pre-bankruptcy in contemplation of and pursuant to the Settlement Agreement, including for bankruptcy retainers for undersigned counsel and TSI, the remaining monies the Debtors have are in accounts believed to be held at U.S. Bank and which contain approximately $316,000 that have, upon information and belief, been frozen in connection with the legal proceedings in the District or Bankruptcy Courts in Minnesota concerning the Petters Fraud.

[6] *Debtors' Application for Entry of Interim and Final Orders Approving the Employment of Trustee Services, Inc. as Interim Management for the Debtors Nunc Pro Tunc to the Petition Date.* (D.E. 8)

II. Argument

A. Legal Standards

(i) Motion to Convert

10. Section 1112(b)(1) provides, in relevant part, as follows:

> … on request of a party in interest, and after notice and hearing, absent unusual circumstances specifically identified by the court that the requested conversion … is not in the best interests of creditors and the estate, the court shall convert a case under this chapter to a case under chapter 7 … if the movant establishes cause.

11 U.S.C. § 1112(b)(1). The word "cause" is defined in a non-limiting fashion in Code section 1112(b)(4). 11 U.S.C. § 1112(b)(4).

11. If cause is established, the court must convert the case unless it finds "unusual circumstances" that establish that the requested conversion is not in the best interests of creditors and the estate. 11 U.S.C. §§ 1104(a)(3) and 1112(b)(1). If the court finds such unusual circumstances exist, the court is not required to convert. If no such unusual circumstances are found, the court must not convert the case if (i) the debtor or another party objects, (ii) the act or omission is other than a substantial or continuing loss to or diminution of the estate coupled with the absence of a reasonable likelihood of rehabilitation, and (iii) the objecting party establishes that there is a reasonable likelihood that a plan will be confirmed within a time specified in the statute, that there exists a reasonable justification for the act or omission, and that the act or omission will be cured within a reasonable period fixed by the court. 11 U.S.C. § 1112(b)(2).

(ii) Motion to Appoint Chapter 11 Trustee

12. The appointment of a chapter 11 trustee is an extraordinary remedy. *In re Nartron Corp.*, 330 B.R. 573, 591 (Bankr. W.D. Mich. 2005). "Because the appointment of a trustee is such an extraordinary remedy, the moving party must show that cause for appointment

of a trustee exists by clear and convincing evidence." *In re Sundale Ltd.*, 400 B.R. 890, 899 (Bankr. S.D. Fla. 2009).

13. "The decision whether to appoint a trustee is fact intensive and the determination must be made on a case by case basis." *Sundale Ltd.*, 400 B.R. at 900. "Under section 1104(a)(1) the court is required to appoint a Chapter 11 trustee upon finding cause, including fraud, dishonesty, incompetence or gross mismanagement by the debtor." *Id.* However, "[w]hile appointment is mandatory once cause is found, it is within the court's discretion, on a case-by-case basis, to determine whether conduct rises to the level of 'cause'". *Id.*

14. When considering whether the appointment of a trustee is necessary under Section 1104(a)(2), the court considers "the interest of creditors, any equity security holders and other interests of the estate." *Id.* at 901.

15. Code section 1104(a)(1) and (2) provide:

> (a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and hearing, the court shall order the appointment of a trustee--
>
> (1) for cause, including fraud, dishonesty, incompetence or gross mismanagement of the affairs of the debtor by *current management*, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor;
>
> (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor . . .

11 U.S.C. §§ 1104(a)(1) and (2) (Emphasis added).

16. Unlike § 1104(e), § 1104(a)(1) refers to the fraud, dishonesty, incompetence, or gross mismanagement of *current management* of a debtor. When Congress enacted the

Bankruptcy Abuse and Crime Prevention Act of 2005, adding subsection (e) to § 1104, it could have amended subsection (a) to also refer to the "governing body of the debtor," but it did not. Instead, Congress clearly intended for the "cause" standard in § 1104(a) to apply solely to bad acts by *current management*. As noted in *Collier*:

> The new section 1104(e) requires the U.S. trustee to move for the appointment of a trustee if there are reasonable grounds to suspect any of the enumerated circumstances. However, section 1104(e) does not expand the grounds for the appointment of a trustee set forth in section 1104(a) and, once the U.S. trustee files a motion required by section 1104(e), the standards for determining whether a trustee should be appointed are the same as in any other motion for such an appointment.

