

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  
) March 24, 2010 at 10:00 a.m.

**RESPONSE OF THE UNITED STATES TRUSTEE TO GROUP OF INVESTORS'  
MOTION TO DISMISS, ALTERNATIVELY, TO TRANSFER VENUE**

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 as his Response to the Group of Investors’ Motion to Dismiss, Alternatively, to Transfer Venue states to the Court as follows.

**BACKGROUND**

These jointly administered cases were filed on September 2, 2009. The petitions were signed by Russell E. Mackert (“Mackert”) as Manager of Shepherd Capital Management, LLC in accordance with the Administrative Procedures of the Court. The petitions were each accompanied by a Certificate of Resolution which referenced a state court judgment which explicitly authorized the filing. (Although each Certificate of Resolution purported to attach the state court judgment, none did so. The Group of Investors’ motion also references the state court judgment. Inexplicably, the Group of Investors did not attach the state court judgment to their motion or give any direction to the Court where it might be found. Should the Court wish to review the state court judgment, it may be found at Exhibit A to docket #13.)

On September 15, 2009, the Group of Investors filed their Motion to Dismiss, Alternatively, to Transfer Venue, docket #12. Since the filing of the motion, the cases have been very active with over 290 docket entries. A trustee has been appointed. A disputed trustee election has been conducted, a trial held, and its resolution given a briefing schedule. Numerous claims have been filed. Mackert appeared and testified at the meeting of creditors.

Although the Group of Investors' concedes on page 2 of their motion that Mackert could have filed the cases directly, the Group of Investors nevertheless contends that the cases should be dismissed because there was no proper authority to file them. If there was, however, the Group of Investors asserts the cases should be transferred to Texas. As will be shown below, the Group of Investors is wrong on both counts. There is no basis to dismiss these cases and no reason to transfer them.

**ARGUMENT: THERE IS NO CAUSE TO DISMISS THE CASES**

There is no dispute that a corporate bankruptcy petition must be authorized under state law. *Hager v. Gibson*, 108 F.3d 35, 38-39 (4<sup>th</sup> Cir. 1997), affirmed in part and reversed in part on other grounds, 109 F.3d 201 (4<sup>th</sup> Cir. 1997). The Group of Investors contends that these cases were not so authorized, and, therefore, must be dismissed.

The state court judgment, however, explicitly authorized the filings. While the Group of Investors would like this Court to consider possible infirmities in the state court proceedings and judgment, the Court is prohibited from doing so under the *Rooker-Feldman* doctrine. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *District of Columbia Ct. Of App. v. Feldman*, 460 U.S. 462, 486 (1983). "These two decisions establish the proposition that the lower federal courts lack jurisdiction to review the decisions of state courts in civil cases." *Gilbert v. Illinois*

*State Bd. of Educ.*, —F.3d—,2010 WL 59188 at \*3 (7<sup>th</sup> Cir. 2010); *see also, In re Homer-Radtke*, 305 B.R. 846, 849-51 (Bankr.N.D.Ill. 2004). Accordingly, the Group of Investors has provided the Court no basis in law to revisit the state court’s judgment’s authorizing the filing of these cases and without that there no basis to conclude that the cases should be dismissed. In short, the Court must deny the Group of Investors’ request to dismiss these cases.

**ARGUMENT: THERE IS NO CAUSE TO TRANSFER VENUE**

The Group of Investors’ alternatively requests transfer of venue in the interest of justice or for the convenience of the parties. The Group of Investors, however, does not address the standards for determining whether venue should be transferred on this basis, or provide any reasons why the Court should do so (other than that’s what the Group of Investors’ wants).

The standards for transferring venue were well stated by the court in *In re Eagle Pointe Ltd. Dividend Housing Ass'n Ltd. Partnership*, 350 B.R. 84, 91-92(Bankr.N.D.Ind. 2006), citing *Commonwealth Oil Refining Co., Inc.*, 596 F2d 1239, 1247 (5<sup>th</sup> Cir. 1979):

“28 U.S.C. § 1412 and Fed.R.Bankr.P. 1014(a)(1) have two principal overriding rubrics which are to determine whether or not venue of a Chapter 11 case should be transferred to another court: in ‘the interest of justice’ or ‘for the convenience of the parties’. As stated in *Commonwealth Oil Refining Co., Inc.*- . . -the factors under the prong of ‘convenience of the parties’ is to be determined by analysis under six elements:

\_\_\_\_\_ Under the heading of convenience of the parties the bankruptcy court listed six factors:

- (1) The proximity of creditors of every kind to the Court;
- (2) The proximity of the bankrupt (debtor) to the Court;
- (3) The proximity of the witnesses necessary to the administration of the estate;
- (4) The location of the assets;
- (5) The economic administration of the estate;
- (6) The necessity for ancillary administration if bankruptcy should result.

*Commonwealth Oil Refining Co., Inc.*, 596 F.2d 1239, 1247. The COMCO factors principally focus on the element of “convenience of the parties”. The concept of “interest of justice” is a totally subjective one...”

The Group of Investors has not addressed any of the above factors, so the Group of Investors has provided no basis to the Court for transferring venue. Nevertheless, the administration of the case has been very active and the Court has been involved in numerous issues. There is no reason to start over in another venue with the attendant expense of doing so. Even the individual the Group of Investors hopes to elect as trustee, Jeff J. Marwil, offices in Chicago. Factor 5, therefore, strongly favors retention of the cases by this Court and none of the other factors appear to be of much significance. In short, while the Group of Investors has offered no basis to transfer the venue of the cases to another district, there is ample cause to retain the cases in this Court. Accordingly, the Court should deny the Group of Investors’ request to transfer venue of these cases.

### **CONCLUSION**

For the reasons stated above the U.S. Trustee asserts that the Court should deny the Group of Investors’ motion in its entirety.

RESPECTFULLY SUBMITTED,  
WILLIAM T. NEARY  
UNITED STATES TRUSTEE

DATE: January 27, 2010

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 **Response of the United States Trustee to Group of Investors' Motion to Dismiss, Alternatively, to Transfer Venue** was filed on January 27, 2010, 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 January 27, 2010.

/s/ Richard C. Friedman

**SERVICE LIST**

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