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March 17, 2009

VIA EMAIL: Bernstein.chambers@nysb.uscourts.gov

The Honorable Stuart M. Bernstein
Chief Judge of the United States Bankruptcy
Court for the Southern District of New York
One Bowling Green
New York, New York 10004-1408

**Re: In re Kollel Match Efraim, LLC a/k/a Match Ephraim LLC
a/k/a Kolel Match Efraim, Debtor, Chapter 7 Case No. 04-16410
Geltzer v. Lefkowitz and Steinwurzlel
Adv. Proceeding No. 08-01265**

Dear Chief Judge Bernstein:

We are Substitute General Counsel to Robert L. Geltzer, as Chapter 7 Trustee (the “Trustee”) of the above-referenced Debtor, and as Trustee the plaintiff in the above-referenced adversary proceeding (the “Adversary Proceeding”). This letter is submitted in response to the March 13, 2009 letter from counsel for defendants Jack Lefkowitz and Abraham Steinwurzlel (“Defendants”) in the Adversary Proceeding, requesting a pre-motion conference pursuant to Local Rule 7056-1(a) with respect to Defendants’ proposed motion for summary judgment.

As set forth below, Defendants’ request, interposed just one week prior to the present March 20, 2009 deadline date for submission of the parties’ Joint Pre-Trial Order, is a purely dilatory tactic and entirely unwarranted in light of the evidentiary record. A number of the factual assertions made by Defendants in their letter are directly belied by the pertinent documentary evidence and sworn testimony of the Defendants. Other of Defendants’ contentions seek to reintroduce defunct arguments made in their prior motion to dismiss the Trustee’s Complaint in the Adversary Proceeding, which motion has already been rejected by this Court. Defendants’ attempt to obtain another bite at the apple without the undisputed facts necessary to support their position is particularly inappropriate here where the Joint Pretrial Order is due in this case in a matter of days and trial looms on the horizon. The Trustee respectfully submits that this matter should proceed as planned to trial, without the delay and waste of resources that would come from briefing and considering Defendants’ patently insufficient proposed summary judgment motion.

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Rabbi Steinwurzels, by His Own Testimony, Served as a Manager of the Debtor and Therefore Owed It Fiduciary Duties.

Defendants' contention that Defendant Abraham Steinwurzels ("Steinwurzels") was not the Manager of the Debtor and was therefore not a fiduciary of the Debtor is clearly contradicted by the record. In his own affidavit dated May 21, 2007 submitted in the Debtor's bankruptcy case (the "Steinwurzels Affidavit"; Bankruptcy Case Docket No. 127), Steinwurzels stated that at "all relevant times herein, I have been the Rabbi for the debtor," and have performed "many functions for the Debtor, including managing the Debtor, paying its account payables, and helping raise funds for the Debtor." (Steinwurzels Affidavit at ¶1.) The Steinwurzels Affidavit was submitted on behalf of the Debtor in opposition to the motion of Helen-May Holdings, LLC ("Helen- May") to hold the Debtor in civil contempt for failing to make adequate protection payments required by this Court and for continuing to wrongfully occupy the Meadows Property without making such payments. As the signatory of the Affidavit submitted in opposition to that motion, Steinwurzels expressly held himself out, given his management position, as having "personal knowledge of the Debtor's financial condition and affairs." (Id.)

The record also indisputably demonstrates that Steinwurzels executed each of the Debtor's monthly operating reports filed in the bankruptcy case and was the sole signatory of the Debtor's debtor-in-possession bank account. This Court, fully cognizant of the depth and significance of Steinwurzels' roles and responsibilities on behalf of the Debtor, stated in the Court's decision on the record converting the Debtor's Chapter 11 case to a case under Chapter 7, that "[a]ccording to the affidavits [Steinwurzels] has submitted in this case, **he is also the debtor's rabbi, manager, and de facto chief financial officer.**" (Transcript of October 25, 2007 Hearing [the "Conversion Hearing"]; Bankruptcy Case Docket No. 228, at page 24, lines 16-18) (emphasis added).) Moreover, during that same Conversion Hearing, the Debtor's counsel, confirmed that Steinwurzels was a manager of the Debtor:

Well, we've indicated that the rabbi is a manager. I mean, it's no secret. We've indicated that the rabbi is a manager of the debtor.

(Transcript of Conversion Hearing at page 14, lines 10-12.)