7 Lawrence P. King, *Collier on Bankruptcy* § 25.36[1] (15th ed. rev. 2007).

(B) Analysis

(i) Introduction

17. The discussion at the first day hearings in respect of Mr. Welt's status as Receiver over LBFP, and his concurrent status as the Debtors' CRO, and whether those positions precluded a finding that Mr. Welt was disinterested, (a) concerned potential claims by the Debtors against LBFP and claims by LBFP against the Debtors, and (b) presupposed that (i) Mr. Welt had or has a personal interest in either proceeding, and (ii) the Debtors sought to retain him, individually, pursuant to Code section 327(a). As explained at the first day hearings, there are at present no known claims by the Debtors against LBFP; however, it has since been discovered that LBFP does have a claim of approximately $10,000 against the Debtors based, in part, on services rendered by Mr. Freeman as Chief Restructuring Officer for the Debtors. Mr. Welt, however, holds no personal interest in either LBFP or the Debtors—he serves *solely* in fiduciary or representative capacities for each of these entities. Lastly, because the Debtors are seeking to retain TSI, *not* Mr. Welt, and because the statutory basis for the proposed retention is Code

section 363(b), a disinterestedness requirement found only in Code section 327(a) as to Mr. Welt is otherwise inapposite.

18. As to any potential claims the Debtors may have against LBFP, the Court correctly noted in response to the UST's reference to such potential claims, *i.e.*, malpractice, preferential and fraudulent transfers, etc. are present in every case. If the existence of potential claims based upon pre-bankruptcy work was the standard for retention of professionals, or their firms, whether under Code section 327(a) or 363(b), then no such professionals or their firms could ever be retained by bankruptcy estates. As to the issue of the nature of Mr. Welt's interest, *i.e.*, the capacities in which he serves, it is undisputed that he serves in fiduciary or representative capacities both as Receiver over LBFP and as CRO of the Debtors. As such, Mr. Welt lacks any *personal* interest in either proceeding. Hence, putting aside the fact that the Debtors seek to retain TSI, *not* Mr. Welt, and seek to do so under section 363(b) which, unlike section 327(a), does not contain a disinterestedness requirement, Mr. Welt is a disinterested person as contemplated by Code section 101(14) and the case law construing it. As to the various facts (some incorrect) alluded to by the UST in its Motion to Convert, none establish cause for conversion or otherwise warrant the appointment of a Chapter 11 trustee.

19. As stated, the Debtors have acknowledged through supplemental declarations filed by Mr. Welt and Mr. Avron that LBFP asserts a claim of approximately $10,000 against the Debtors. However, that such a claim exists does not make Mr. Welt disinterested, again assuming *arguendo* that such a requirement is present here (which it is not). Alternatively, to the extent the Court concludes otherwise, there are at least two ways to resolve the conflict premised upon the existence of LBFP's claim against the Debtors. First, retention of conflict counsel (both to prosecute the claim *and* to review and, if appropriate, object to it), which is a common practice

and has been approved in other cases. Second, have a third party purchase LBFP's claim and pay it in full.

(ii) The Debtors seek to retain TSI, *not* Mr. Welt, under Code section 363(b) which does not contain a disinterestedness requirement; Mr. Welt does not hold an interest adverse, let alone materially adverse, to the interests of the Debtors' estates; Berger Singerman is a disinterested person.

20. The Debtors seek to retain TSI as interim management, including providing the services of Mr. Welt as CRO. Mr. Welt, individually, is not being retained in these Chapter 11 cases. The basis of the proposed retention of TSI is section 363(b) of the Bankruptcy Code which does not contain a disinterestedness requirement, and Orders entered in this district, including by this Court, have approved such retentions pursuant to this statute. *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).

