

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CIVIL DIVISION

OFFICE OF THE ATTORNEY
GENERAL, DEPARTMENT OF LEGAL
AFFAIRS, STATE OF FLORIDA,
Plaintiff,

CASE NO.: 51-2010-CA-2912-WS/G

v.

BOTFLY L.L.C., DAVID R. LEWALSKI,
and JON J. HAMMILL,
Defendants.

**APPLICATION TO EMPLOY BERGER & WEBB, LLC
AS SPECIAL COUNSEL FOR THE RECEIVER**

Michael E. Moecker (the “**Receiver**”), as Receiver of Botfly L.L.C., David R. Lewalski, and Jon J. Hammill and all other entities operated, controlled or otherwise associated with the Defendants’ activities (collectively, the “**Defendants**”), by this application, seeks leave to retain the law firm of Berger & Webb, LLC. (“**Berger & Webb**”) on a contingency basis for the limited purpose of pursuing claims by entities in the Receivership against Bank of America

The Order Appointing Receiver authorizes him to employ legal counsel with the prior approval of the Office of the Attorney General but does not address the payment of fees to counsel retained on a contingency basis.

The Receiver, with the approval of this Court and the Office of the Attorney General, retained Bush Ross, P.A., to represent him in matters involving the administration of the Receivership estate and the pursuit of litigation to recover assets for the Receivership. During the course of the representation, Bush Ross alerted both the Receiver and the Office of the Attorney General that it represented Bank of America in unrelated matters and that, therefore, Bush Ross could not participate in any matters adverse to Bank of America.

During 2009 and 2010, Lewalski made transfers totaling \$1,550,000.00 from Botfly accounts at Bank America to a Swiss trading account that was titled in his own name, including the transfer of \$500,000.00 made on April 2, 2010, the day after the injunction was entered in the instant matter. The Receiver's duties required that he investigate all transfers of assets from the Defendants and determine whether the Receivership had any claim arising from the transfers. Bush Ross can not counsel the Receivership with regard to the international transfers from Bank of America accounts due to its conflict of interest. Accordingly, the Receiver has conferred with other law firms regarding the known facts and circumstances surrounding the transfers to the Swiss trading account. Bush Ross has not participated in these discussions.

Berger & Webb has agreed to pursue the Receiver's rights and remedies with regard to these transfers on a pre-litigation basis for a contingency fee of 20% with an initial payment of \$10,000 to proceed with the matter on a pre-litigation basis. The Receiver, through counsel has conferred with Plaintiff regarding the engagement of Berger & Webb on these terms.

In selecting counsel to represent him in the matters addressed in this motion, the Receiver communicated with law firms with relevant expertise to explore potential claims against the Bank of America. The Receiver believes that Berger & Webb is highly qualified to represent the Receiver in this regard and that retaining Berger & Webb is in the best interest of the estate. The Receiver also believes that pursuing the claims on a contingency basis is in the best interest of the Receivership and that the terms of the agreement are fair and appropriate. (*See Ex. A.*)

In sum, the Receiver believes that (1) employing counsel to pursue potential claims against the Bank of America is in the best interest of the Receivership, (2) Berger & Webb would be effective counsel, and (3) the fees charged by Berger & Webb for its services are fair and reasonable.

MEMORANDUM IN SUPPORT

The Receiver is knowledgeable of the skill and reputation of Berger & Webb and, in particular, attorney Steven A. Berger, who will be principally involved in the representation of the Receiver in this matter. The Receiver selected Berger & Webb based upon its considerable experience and expertise in the pursuit of matters of a comparable nature and scope. The Receiver believes that Berger & Webb would be an excellent choice of counsel to represent him in this matter and seeks the Court's approval to do so.

The Court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad. *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). The Receiver requests that the Court exercise its discretion and grant the receiver leave to employ Berger & Webb.

WHEREFORE, the Receiver respectfully requests that this Honorable Court enter an order authorizing the employment of Berger & Webb, *nunc pro tunc* to March 7, 2012, and grant any other further relief as may be just and proper.

Dated: Tampa, Florida
March 16, 2012

BUSH, ROSS, P.A.
Post Office Box 3913
Tampa, FL 33601-3913
(813) 224-9255
(813) 223-9620 (telecopy)
Counsel for the Receiver

Jeffrey W. Warren, Esquire
Florida Bar No. 150024
Karen Cox, Esquire
Florida Bar No. 456667

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been delivered via email and U.S. Mail this 16th day of March, 2012 to:

Gregory S. Slemp, Esq.
PL-01: The Capitol
Tallahassee, Florida 32399-1050

Gabriel Mazzeo, Esquire
285 Ocklawaha Circle
Quincy FL 32351

Karen Cox

Karen Cox, Esq.

BERGER & WEBB, LLP
ATTORNEYS AT LAW
7 TIMES SQUARE
NEW YORK, NEW YORK 10036
(212) 319-1900

CHARLES S. WEBB III
STEVEN A. BERGER
THOMAS E. HONE
KENNETH J. APPLEBAUM
JONATHAN ROGIN
JUDITH Z. KATZ
ADAM H. BRODSKY

SUTTON KEANY
OF COUNSEL

TELECOPIER
(212) 319-2017
(212) 319-2018

WWW.BERGERWEBB.COM

March 7, 2012

Botfly, LLC
Michael Moecker & Associates, Inc.
c/o Michael Moecker, Receiver
1409 W. Swann Avenue
Tampa, FL 33606

Re: Bank of America

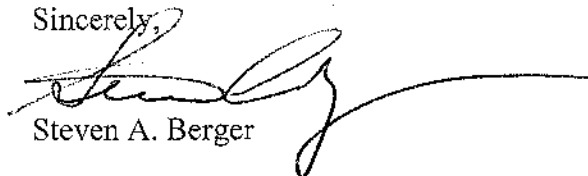
Dear Mr. Moecker:

This confirms the retention of Berger & Webb, LLP (the "Firm") by Botfly, LLC ("Botfly") in connection with its pursuit of its rights and remedies against the Bank of America ("BOA") relating to the wrongful transfer by David Lewalski of \$1,550,000 of Botfly funds to his personal account at Dukascopy Bank in Switzerland in 2009 and 2010.

The Firm has agreed to accept a \$10,000 flat fee to proceed with this matter on a pre-litigation basis. In addition, if we negotiate a settlement satisfactory to Botfly, then the Firm shall also be paid 20% of any amounts Botfly receives, whether in cash or other consideration. In the event that this matter does not settle and Botfly decides to pursue litigation against BOA, we will discuss entering into a different retainer agreement at that time.

If the foregoing is agreeable, then please sign below and return a copy of this letter to me at your earliest convenience.

Sincerely,


Steven A. Berger

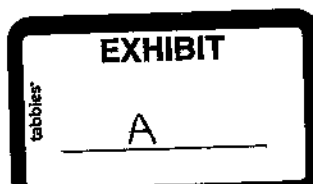
AGREED TO AND ACCEPTED:

Botfly, LLC

By: 

Michael Moecker, Receiver

80499.1



MAR 12 2012