Defendants now seek to argue to this Court that Steinwurzels was not a manager of the Debtor and "*at the very most* Rabbi Steinwurzels performed ministerial duties on behalf of the [Debtor] and had no authority or responsibility with respect to such discretionary business matters"(emphasis in original)¹

¹ Curiously, in their papers in support of their motion to dismiss this Adversary Proceeding, Defendants explicitly conceded that Steinwurzels was a Manager of the Debtor subject to the legal principles applicable to a fiduciary of a limited liability company. See Defendants' Memorandum of Law in Support of their Motion to Dismiss the Trustee's Complaint, Docket No. 5 in this Adversary Proceeding, at page 8 ("managers of limited liability companies [are] subject to the same standards of care as directors of business corporations," citing In re Die Fliedermaus LLC, 323 B.R. 101, 110 [Bankr. S.D.N.Y. 2005]; "under the New York business judgment rule, a sole member such as Lefkowitz and **manager such as Steinwurzels** are protected by the decisions they make, provided they are 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporation purposes.'" [citation omitted]) (emphasis added).

Defendants' incredible argument simply cannot be reconciled with the record, including Steinwurzels' own statements in the sworn Steinwurzels Affidavit and the Defendants' statements in their prior dismissal motion papers. Indeed, Defendants' present disingenuous arguments in regard to Steinwurzels' status and role is so directly contradictory to their own statements as to merit Bankruptcy Rule 9011 sanctions were they to be propounded in a summary judgment motion.

There Is Evidence that Defendants' Continued Occupation of the Meadows Property Was for Their Own Self-Interested Purposes and at the Debtor's Expense; That Evidence is Sufficient for the Trustee to Prevail Against Defendants on His Claims for Breaches of Their Fiduciary Duties.

Defendants' contention that it is "undisputed" that the summer camp (the "Camp") operated by Steinwurzels for four consecutive summers at the Meadows Property lacked funds to pay "direct rent" to the Debtor for use of the that property, is far from sufficient to merit summary judgment in Defendants' favor, even if it were true. Defendants' claim that testimony of the principals of Helen-May that they were unaware of "potential rental opportunities" during the relevant time period, is hardly dispositive of the issue of whether the Meadows Property could have been used in some profitable manner. Indeed, given that under the subject Occupancy Agreement between the Debtor and Helen-May (which Defendant Lefkowitz signed on behalf of the Debtor), the Debtor was obligated to make substantial payments to Helen-May for the use of the property, including a charge of \$1,500.00 per day for each day it continued to occupy the property beyond the stipulated date for closing on the purchase of same, Defendants' claim that they could not have caused the Debtor to put the property to profitable use is specious at best.

Moreover, it is inapposite that the Trustee has not offered "evidence" of specific rental opportunities or other for-profit uses for the Meadows Property during the time period in which Defendants misused the property for their own benefit to the detriment of the Debtor's estate. Defendants appear to ignore the Trustee's position that Defendants' breaches of their fiduciary duties included, among other things, both (a) using the Meadows Property for the Steinwurzels-operated Camp (attended by one of Lefkowitz's sons for at least one summer) without any payment to the Debtor for such use, and (b) remaining on the property to use it for their own purposes despite knowing that they were collecting no money for the Debtor yet causing it to incur substantial daily liability to Helen-May under the Occupancy Agreement.

Indeed, even in the face of (i) this Court's April 25, 2007 Order requiring the Debtor to pay Helen-May the \$210,120.00 of adequate protection payments in arrears at that time²; (ii) the continuing accrual of the \$1,500.00 per day charge under the Occupancy Agreement; and (iii) Helen-May's service upon the Debtor of a Ten-Day Notice to Quit the Meadows Property on or about June 15, 2007, the Defendants permitted Steinwurzels to continue to operate the Camp in the summer of 2007 without

² The Debtor's continued failure to pay those adequate protection payments resulted in this Court's entry of a Judgment in favor of Helen-May and against the Debtor in the amount of \$245,779.00 on August 10, 2007.

requiring the Camp or Steinwurzle to pay anything to the Debtor for that use. At the very least, Defendants should have surrendered occupation of the Meadows Property to stop the bleeding of the Debtor. But Defendants did not do so, in order to continue using the Meadows Property in furtherance of their own self-interests. That Defendants chose to cause that damage while simultaneously using the property for their own interests and without benefit to the Debtor only makes their conduct all the more egregious.³ As this Court has previously stated:

The debtor is a for-profit corporation and cannot, consistent with its fiduciary duties to its creditors and the estate, permit its property to be used free of charge. A trustee can investigate the circumstances surrounding the use of the debtor's property and, if appropriate, recover compensation or damages from those who used it or from the debtor's fiduciaries for permitting that use.

(Transcript of Conversion Hearing at page 25, line 24 through page 26, line 5.)