21. 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 as contemplated by Code section 101(14)(A).

22. Likewise, in affirming the bankruptcy court's rejection of a challenge by related creditors to a 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)[7]] 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). Thus, Mr. Welt does not hold an interest adverse, let alone an interest materially adverse, to the Debtors' estates as contemplated by Code section 101(14)(C).

23. 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). 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. Thus, the fact that Berger Singerman represents Mr. Welt in each proceeding does not preclude a finding that it is disinterested as contemplated

[7] 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).

by Code section 101(14) as that representation is of Mr. Welt in a fiduciary or representative capacity.

(iii) The various facts alluded to in the Motion to Convert do not constitute cause warranting conversion.

24. The UST points to various facts (some incorrect) that, according to it, warrant conversion of these Chapter 11 cases to cases under Chapter 7.

25. The UST makes much of the fact that this is a litigation case with no guarantee of recovery (which is, by definition, always the case with litigation claims and would not change if these were Chapter 7 cases or a Chapter 11 trustee was appointed) and that a Chapter 11 liquidating plan will be proposed. However, Chapter 11 cases in which litigation claims against third parties have been the focus,[8] and liquidating Chapter 11 plans have been proposed and confirmed,[9] are standard fare in bankruptcy courts across the country including in this district, with the latter being expressly authorized by the Bankruptcy Code.[10] Hence, the fact that this is a litigation-based case and a liquidating plan will be forthcoming do not, notwithstanding the UST's argument to the contrary, constitute cause to convert the Debtors' Chapter 11 cases to cases under Chapter 7.

26. The UST harps on the fact that the Debtors are not operating, and there are no financial strategies to be implemented other than to liquidate and monetize assets, primarily via asserting litigation claims against third parties. While true, these facts do not constitute cause to

[8] *See, e.g., In re E.S. Bankest, L.C.,* Case No. 04-10941-BKC-AJC (Bankr. S.D. Fla.).

[9] *See, e.g., In re Levitt and Sons, LLC, et al.,* Case No. 07-19845-BKC-RBR (Bankr. S.D. Fla. Feb. 20, 2009) (*Amended Order (I) Confirming Second Amended Joint Liquidating Chapter 11 Plan for Debtors, as Amended, and (II) Setting Post-Confirmation Status Conference*) (D.E. 4646).

[10] 11 U.S.C. § 1129(a)(11) ("Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor…under the plan, *unless such liquidation* or reorganization *is proposed in the plan*.") (Emphasis added).

convert. To what end? So that another person who, like Mr. Welt, is bonded and on the trustee panel and subject to the Court's oversight can step in and engage in the exact same undertakings, *i.e.*, confer with special counsel on litigation claims, that Mr. Welt has been doing and will continue to do?

27. The UST asserts that the Debtors have no bank accounts and that all funds were paid as professional retainers. These statements, in addition to being irrelevant to cause to convert since the Debtors are not operating, are factually incorrect. In his First Day Declaration, Mr. Welt identified what he understands to be accounts at U.S. Bank which contain, in the aggregate, approximately $316,000 that were frozen in connection with legal proceedings in Minnesota concerning the Petters Fraud. One of the matters to be undertaken in these cases is to attempt to retrieve these monies for the benefit of the estates.[11] Moreover, prepetition fees paid to Thomas, Alexander & Forrester, LLP were not paid as retainers but, in fact, as contingent legal fees earned in contemplation of and as a result of the execution of the Settlement Agreement. As for retainers paid to Berger Singerman and TSI, the UST cites no authority for the proposition that the prepetition provision of bankruptcy retainers to professional service firms constitutes cause for conversion. If that were the case, then every single Chapter 11 case would be due to converted on the first day of the case.

28. The UST explains that Mr. Welt was employed for only two weeks before the filing of these Chapter 11 cases and, as a result, he lacks "institutional knowledge" of the

[11] Independent of these funds, the bankruptcy retainers held by each of Berger Singerman (approximately $166,000) and TSI (approximately $92,000) serve as a basis to compensate each entity for services rendered which refutes the UST's assertion that there are no funds with which to satisfy administrative expense claims to be incurred by professionals. The proposed retention of each of Thomas, Alexander & Forrester, LLP and Gonzalo R. Dorta, P.A. as special litigation counsel is on a pure contingency basis such that no monies are needed to compensate these firms unless and until they recover on litigation claims against third parties.

