

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re:)	Chapter 11
)	
LIFE FUND 5.1, LLC.,)	Case No. 09 B 32672
)	Jointly Administered
)	
Debtor.)	Judge A. Benjamin Goldgar
)	

REPORT OF DISPUTED CHAPTER 11 TRUSTEE ELECTION

Now comes William T. Neary, the United States Trustee for the Northern District of Illinois (“the U.S. Trustee”), by his attorney, Richard C. Friedman, and pursuant to Fed. R. Bankr. P. 2007(b)(3)(B) submits the following report of a disputed Chapter 11 trustee election.

BACKGROUND

1. This case, the lead of seven jointly administered cases, was filed on September 2, 2009.
2. On September 21, 2009, the Court approved the appointment of Patrick M. Collins (“Collins”) as Chapter 11 trustee in each of the jointly administered cases.
3. On October 13, 2009, Deborah J. Fritsche (“Fritsche”) on behalf of a Group of Investors filed a written request for a trustee election, which she reiterated at the meeting of creditors held in this case on October 14, 2009.
4. The meeting of creditors was continued for additional notice to creditors pursuant to Fed. R. Bankr. P. 2002(a)(1) to November 13, 2009 at 9:30 a.m., at which time the requested election was held for each of the jointly administered cases.

THE MEETING OF CREDITORS

5. The undersigned presided at and conducted the meeting, along with Dean C. Harvalis, Assistant U.S. Trustee, and M. Gretchen Silver, Trial Attorney, Office of the U.S. Trustee. Also among those present were Collins, the Chapter 11 trustee, his attorney, David M. Neff (“Neff”), Hal F. Morris (“Morris”), Assistant Attorney General and Managing Attorney - Bankruptcy Regulatory Section Texas Attorney General (“Texas”), Gordon E. Gouveia (“Gouveia”) on behalf of creditors Harry L. Parlette IV and Adela F. Parlette (the “Parlettes”), and David Audley (“Audley”) on behalf of creditor Dr. Charles Giger (“Giger”). The Group of Investors, whose proxies were held by Lori A. Hood (“Hood”), was represented by Fritsche, Hood, and Brian M. Graham (“Graham”). On behalf of the Group of Investors, Fritsche, Hood and Graham requested a trustee election, nominated Jeff J. Marwil (“Marwil”) to be trustee in each of the cases and cast their votes for Marwil. No other candidates were nominated.

6. The undersigned conducted the election by taking each case in succession, polling those at the meeting either in person or by telephone, whether they were for or against Marwil. Some parties contested the right of other parties to participate in the election. For example, the U.S. Trustee objected to the participation of Consolidated Wealth Management, LLC, John E. Spalding and Laura H. Spalding, because they are insiders with interests materially adverse to the estate. The Group of Investors objected to Texas’s participation, contending the State lacked standing. Although there were significant votes against Marwil, both in number and amounts, there does not appear to be any dispute that but for the objections below, Marwil was nominated and elected as Chapter 11 trustee for each of the seven jointly administered cases.

OBJECTIONS TO ELECTION AND TO CLAIMS FOR VOTING PURPOSES

7. In order to hold a trustee election, §702(b), which is incorporated by reference in § 1104(b) of the Code, requires that creditors holding at least twenty percent (20%) in amount of the claims specified in §702(a) of the Code request the election of a trustee. Pursuant to §702(c), a candidate for trustee is elected if he or she receives a majority in amount of the votes cast, provided that at least twenty percent (20%) in amount of the eligible claims under §702(a) actually vote.

8. The eligibility requirements governing a creditor's right to vote in an election are set forth in §702(a) of the Code and Fed. R. Bankr. P. 2007.1, which incorporates by reference Fed. R. Bankr. P. 2003(b)(3) and Fed. R. Bankr. P. 2006. Section 702(a) of the Code provides that a creditor may vote for a candidate for trustee only if such creditor:

- (1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under Sections 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i) of this title;
- (2) does not have an interest materially adverse . . . to the interest of creditors entitled to such distribution; and
- (3) is not an insider.

9. Fed. R. Bankr. P. 2006 states as follows:

Solicitation and Voting of Proxies in Chapter 7 Liquidation Cases

(a) Applicability. This rule applies only in a liquidation case pending under chapter 7 of the Code.

(b) Definitions.

(1) Proxy. A proxy is a written power of attorney authorizing any entity to vote the claim or otherwise act as the owner's attorney in fact in connection with the administration of the estate.

(2) *Solicitation of proxy.* The solicitation of a proxy is any communication, other than one from an attorney to a regular client who owns a claim or from an attorney to the owner of a claim who has requested the attorney to represent the owner, by which a creditor is asked, directly or indirectly, to give a proxy after or in contemplation of the filing of a petition by or against the debtor.

(c) *Authorized solicitation.*

(1) A proxy may be solicited only by (A) a creditor owning an allowable unsecured claim against the estate on the date of the filing of the petition; (B) a committee elected pursuant to § 705 of the Code; (C) a committee of creditors selected by a majority in number and amount of claims of creditors (i) whose claims are not contingent or unliquidated, (ii) who are not disqualified from voting under § 702(a) of the Code and (iii) who were present or represented at a meeting of which all creditors having claims of over \$ 500 or the 100 creditors having the largest claims had at least five days notice in writing and of which meeting written minutes were kept and are available reporting the names of the creditors present or represented and voting and the amounts of their claims; or (D) a bona fide trade or credit association, but such association may solicit only creditors who were its members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition.

