

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In Re:

LIFE FUND, 5.1, LLC et al.

§ Chapter 11
§ Case No. 09 B 32672
§
§ Administratively consolidating cases nos.
§ Case No. 09 B 32674
§ Case No. 09 B 32676
§ Case No. 09 B 32677
§ Case No. 09 B 32678
§ Case No. 09 B 32679
§ Case No. 09 B 32681

Debtors

§ Judge A. Benjamin Goldgar

**OBJECTION TO TRUSTEE’S APPLICATION TO EMPLOY AND RETAIN
PERKINS COIE LLP AS HIS COUNSEL EFFECTIVE
NUNC PRO TUNC TO SEPTEMBER 21, 2009**

COMES NOW counsel¹ for a group of investor/creditors² (“Group of Investor/Creditors/Creditors”) objecting to Trustee’s Application to Employ and Retain Perkins

¹ Brian M. Graham with the law firm of SmithAmundsen LLC, Chicago, Illinois (“SA”) appears as local counsel for the law firm of Johnson, Trent, West & Taylor, L.L.P., Houston, Texas (“JT”), and two attorneys with JT, Lori A. Hood and Deborah J. Fritsche, each of whom have Orders approving Leave to Appear Pro Hac Vice before this Court for the bankruptcy case(s), referenced in the style. Ms. Fritsche is designated lead counsel.

² As of Friday, October 3, 2009, JT has been retained, or contacted to be retained, to represent the following investors/creditors (all of whom have been identified by Debtors as unsecured creditors): John E. and Laura H. Spalding; Kenneth & Michelle Fancher; Doug Parsons; Eileen Parsons; Kathleen Peck; Luther D. Pritchard, Jr.; Dina A. Pyron; Sumner Kai; Thomas & Vessie Ferrell; Cheryl Northam; Sherryll Bennett; Connie Kieschnick; Mark E. Brooks; Pamela C. Brooks; Bert Brown; Chau Dang; David & Chau Dang; Chau & Linh Dang Nguyen JT; Chalet Morella; Jayanti & Suman Patel; Jayanti Patel; Suman Patel; Barbara Natham; Clyde B. and Norma E. Loan; Rudolph & Dawn Abeyta; Lourdes S. Savana; John C. & Lourdes S. Savana; The Aubin Family Trust; Cary Bauer; Barry H. Cohn; Glenna M. Cohn; Bruce D. Davis; Frank DiMaria; Anthony & Joan DiRienzo; John & Claire Fielding; Daniel Galfione; Mary Barbara Gold; Clarence D. Hall, III; Roy & Ilse Harris; Richard Henke; Don Stanley Hite; Sydney Hite; Michael & Brenda Kessler; Daniel G. Krueger; Mark John Le; Daniel Lenehan; Clyde B. & Norma E. Loan; Georgette H. McNally; Ronald N. & Nedra D. Miller; Wayland W. Moore, Jr.; Danny L. Moseley; Kenneth Wayne Raybon; Michael A. Richards, Jr.; Danny O. Rush; Martha C. Sappington; Daniel & Gerlinde Schmerbach; Edward J. Shannon, Jr.; Lucy B. St. George; Wilbern E. Warnell, Jr.; Leonard Wenig; Guy Thomas Wood; Dorothy Wright; Elma P. Marsh; Luther D. Pritchard, Jr.; Georgia J. Monkres; and T. Eugene Monkres.

Coie LLP (“PC”) as his Counsel effective *nunc pro tunc* to September 21, 2009, (docket no. 38 in Case No. 09-32672; hereinafter, “Application”), and states as follows:

**I.
JURISDICTION**

1. Subject to its Motion to Dismiss or Transfer Venue, and without waiver of its right to challenge the jurisdiction of this Court and the venue of these proceedings, the Group of Investor/Creditors admits retention of professionals for the Trustee is a core proceeding and this Court has jurisdiction to handle same.

**II.
RELIEF REQUESTED**

2. Pursuant to section 327(d) of the Bankruptcy Code, the Trustee has failed to show cause to justify employment of the Trustee’s law firm. Without such a showing, the Trustee is not allowed to hire his own law firm because it fails the disinterestedness test and impairs the Trustee from performing certain of his duties, such as controlling administrative costs and monitoring attorneys’ fees. If the Trustee cannot show that hiring his own law firm saves these estates money, the Application must be denied.

