

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

In re:

Chapter 11

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

Case No. 09-36379-BKC-PGH

Jointly Administered

Debtors.

OBJECTION OF GEOFF 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 MONTHLY AND INTERIM COMPENSATION AND REIMBURSEMENT OF EXPENSES FOR PROFESSIONALS

(Hearing on Compensation Motion Set for 9:30 a.m. on January 28, 2010)

Geoff Varga, in his capacity as Joint Official Liquidator ("Liquidator") of Palm Beach Offshore Ltd. and Palm Beach Offshore II Ltd. (collectively, the "Offshore Funds"), by and through his undersigned counsel, hereby objects to the Debtors' Motion for an Order Establishing Procedures for Monthly and Interim Compensation and Reimbursement of Expenses for Professionals (the "Compensation Motion") [D.E. 9], and in support thereof, states as follows:

PRELIMINARY STATEMENT

1. The Liquidator represents the interests of the Offshore Funds, which are the largest unsecured creditors of Palm Beach Finance Partners, L.P. and Palm Beach Finance II, L.P. (the "Debtors"). Collectively, the Offshore Funds are owed over \$700 million under

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).

demand promissory notes (the “Notes”), representing practically all of the claims against the Debtors.

2. The Debtors issued the Notes to the Offshore Funds which, along with the equity investments of the Debtors’ investors, were subsequently directed to Petters Company, Inc. (the “Petters Company”), in exchange for notes. The Petters Company was an entity owned and controlled by Thomas J. Petters (“Petters”) who was recently convicted by a federal jury in Minnesota of masterminding a \$3.65 billion Ponzi scheme.²

3. The Debtors have no business operations, no employees, no tangible assets and no prospects for a reorganization. Indeed, by any measure they are likely either administratively insolvent at the present time or are on the verge of being so. Nevertheless, in the Compensation Motion, the Debtors seek the Court’s approval for a “streamlined” method to pay their numerous proposed professionals, but the Debtors provide no information as to where the funds will come from to make such payments.

4. The absence of any meaningful ability to pay professionals on a month-to-month basis, as proposed by the Debtors in the Compensation Motion, and the very nature of these cases negates the purpose of these proposed procedures. For these reasons, which are further detailed below, the Liquidator objects to the Compensation Motion.

PROCEDURAL BACKGROUND

5. On November 30, 2009 (the “Petition Date”), the Debtors each filed a voluntary petition for relief under Chapter 11 of title 11 of the United States Code (the “Bankruptcy”

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

Code”). By order dated December 1, 2009, the Court approved the joint administration of these cases [D.E. 19].

6. The Debtors are currently not operating and have not operated for over a year. See United States Trustee’s Motion to Convert Cases to Cases Under Chapter 7 or, in the Alternative, Motion to Appoint Chapter 11 Trustee and Request for Expedited Hearing (the “Motion to Convert”) ¶ 2 [D.E. 34].

7. No official committee of unsecured creditors was appointed in these cases by the U.S. Trustee’s Office [D.E. 56 (Case 09-36379); D.E. 25 (Case 09-36396)].

8. Other than the Compensation Motion, the Chapter 11 petitions were accompanied only by multiple applications to retain various counsel and special counsel to the Debtors (collectively, the “Applications”) – there were no other substantive motions or applications for relief filed by the Debtors as part of their “first day” filings.

9. The Applications consist of:

(i) Application for Approval, on an Interim and Final Basis, of Employment, *Nunc Pro Tunc* to the Petition Date, of Berger Singerman, P.A. (“Berger Singerman”) as Counsel for Debtors in Possession [D.E. 6];

(ii) Application for Approval, on an Interim and Final Basis, of Employment, *Nunc Pro Tunc* to the Petition Date, of Thomas, Alexander & Forrester, LLP (“TAF”) as Special Litigation Counsel to the Debtors [D.E. 7];

(iii) Application for Approval, on an Interim and Final Basis, of Employment, *Nunc Pro Tunc* to the Petition Date, of Trustee Services, Inc. (“TSI”) as Interim Management for the Debtors [D.E. 8]; and

(iv) Application for Approval, on an Interim and Final Basis, of Employment, *Nunc Pro Tunc* to the Petition Date, of Gonzalo R. Dorta, P.A. (“Dorta,” and

together with Berger Singerman, TAF and TSI, the “Professionals”) as Special Litigation Counsel to the Debtors [D.E. 11].³

10. On December 10, 2009, the United States Trustee filed the Motion to Convert. On December 16, 2009, the Liquidator filed a joinder to the Motion to Convert (the “Joinder”). [D.E. 54]. The Court conducted a Preliminary Hearing on the Motion to Convert on December 17, 2009 and an evidentiary hearing on the Motion to Convert has been scheduled for January 28, 2010. A final hearing on the Compensation Motion and the Applications is also scheduled for January 28, 2010.