**The Business Judgment Rule Does Not Protect Defendants'
Unreasonable and Self-Interested Conduct**

Defendants argue that their breaches of their fiduciary duties are excused by the business judgment rule, under which a court will not "second guess" a business decision made "in good faith and in the exercise of honest judgment and in the lawful and legitimate furtherance of corporation purposes." *Auerbach v. Bennett*, 47 N.Y. 2d 619, 629 (1979). However, because Defendants' conduct can hardly be characterized as "in good faith" or "in the lawful and legitimate further of corporation purposes," the business judgment rule has no application here and cannot shield Defendants from liability for the harm they visited upon the Debtor in furtherance of their own self-interests.

Contrary to Defendants' assertion, there is clear evidence that Defendants benefited as a result of their causing the Debtor to continue in its occupancy of the Meadows Property. Not only was Steinwurzle able to operate his Camp there rent-free for four consecutive summers, but as he admitted in his deposition testimony in this Adversary Proceeding, Steinwurzle and a number of his family members, including his wife and at least eight (8) of their children, stayed up for free at the Meadows Property during each of those summers. As to Defendant Lefkowitz, it was admitted in both his and Steinwurzle's deposition testimony that one of Lefkowitz's sons attended the Camp during one of the summers, and given the Defendants' admission that the Debtor collected no income whatsoever for any of those summers, obviously there was no money was paid by Lefkowitz to the Debtor for his son's attendance there.

³ Defendants purport to rely upon *Shetty v. Nastel Technologies, Inc.*, 21 Misc. 3d 1130(A), 2008 WL 4901163 at *5 (Sup. Ct. Suffolk Cty. 2008) for the principle that there can be "no breach of fiduciary claim when company 'did not suffer monetary damage as a result' of actions complained of." Defendants fail to explain, however, how such a principle supports their position where, as here, the Defendants' conduct, as alleged by the Trustee has caused significant and substantial monetary damages to the Debtor's estate, including claims filed by Helen-May against the estate which are currently estimated to exceed \$3.3 million.

Regardless, there certainly is no evidence to support Defendants' contention that their causing the Debtor to remain in occupancy of the Meadows Property, despite their awareness of the \$1,500.00 per diem charge under the Occupancy Agreement and the Court-imposed adequate protection payment obligations, and their knowledge that the Debtor lacked the funds to pay for same, somehow constitutes a "reasonable" judgment. Indeed, in the Steinwurzle Affidavit, Steinwurzle stated that "the Debtor simply does not have the funds" to make the adequate protection payments for its continued occupancy of the Meadows Property (Steinwurzle Affidavit at ¶2), which this Court had ordered the Debtor to pay. Yet, notwithstanding Steinwurzle's own recognition of the Debtor's insolvency, the Defendants recklessly and defiantly proceeded to allow Steinwurzle and his Camp to enjoy free use of the Meadows Property yet again during the summer of 2007 – while subjecting the Debtor to additional liability with each passing day.

The Evidence is Clear that Defendants' Breaches Their Fiduciary Duties Caused At Least \$3.3 Million in Damage to the Debtor's Estate

Defendants' claim that the Debtor suffered no damage as a result of Defendants' breaches of their fiduciary duties is nothing but a fallacy. As discussed above and as this Court is aware, Defendants' egregious actions have resulted in damages to the Debtor's estate in excess of \$3.3 million, including but not limited to a proof of claim against the estate filed by Helen May that sets forth (a) a secured claim for the Judgment amount of \$245,779.00; (b) a Chapter 11 administrative claim in excess of \$3 million based upon the \$1,500.00 per day charges and other alleged charges under the Occupancy Agreement; and (c) unliquidated Chapter 11 administrative damage claims for alleged physical injury to the Meadows Property caused by the Camp operation and for financial and other damages as well. Defendants' characterization of this harm as "meaningless" is as incorrect as it is troubling.

The Occupancy Agreement, Which Defendants Themselves Admit to Breaching, Permitted Profitable Use of the Meadows Property and in No Way Provides an Ex Post Facto Justification for Defendants' Breaches of Their Fiduciary Duties

Defendants once again seek to raise their spurious argument that the same Occupancy Agreement they so flagrantly breached somehow shields them from liability for their malfeasance. In fact, the Occupancy Agreement does nothing of the sort. As Defendants note, the Occupancy Agreement required that the Debtor operate the Meadows Property "in accordance with its present use only." (Occupancy Agreement at page 1.) In addition to other material in the evidentiary record, and as conceded in Defendants' letter to the Court, the deposition testimony of Peter Griffin and of Irene Griffin in this Adversary Proceeding establishes that the "present use" of the Meadows Property contemplated by the Occupancy Agreement was as a hotel resort. Yet, Defendants fail to offer any explanation why they did not operate any portion of the Meadows Property post-petition as such a for-profit resort⁴.