(2) A proxy may be solicited only in writing.

(d) *Solicitation not authorized.* This rule does not permit solicitation (1) in any interest other than that of general creditors; (2) by or on behalf of any custodian; (3) by the interim trustee or by or on behalf of any entity not qualified to vote under § 702(a) of the Code; (4) by or on behalf of an attorney at law; or (5) by or on behalf of a transferee of a claim for collection only.

(e) *Data required from holders of multiple proxies.* At any time before the voting commences at any meeting of creditors pursuant to § 341(a) of the Code, or at any other time as the court may direct, a holder of two or more proxies shall file and transmit to the United States trustee a verified list of the proxies to be voted and a verified statement of the pertinent facts and circumstances in connection with the execution and delivery of each proxy, including:

(1) a copy of the solicitation;

(2) identification of the solicitor, the forwarder, if the forwarder is neither the solicitor nor the owner of the claim, and the proxyholder, including their connections with the debtor and with each other. If the solicitor, forwarder, or proxyholder is an association, there shall also be included a statement that the

creditors whose claims have been solicited and the creditors whose claims are to be voted were members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition. If the solicitor, forwarder, or proxyholder is a committee of creditors, the statement shall also set forth the date and place the committee was organized, that the committee was organized in accordance with clause (B) or (C) of paragraph (c)(1) of this rule, the members of the committee, the amounts of their claims, when the claims were acquired, the amounts paid therefor, and the extent to which the claims of the committee members are secured or entitled to priority;

(3) a statement that no consideration has been paid or promised by the proxyholder for the proxy;

(4) a statement as to whether there is any agreement and, if so, the particulars thereof, between the proxyholder and any other entity for the payment of any consideration in connection with voting the proxy, or for the sharing of compensation with any entity, other than a member or regular associate of the proxyholder's law firm, which may be allowed the trustee or any entity for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;

(5) if the proxy was solicited by an entity other than the proxyholder, or forwarded to the holder by an entity who is neither a solicitor of the proxy nor the owner of the claim, a statement signed and verified by the solicitor or forwarder that no consideration has been paid or promised for the proxy, and whether there is any agreement, and, if so, the particulars thereof, between the solicitor or forwarder and any other entity for the payment of any consideration in connection with voting the proxy, or for sharing compensation with any entity, other than a member or regular associate of the solicitor's or forwarder's law firm which may be allowed the trustee or any entity for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;

(6) if the solicitor, forwarder, or proxyholder is a committee, a statement signed and verified by each member as to the amount and source of any consideration paid or to be paid to such member in connection with the case other than by way of dividend on the member's claim.

(f) Enforcement of Restrictions on Solicitation. On motion of any party in interest or on its own initiative, the court may determine whether there has been a failure to comply with the provisions of this rule or any other impropriety in connection with the solicitation or voting of a proxy. After notice and a hearing the court may reject any proxy for cause, vacate any order entered in consequence of the voting

of any proxy which should have been rejected, or take any other appropriate action.

10. Collins contested the election for the reasons stated on the record by his attorney, Neff, which have now been reduced to writing in his "Objections of Trustee Patrick M. Collins to the November 13, 2009 Election of Trustee," docket # 180. Collins contested the validity of the proxies of the Group of Investors, because their attorneys' solicitation was unauthorized under Fed. R. Bankr. P. 2006(d)(4), and because they failed to substantially comply with Fed. R. Bankr. P. 2006(e), (notwithstanding their attempt to do so on November 12, 2009, docket # 176). The Parlettes have adopted the Collins' objections. *See* docket # 182.

11. Collins' objections were in substance also made by the U.S. Trustee, Texas, and Giger, and while each of these parties reserves the right to file papers in support of their specific position, the U.S. Trustee specifically reserves the right to file a motion pursuant to Fed. R. Bankr. P. 2006(f) to disallow the proxies of the Group of Investors due to improprieties in connection with their solicitation. In sum, the objectors assert that the election was irremediably tainted and that, therefore, Collins should continue to serve as Chapter 11 trustee.

[INTENTIONALLY LEFT BLANK]

CONCLUSION

12. Based upon these disputed issues, the election itself is disputed and, therefore, no trustee was elected at the meeting of creditors held in this case.¹

RESPECTFULLY SUBMITTED,

WILLIAM T. NEARY
UNITED STATES TRUSTEE

DATE: November 19, 2009

BY:

/s/ Richard C. Friedman
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CERTIFICATE OF SERVICE

I, Richard C. Friedman, Attorney, state that pursuant to Local Rule 9013-3(D) the above **Report of Disputed Chapter 11 Trustee Election** was filed on November 19, 2009, and served on all parties identified as Registrants on the service list below through the Court's Electronic Notice for Registrants and, as to all other parties on the service list below, I caused a copy to be sent via First Class Mail to the address(es) indicated on November 19, 2009.

/s/ Richard C. Friedman

¹This report was prepared without the benefit of the transcript of the meeting, which took place over several hours. The transcript has been ordered, but not received. The U.S. Trustee reserves the right to amend this report if a review of the transcript discloses that such amendment is appropriate.

SERVICE LIST

LIFE FUND 5.1, LLC

09-32672

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