**III.
ARGUMENT AND AUTHORITIES**

3. The disinterestedness test of section 327(a) is that a professional person hired to represent the estate may not hold, or represent, an interest adverse to the estate. 11 U.S.C. § 327(a). See also Bankruptcy Code section 101(14), defining “disinterestedness”. A trustee, who will also make money from the attorneys’ fees charged to an estate, is not disinterested. There are two significant problems. “First, the trustee has a statutory duty to object to fees where the requested fees are inappropriate; therefore, a conflict of interest could arise if the trustee’s law

firm's fee petition is at issue." *In re Dergance*, 218 B.R. 436, 438 (Bankr. N.D. Ill. 1998), citing *In re Cee Jay Discount Stores, Inc.*, 171 BR. 173, 176 (Bankr. E.D. N.Y. 1994). The second problem is the confusion of tasks. What is the trustee's duty to perform for his statutory fee and what is lawyer work entitled to additional compensation? The trustee is responsible to make sure the estate does not pay an excessive, duplicative or unnecessary amount of professional fees. *Id.*

4. Section 327(d), however, is an exception to the disinterestedness test allowing a trustee to also "act as attorney or accountant for the estate if such authorization is **in the best interest of the estate**." 11 U.S.C. § 327(d) (emphasis added). Generally, this is a concern in a small case where hiring of outside counsel is not cost effective. See, e.g., *In re Spungen*, 168 B.R. 373 (N.D. Ind. 1993) (district court stopped the practice of allowing tax-refund-only bankruptcy cases to be charged for both for the chapter 7 trustee and for counsel up to 50%). Section 327(d), however, has not been limited to small cases in which the trustee serves as both trustee and attorney. See, e.g., *In re Interamericas, Ltd.*, 321 B.R. 830 (Bankr. S.D. Tex. 2005). But in all instances, the rule has developed that the trustee must make a special showing covering a variety of factors. The most cited case for the applicable factors is *In re Butler Industries, Inc.*, 114 B.R. 695, 698 (C.D. Cal. 1990).

5. Pursuant to section 327(d) and applicable case law, in order for a trustee to hire his/her own law firm, the trustee must make a special showing of the following:

- The legal representation is for preference or fraudulent conveyance actions and counsel will work on a contingency fee basis.;
- The representation is only a nominal amount of legal work.;
- The work must be performed on such an urgent basis that there is no time to get outside counsel up to speed and hired. And
- There will be a substantial cost savings to the estate.

Id. at 698, n. 1 (the list above is most often shown as all the factors that must be satisfied. In practice and subsequent case law, the list is cited as though the trustee must meet one of the top

three situations, but in all instances, there must be a substantial cost savings.) See, e.g., *In re Gem Tire & Service Co.*, 117 B.R. 874, 878-89 (Bankr. S.D. Tex. 1990) (citing legislative history to support that a trustee cannot receive two fees for the same service); *In re Interamericas, Ltd.*, 321 B.R. 830 (Bankr. S.D. Tex. 2005) (developing more factors); *In re Dergance*, 218 B.R. 436, 438 (Bankr. N.D. Ill. 1998) (using only the contingency fee basis for estate savings); *In re Kurtzman*, 220 B.R. 801, 803 (Bankr. S.D.N.Y. 1998) (trustee is a fiduciary and must overcome all conflicts of interest).

6. In the cases before this Court, there likely will be a need to pursue fraudulent transfers and conveyances. It would indeed be double dipping if the trustee was to receive his statutory fee and he pays his law firm in which fees the trustee also participates. If that work is done for one contingent fee, however, there is a cost savings to the estates.

7. Further, in light of the fact that Mr. Collins does not have bankruptcy experience, he must make a showing that hiring his own firm is not so the lawyers there can perform trustee tasks for which the estate will be charged. If that is necessary for his education, the estates should not be charged.

8. Finally, as a new trustee, Mr. Collins may indeed need to hire his law firm in order to get up to speed quickly, but again, the estate should not be charged for trustee tasks.

9. Should the Court overrule this Objection and allow the retention of PC as counsel to the Trustee, Group of Investor/Creditors hereby expressly reserve the right, at the time of the presentation of any fee applications in these cases, to object to the reasonableness and necessity of services charged to the estates by PC and to the rates PC proposes to charge the estates for such services.