11. On January 8, 2010, the Liquidator filed an omnibus objection to the Applications.

BASIS FOR OBJECTIONS

12. As the Liquidator pointed out in the Joinder, these cases concern entities with no business operations, no employees, no tangible assets and no prospects for reorganization, and exist for a single purpose: to prosecute claims against third parties to generate funds for distribution to creditors.⁴ See Joinder ¶ 3. There is nothing “complex” about these cases as the Debtors assert in the Compensation Motion, and the proposed “streamlined” procedures are therefore unwarranted.

³ On December 11, 2009, the Court entered Interim Orders: (i) Approving in Part and Denying in Part the Employment of Berger Singerman as Counsel for the Debtors-in-Possession *Nunc Pro Tunc* to the Petition Date [D.E. 37]; (ii) Approving the Employment of TSI as Interim Management for the Debtors *Nunc Pro Tunc* to the Petition Date [D.E. 38]; (iii) Approving in Part the Employment of TAF as Special Litigation Counsel to the Debtors *Nunc Pro Tunc* to the Petition Date [D.E. 40]; and (iv) Approving in Part the Employment of Dorta as Special Litigation Counsel to the Debtors *Nunc Pro Tunc* to the Petition Date [D.E. 41].

⁴ A fact that the Debtors acknowledge. See Debtors’ Response in Opposition to United States Trustee’s Motion to Convert Cases to Cases under Chapter 7 or, in the Alternative, Motion to Appoint Chapter 11 Trustee. (the “Debtors’ Objection”) ¶26 [D.E. 44].

13. Additionally, while there are potentially significant claims held by the Debtors against third parties, presently there are no tangible assets, much less cash, in the estates with which to compensate the Professionals. For all practical purposes, including paying the Professionals month-to-month, these estates are administratively insolvent and approval of an expedited payment procedure for the benefit of the Professionals would be inappropriate, if not impossible.

14. Finally, in light of the financial condition of these estates, and given the absence of creditors' committees, significant parties-in-interest such as the Liquidator must be given the opportunity to review and comment on any professional fees paid in these cases, prior to any payment – oversight the Debtors neglected to include in the Compensation Motion. Accordingly, the Compensation Motion should be denied.

A. The Proposed Compensation Procedures Are Not Warranted in Cases Such as These

15. In the Compensation Motion, the Debtors request that the Court enter an order establishing procedures for compensating and reimbursing the Professionals (whose retention is yet to be authorized) on a monthly basis, “comparable to those established in complex Chapter 11 cases in other districts.” Compensation Motion ¶ 5. While there are very serious issues to be resolved in the Debtors' cases, these cases are not complex and the establishment of special procedures for expedited payment of the Professionals is not warranted.

16. Rule 2016-1(B)(3)(b), Local Rules of the United States Bankruptcy Court for the Southern District of Florida (“Local Rules”) provides:

In larger chapter 11 cases, upon motion of a chapter 11 debtor, the court, upon notice and hearing, may consider approval of procedures for monthly payment of interim fee applications of chapter 11 professionals. The motion and proposed Local Form “Order Establishing Procedures to Permit Monthly Payment of Interim Fee Applications of Chapter 11 Professionals” shall be served on the U.S. Trustee, the attorney for each official committee (or if no committee is appointed,

the 20 largest unsecured creditors), attorneys for all postpetition lenders (or attorneys for their agents) and all parties who have filed a notice of appearance.

Local Rule 2016-1(B)(3)(b).

17. While there does not appear to be a precise definition of “larger chapter 11 cases” for purposes of Local Rule 2016-1(B)(3)(b), it is not beyond peradventure that this rule is intended to be utilized in complex cases with “many moving parts.” Indeed, the Debtors use the word complex in the Compensation Motion and courts have stated that crucial factors to consider when determining whether interim compensation procedures are needed include, “the size of [the] reorganization cases, the complexity of the issues involved, and the time required on the part of the attorneys for the debtors in providing services necessary to achieve a successful reorganization of the debtors.” *See, e.g., In re Int’l Horizons, Inc.*, 10 B.R. 895, 897 (Bankr. N.D. Ga. 1981). In “one-dimensional” cases such as the Debtors’ cases, the complexities that may otherwise warrant compensation procedures such as those sought by the Debtors in the Compensation Motion are simply not present.

18. In support of the Compensation Motion, the Debtors note that similar procedures have been adopted in other Chapter 11 cases in this district. *See* Compensation Motion ¶ 11. The cases cited by the Debtors, however, are nothing like the Debtors’ cases inasmuch as they each involved entities with on-going operations and a ready source of funds to compensate their professionals.⁵ They also were multi-faceted cases and were not liquidations limited in purpose to the prosecution of litigations with, hopefully, a distribution to creditors. While those cases may have had legitimate bases for interim compensation procedures, the Debtors’ cases do not.

⁵ The one apparent consistency is that Berger Singerman was counsel to each of the debtors cited in the Compensation Motion.

B. The Proposed Compensation Procedures are Inappropriate Because the Debtors are Administratively Insolvent

19. The Compensation Motion is silent on how the Professionals in these cases will be paid and a review of the Debtors' filings, including the Debtors' Schedules and Statements of Financial Affairs ("SOFA"), offers no clue as to how, on a monthly basis, the Debtors will pay the Professionals for any services rendered.