Debtors and their business. It is an unremarkable fact to which the UST points, that is, an individual is put in place as an officer in control of management of a company shortly before it files a Chapter 11 case. Again, if that scenario constituted cause for conversion then most, if not all cases in which a Chief Restructuring Officer is put in place and a bankruptcy was filed shortly thereafter would due to be converted on the first day of the case. As a factual matter, though, in paragraph 41 of his First Day Declaration Mr. Welt explained his (mistaken) belief that he was in place as Chief Restructuring Officer through his status as Receiver over LBFP and had been "learning about the business of [the Debtors] and the Petters Fraud, generally," since October 16, 2009, approximately six weeks prior to the filing of the Debtors' Chapter 11 cases.

29. The foregoing refutes the UST's assertion that there is "no real intrinsic value in keeping a CRO in place" where the administration of the case can, according to the UST, "be better handled by a Chapter 7 trustee, who is an independent fiduciary subject to oversight of the Court." Moreover, this statement completely discounts the fact, explained above and as to which the Court (and the UST) is well aware, that Mr. Welt is already serving in a fiduciary capacity and is otherwise a panel trustee who is bonded and indisputably subject to this Court's oversight. And there is no basis for the UST to assert that a replacement can or will do a "better" job than Mr. Welt has been and continues to do. In short, replacing one fiduciary for another as proposed by the UST will serve no purpose here other than to delay the proceedings and add costs for a new fiduciary to "get up to speed."

30. As explained above, the UST's characterization of the Settlement Agreement is incorrect and not properly part of the instant matter since it has not yet been brought before the Court. And the UST's statement that Mr. Welt had no authority to enter into the Settlement Agreement is simply wrong based upon the explanation previously provided to the UST and as

alluded to in ¶ 7, *supra*. Regardless, the UST and any other party in interest, including any creditor's committee formed in these Chapter 11 cases (which has been solicited by the UST) can object to the Settlement Agreement, as it will be modified, at the appropriate time, which is not now. And contrary to the UST's assertion that the Settlement Agreement was not reviewed by management, each of Mr. Freeman and Mr. Welt, in their respective capacity as Chief Restructuring Officer for the Debtors, were apprised of the settlement terms and each of them independently concluded that it should proceed. Lastly, the Debtors' respective Steering Committees, consisting of representatives of the limited partners who provided the funds lost in the Petters Fraud, and who undoubtedly have the most interest in having recoveries pursed by proposed special litigation counsel, approved the Settlement Agreement.

31. The UST's statement that the Debtors have no ability to rehabilitate ignores that the Code specifically provides for liquidating Chapter 11 cases that are routinely submitted and confirmed in courts across the country, including in this district, ¶ 25 and nn. 9 and 10, *supra*, and does not constitute cause to convert.

32. The UST has not and cannot establish cause for conversion. As such, the Court should deny the UST's request that these Chapter 11 cases be converted to cases under Chapter 7 of the Bankruptcy Code. Alternatively, if the Court finds the existence of cause, the Court is still not required to convert if it finds "unusual circumstances" such that the requested conversion is not in the best interests of creditors and the estate. 11 U.S.C. §§ 1104(a)(3) and 1112(b)(1). Here, unusual circumstances exist, primarily in the form of the (previously spoken) interests of the persons with the most interest in these Chapter 11 cases, the Debtors' limited partners, through their respective Steering Committees, who have authorized the retention of Mr. Welt as Chief Restructuring Officer and Berger Singerman as general counsel (as well as Thomas, Alexander

& Forrester, LLP as lead special litigation counsel), and entry into the Settlement Agreement, all of which are challenged by the UST. The voices of the most directly affected parties should be recognized.

(iv) The various facts alluded to in the Motion to Convert do not warrant the extraordinary remedy of appointment of a Chapter 11 trustee.