FOR THE REASONS AND AUTHORITIES STATED ABOVE, counsel for the Group of Investor/Creditors requests the Court deny the Application unless and until there has been a showing of cost savings to the estates for the trustee to hire his own law firm and there will not be duplication of fees, and grant such other and further relief to which the Group of Investor/Creditors may be entitled.

Dated: October 6, 2009.

GROUP OF INVESTOR/CREDITORS (see footnote 2)

Respectfully submitted,

By: /s/ Deborah J. Fritsche
Lead Counsel for Group of Investor/Creditors

OF COUNSEL:

SMITHAMUNDSEN LLC
Brian M. Graham (IL Bar No. 6243015)
150 North Michigan Avenue
Suite 3300
Chicago, Illinois 60601
(312) 894-3309 (Telephone)
(312) 894-3210 (Facsimile)

JOHNSON, TRENT, WEST
& TAYLOR, L.L.P.
Lori Hood
Texas State Bar No.: 009943430
Deborah J. Fritsche
Texas State Bar No. 07481150
919 Milam, Suite 1700
Houston, Texas 77002
(713) 222-2323 (Telephone)
(713) 222-2226 (Facsimile)

COUNSEL FOR GROUP OF INVESTOR/CREDITORS

CERTIFICATE OF SERVICE

I, Brian M. Graham, an attorney, do hereby certify that I caused true and correct copies of the foregoing OBJECTION TO TRUSTEE'S APPLICATION TO EMPLOY AND RETAIN PERKINS COIE AS HIS COUNSEL EFFECTIVE NUNC PRO TUNC TO September 21, 2009 to be served upon the attached service list via the Court's CM/ECF electronic filing system and/or via email, as indicated below, on this the 6th day of October, 2009.

/s/Brian M. Graham

SERVICE LIST

Counsel for Debtors

Michael L. Gesas

Miriam R. Stein

Arnstein & Lehr, LLP
120 S. Riverside Plaza, Suite 1200
Chicago, IL 60606-3910
(312) 876-7125
(312) 876-6260 (fax)
mlgesas@arnstein.com
mrstein@arnstein.com

Chapter 11 Trustee

Patrick Collins, Ch. 11 Trustee

Brian A. Audette

David M Neff

Perkins Coie LLP
131 South Dearborn, Suite1700
Chicago, IL 60603
(312) 324-8400
(312) 251-5865 (fax)
baudette@perkinscoie.com
dneff@perkinscoie.com

U.S. Trustee

Richard C. Friedman

Gretchen M. Silver

Office of the U.S. Trustee
219 S. Dearborn St., Room 873
Chicago, IL 60604
USTPRegion11.ES.ECF@usdoj.gov

The Texas State Securities Board

Edith Stuart Phillips

Office of the Texas Attorney General
Bankruptcy & Collection Division
PO Box 12548
Austin, TX 78711

Those Requesting Notice:

Eric Boutte, as Trustee for the AB
Revocable Living Trust

Michael M. Eidelman, ESQ

Arlene N Gelman

Vedder Price
222 N. LaSalle Street, Suite 2600
Chicago, IL 60601
(312) 609-7636
(312) 609-5055 (fax)
meidelman@vedderprice.com
agelman@vedderprice.com

Deana F Tillostson

Tony L Visage

Bracewell & Giuliani LLP
711 Louisiana Street, Suite 2300
Houston, TX 77002

Alma and Fred Held

Zala L Forizs

Forizs & Dogali PA
4301 Anchor Plaza Pkwy, Suite 300
Tampa, FL 33634
(813) 289-0700
(813) 289-9435 (fax)

Mark Self

Daniel T. Graham

Neil M. Rosenbaum

Funkhouser Vegosen Liebman & Dunn, Ltd.
55 West Monroe, Suite 2300
Chicago, IL 60606
(312) 701-6800
(312) 701-6801 (fax)
dgraham@fvldlaw.com
nrosenbaum@fvldlaw.com

Dr. Charles Giger

David T.B. Audley

Chapman and Cutler LLP

111 W. Monroe

Chicago, IL 60603

(312) 845-3000

audley@chapman.com

benz@chapman.com

Bryant D. Truitt

David S. Gragg

Langley & Banack, Inc.

Trinity Plaza II, Ninth Floor

745 East Mulberry

San Antonio, TX 78212-3166

(210) 736-6600

(210) 735-6889 (fax)

dgragg@langleybanack.com