20. Indeed, what little cash may exist in the Debtors' accounts has been frozen by the Chapter 11 Trustee in the Petters bankruptcy cases. *See* Debtors' Schedule B, and SOFA Item 6(b) [D.E. 48 (Case 09-36379); D.E. 19 (Case 09-36396)]. While there may be brighter days ahead, the Debtors' estates are currently administratively insolvent and the ability to pay the Professionals is questionable at best. The Compensation Motion should not be granted by the Court absent full disclosure by the Debtors identifying the source of funds to be used to pay the Professionals' fees.

21. Assuming the court papers filed by the Debtors accurately reflect their financial condition as of the Petition Date, if the Debtors are administratively insolvent, pursuant to the Local Rules the Compensation Motion cannot be granted by the Court. For purposes of establishing interim compensation procedures in a case, it can be inferred from the Local Rules, Form-91 "Order Establishing Procedures to Permit Monthly Payment of Interim Fee Applications of Chapter 11 Professionals" that a debtor must be administratively solvent. The Form-91 order includes a proposed finding that the order is being entered upon, *inter alia*, "the representation of the Debtor that the estate is administratively solvent." No such representation was made by the Debtors in the Compensation Motion and the proposed order submitted with the Compensation Motion reads nearly verbatim to Form-91, but notably

excludes any mention of administrative solvency.

22. Furthermore, in addition to preparing their quarterly interim fee applications pursuant to the procedures proposed by the Debtors in the Compensation Motion, the Professionals will be required to prepare and submit monthly statements to the Debtors, through the CRO, before their fees and expenses will be paid. The time and expense of preparing the monthly statements will ultimately be passed onto the Debtors' estates. Where there is no apparent means to pay the Professionals, adding this extra layer of administrative expenses makes no sense.

23. Finally, establishing the expedited payment protocol sought by the Debtors in the Compensation Motion will allow the Professionals to trump any other administrative expenses of the estates (except, presumably, the U.S. Trustee's fees). A prioritization of these expenses at this time may prove to be inequitable to more meritorious claims that may arise in the future.

C. Alternatively, if the Compensation Motion is Approved, the Liquidator Must be Timely Served With a Copy of All Monthly Statements and Given an Opportunity to Object to Payment

24. The Debtors propose in the Compensation Motion that the Professionals will serve on a limited number of recipients monthly statements of fees and expenses: the Debtor c/o TSI (which may be submitting statements on its own behalf⁶), Debtors' counsel c/o Berger Singerman (which will be submitting statements on its own behalf), the Office of the United

⁶ Despite the fact that the Debtors purport to retain TSI under section 363 of the Bankruptcy Code and not section 327 (i.e., TSI is not a professional), see Debtors' Objection ¶17, the Compensation Motion seems to include TSI among those Professionals who will benefit from the relief sought in the motion. See Compensation Motion ¶ 6.

States Trustee, and counsel for the Official Committee of Unsecured Creditors, if established⁷ (collectively, the “Application Recipients”). See Compensation Motion ¶8(a). If any interim procedure for compensation is established, the Liquidator, as the largest creditor of these Debtors must be an “Application Recipient,” with all the rights such party would have under the proposed procedures.

25. The Debtors argue that the procedures set forth in the Compensation Motion, “will allow the Court and parties in interest to monitor fees sought by and paid to professionals.” Compensation Motion ¶ 6. However, in the Compensation Motion the Debtors also provide that the monthly statement need not be filed with the Court and a courtesy copy need not be delivered to the presiding judge’s chambers. See *Id.* ¶ 8(b). This coupled with the limited list of “Application Recipients” does not bode well for the monitoring the Debtors suggest will occur.

26. Providing the Liquidator with this information is especially important where, as here, creditors’ committees were not appointed by the U.S. Trustee. Additionally, providing significant parties-in-interest the opportunity to review and object to monthly fee statements is not without precedent in this district, even where a creditors’ committee has been appointed. See, e.g., *In re Gemini Cargo Logistics, Inc., et al.*, Case 08-18173-BKC-AJC [D.E. 16, ¶ 9(a)].

27. Accordingly, in the event the Court allows interim procedures for compensation of professionals to be established in these cases, the Liquidator should be given the opportunity to review such fee requests and comment, or object before any payment to Professionals is made by the Debtors.

28. Additionally, to the extent that the Professionals are intending to draw down on

⁷ As previously discussed, no Creditors Committees were established in either of the Debtors’ cases. See, *infra*, ¶ 7.

the various retainers they received from the Debtors pre-Petition Date, the Liquidator believes that any such draw should only be permissible following application to the Court with notice to all parties-in-interest and an opportunity to review such applications and lodge any objections.

CONCLUSION

29. For the foregoing reasons, the Liquidator respectfully objects to the approval of the Compensation Motion and requests entry of an order of the Court denying such motion.

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

Respectfully submitted,

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