33. Because prior management of the Debtors has been displaced the provisions of Code section 1104(a)(1) are irrelevant. "Current management," as contemplated by the statute, ¶ 16, *supra*, consists of Mr. Welt and there has been and can be no allegation, let alone a showing by clear and convincing evidence, that Mr. Welt has engaged in fraud or dishonesty, or has been incompetent or engaged in gross mismanagement of the Debtors' affairs. Neither Mr. Welt nor Mr. Freeman before him were in place as Chief Restructuring Officer when the Debtors suffered massive losses in connection with the Petters Fraud. In short, Code section 1104(a)(1) does not serve as a basis for the appointment of a Chapter 11 trustee on the facts before the Court.

34. The UST makes reference to the same facts in support of its alternative request for the appointment of a Chapter 11 trustee, Motion to Convert, ¶¶ 32 and 33, as it did in support of its principal request for conversion. The UST urges a "fresh look" at the Debtors' Chapter 11 cases. There is not much to look at, however. The Debtors are not operating, they need to seek turnover of funds frozen in accounts at U.S. Bank, claims must be pursued against third parties to seek to recover at least some portion of thee massive losses suffered by the Debtors in connection with the Petters Fraud, and at least two fiduciaries (in addition to the Debtors' respective Steering Committees) have already signed off on the Settlement Agreement which will be subject to further scrutiny by a creditor's committee once formed.

35. At bottom, the UST seeks to replace Mr. Welt, a panel trustee who is not only well known to this Court but bonded and subject to this Court's oversight with another panel

member that is also bonded and subject to this Court's oversight. The Debtors respectfully submit that not only is there no value or utility to the proposal urged on the Court by the UST, but that it cannot establish, by clear and convincing evidence, that the appointment of a Chapter 11 trustee is in the best interests of the Debtors' creditors, equity security holders (whose representatives—the members of the Steering Committees—notably appointed Mr. Welt as Chief Restructuring Officer and approved the Settlement Agreement), and other interests of the estates as contemplated by Code section 1104(a)(2).

(v) If the Court for whatever reason believes that the existence of the LBFP claim against the Debtors raises a disinterestedness issue for TSI, Mr. Welt or Berger Singerman, there are alternative resolutions of that issue.

36. If the Court concludes that the existence of LBFP's approximate $10,000 claim against the Debtors raises a disinterestedness issue, then the Debtors propose two alternate ways to resolve that issue. First, retain conflict counsel (one firm to prosecute the LBFP claim *and* another to review and, if appropriate, object to it), which is a common practice and has been approved in numerous cases. For example, the Bankruptcy Court for the Middle District of Florida authorized the retention of Genovese, Joblove & Battista, P.A. ("GJB") to act as special litigation and conflicts counsel by Order dated May 11, 2007 in *In re Louis J. Perlman*, Case No. 6:07-BK-00761-ABB. There, general counsel to Chapter 11 trustee Soneet Kapila, the Akerman Senterfitt law firm, could not pursue litigation claims on behalf of the Debtor's estate against, among others, Mercantile Bank which Akerman Senterfitt represented in unrelated matters, so Mr. Kapila retained GJB to investigate and, if appropriate, pursue such claims.

37. Also, in *In re Levitt and Sons, LLC*, Case No. 07-19845-BKC-RBR, because of prior representations by Berger Singerman of KeyBank, N.A., GJB undertook sole responsibility to prosecute an objection to the claim(s) of KeyBank, N.A. filed against the estate and file and

prosecute an adversary proceeding against KeyBank, N.A., which matters are pending before the court. Previously, Berger Singerman, as Debtors' counsel, and GJB, as counsel to the creditor's committee, had filed a joint objection to KeyBank, N.A.'s claim.

38. Alternatively, a third party could purchase LBFP's claim and pay it off at par hence removing the claim issue in its entirety.

III. Conclusion

39. Based on the foregoing, the Court should deny the Motion to Convert.

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).

Dated: December 14, 2009

Respectfully submitted,

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