⁴ The record also demonstrates that during the one summer, that of 2004, prior to the filing of the Debtor's petition, when the Defendants did cause the Debtor to let out some rooms at the Meadows Property, none of the guests paid any fees to the Debtor for such use.

Instead, they concede that the “present use” referred to under the Occupancy Agreement was *not* (Defendants’ own emphasis in its letter) as a summer camp, effectively admitting that they violated the terms of the document by permitting such use, but then, incredulously, in an exercise of distorted logic, they in essence argue that Defendants cannot be deemed to have violated their fiduciary duties for failing to collect use and occupation fees from the Camp which they allowed to use the property in contravention of the Occupancy Agreement. Such a disingenuous argument should not be countenanced by this Court.

Furthermore, even assuming *arguendo* that Defendants legitimately believed that the Occupancy Agreement actually prohibited them from collecting rent or income for the use of the Meadows Property, nothing in those agreements prohibited Defendants from terminating the Occupancy Agreement and surrendering possession of the Meadows Property, while still retaining the Debtor’s alleged rights as contract vendee under the sale contract with Helen-May. By not doing so after the closing failed to take place as scheduled and the contract became a subject of dispute, Defendants breached their fiduciary duties by recklessly and irresponsibly continuing to allow for the rent-free use of the Meadows Property for more than three years and for their own self-serving purposes, at the expense of the Debtor and the Debtor’s estate – subjecting the Debtor and the estate to continually increasing claims for the \$1,500.00 a day charges under the Occupancy Agreement, and the monthly adequate protection payment obligations imposed upon it by this Court -- all without collecting a single cent from the Camp for the use of the property over four consecutive summers, or from any other uses of the property.

Defendants caused the Debtor to remain in possession of the Meadows Property under the Occupancy Agreement long after the filing of the Chapter 11 bankruptcy petition on October 4, 2004 and the passage of the stipulated closing date pursuant to the sale contract. Defendants kept the Debtor in occupancy of the Meadows Property after it stopped making the monthly use and occupancy payments required by Judge Blackshear’s order in May 2005 and after it failed to make the adequate protection payments in arrears required by this Court’s Order issued on April 25, 2007. Indeed, it was not until after this case was converted to a Chapter 7 proceeding and the Defendants were no longer in control of the Debtor that the Trustee caused the surrender of the estate’s possession of the Meadows Property, as of on or about November 20, 2007. At any time prior to the conversion of the case, Defendants simply could have surrendered possession and stopped the bleeding, while at the same time preserving their alleged rights as contract vendee under the contract to purchase the Meadows Property. They did not. To claim that this Court cannot “second guess” Defendants’ failure to do so and to suggest that such failure somehow might have “[i]f anything ... benefitted the [Debtor],” as Defendants do here, is simply specious.

In summary, the Trustee respectfully submits that the arguments raised by Defendants in the Letter of their counsel requesting a pre-motion conference share a patent lack of merit and fall far short of warranting an opportunity for Defendants to brief them in a motion for summary judgment.

The bankruptcy case is now nearly four and one-half (4-1/2) years old, and the resources of this Court and of the parties should be focused on proceeding expeditiously to a trial of this Adversary Proceeding. Toward that end, and cognizant of the present March 20, 2009 Court-ordered deadline for submission of the parties’ Joint Pre-Trial Order, the undersigned, on behalf of the Trustee, had forwarded to Defendants’ counsel a draft of a substantial portion of that document last Thursday evening March 12.

Rather than respond with input respecting that document, Defendants' counsel sent its pre-motion letter the following day and has not provided the undersigned to date with any comments to the Joint Pre-Trial Order. Accordingly, the Trustee respectfully requests that the Court extend the deadline for filing of that document to March 30, 2009, but keep intact the previously scheduled March 31, 2009 date for the Final Pre-Trial Conference in this Adversary Proceeding, at which conference the Court can set the dates for trial.

We thank Your Honor for your time and consideration in this matter, and also hereby confirm that, as per the advice of Your Honor's law clerk Jeb Singer, the Court will hold a pre-motion conference this Thursday, March 19, at the conclusion of the morning calendar.

Respectfully submitted,

/s/ Robert A. Wolf
Robert A. Wolf

cc: Stuart A. Blander, Esq. (by e-mail)