

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

-against-

STEVEN BYERS, JOSEPH SHERESHEVSKY,
WEXTRUST CAPITAL, LLC, WEXTRUST EQUITY
PARTNERS, LLC, WEXTRUST DEVELOPMENT
GROUP, LLC, WEXTRUST SECURITIES, LLC, AND
AXELA HOSPITALITY, LLC,

Defendants,

-and-

ELKA SHERESHEVSKY,

No. 08 Civ. 7104 (DC)

TIMOTHY J. COLEMAN, RECEIVER FOR
WEXTRUST CAPITAL, LLC, WEXTRUST EQUITY
PARTNERS, LLC, WEXTRUST DEVELOPMENT
GROUP, LLC, WEXTRUST SECURITIES LLC, AND
AXELA HOSPITALITY LLC,

Movant,

-against-

STEVEN BYERS, JOSEPH SHERESHEVSKY,
WEXTRUST CAPITAL, LLC, WEXTRUST EQUITY
PARTNERS, LLC, WEXTRUST DEVELOPMENT
GROUP, LLC, WEXTRUST SECURITIES, LLC,
AXELA HOSPITALITY, LLC, AND ELKA
SHERESHEVSKY

Respondents.

**FIRST JOINT MONTHLY APPLICATION OF THE RECEIVER
AND DEWEY & LEBOEUF, LLP FOR ALLOWANCE OF COMPENSATION
AND REIMBURSEMENT OF EXPENSES INCURRED DURING
THE PERIOD AUGUST 11, 2008 THROUGH AUGUST 31, 2008**

**TO: THE HONORABLE DENNY CHIN
UNITED STATES DISTRICT COURT**

Timothy J. Coleman, receiver (the "Receiver") for Wextrust Capital, LLC, *et al.* (collectively, the "Wextrust Entities")¹, and Dewey & LeBoeuf LLP ("D&L"), as counsel to the Receiver, hereby submit their First Joint Application for Allowance of Compensation and Reimbursement of Expenses Incurred During the Period August 11, 2008 through August 31, 2008 ("First Interim Application"). The Receiver requests interim approval of fees in the amount of \$57,300 for the period August 11, 2008 through August 31, 2008 ("First Application Period"). D&L requests interim approval of fees in the amount of \$2,147,666.75 and reimbursement of expenses in the amount of \$85,840.10 for the First Application Period.²

This First Interim Application contains the following sections:

Section I provides a brief summary of the background of the receivership and also contains case status information required by Section C.2 of the Billing Instructions for Receivers in Civil Actions Commenced by the U.S. Securities and Exchange Commission ("SEC Billing Guidelines").

Section II summarizes the procedures used by the D&L in compiling its billing records and other information requested by the SEC Fee Guidelines. Section II also

¹ The SEC Complaint (as defined below) identifies five Wextrust Entities: Wextrust Capital, LLC ("WTC"), Wextrust Equity Partners, LLC ("WEP"), Wextrust Development Group, LLC, n/k/a Wexford Development, LLC ("WDG"), Axela Hospitality, LLC (Axela) and Wextrust Securities, LLC ("Wextrust Securities").

² The amount of fees requested for the Receiver and D&L reflects discounts in the amount of \$407,703.50 (as described in paragraphs 17 and 18 below), an additional discount of \$70,620.50 (as described in paragraph 19 below) and a 50% travel time reduction of \$42,177 (as described in paragraph 41 below). The total discount is \$520,501. The amount of expenses requested for D&L reflects a discount of \$20,628.47 (as described in paragraphs 20 and 21 below).

describes the exhibits to this First Interim Application and describes the reduction in fees agreed to in connection with the appointment of the Receiver.

Section III contains a narrative description of each activity category in which D&L professionals provided services to the Receiver during the First Application Period, in accordance with Section D of the SEC Fee Guidelines.

Section IV contains a summary of all expenses for which D&L seeks reimbursement and the procedures and policies adopted by D&L to insure compliance with Section E of the SEC Fee Guidelines.

Section V briefly summarizes the standards to be applied by the Court in determining fee awards in SEC equity receiverships.

I. CASE BACKGROUND AND STATUS

A. Case Background

1. On August 11, 2008, the United States Securities and Exchange Commission ("SEC") filed its Complaint ("SEC Complaint") against individual defendants Joseph Shereshevsky ("Shereshevsky"), Steven Byers ("Byers") and the Wextrust Entities (collectively the "Defendants"). The SEC Complaint alleged that the Defendants committed fraud in connection with at least 60 private placement offerings, which raised at least \$255 million from at least 1,196 investors. These offerings occurred primarily during the period 2005 through 2007. The Defendants created some 150 entities (usually limited liability companies ("LLC Entities")) which were used as vehicles in the issuance of these securities.

2. The SEC further alleged that the Defendants represented to their investors (in many instances members of the Orthodox Jewish communities in New York City, Norfolk, Virginia, Israel and elsewhere solicited by Shereshevsky) that investments

in particular securities offerings would be invested in properties associated with the investments. According to the SEC Complaint, Defendants used the investments to pay prior investors with respect to other offerings or to fund operating deficits either at the holding company level or at the level of the various LLC Entities formed by Byers and Shereshevsky. The SEC Complaint further alleged that the Defendants failed to disclose Shereshevsky's status as a convicted felon and that certain Defendants violated broker-dealer registration requirements.

3. To prevent further diversions of funds and dissipation of the assets of the Wextrust Entities, the SEC sought, *inter alia*, a freeze order barring any further dissipation of Wextrust Entity assets, including monies deposited in bank accounts, and the appointment of a receiver to take control of the Wextrust Entities and their affiliates.

4. On August 11, 2008, the District Court entered its Order Appointing Temporary Receiver, entered as Document No. 2 ("Initial Receivership Order").³ The Initial Receivership Order appointed Timothy J. Coleman, a partner in D&L, as Temporary Receiver and ordered him to:

(a) preserve the *status quo* with respect to the Wextrust Entities and all entities which the Wextrust Entities either controlled or had an ownership interest, including without limitation over 240 entities and funds described in Exhibit A to the Initial Receivership Order (collectively, the "Wextrust Affiliates");

³ On September 11, 2008, the Court amended the Initial Receivership Order through the means of the Amended Order Appointing Temporary Receiver (Document 36) ("Amended Receivership Order"). The Amended Receivership Order expanded the powers provided for under the Initial Receivership Order, by, *inter alia*, authorizing the establishment of a new cash management system to replace the byzantine collection of bank accounts employed by the Defendants, allowing the Receiver to enter into loan agreements and credit facilities to the extent necessary and authorizing the private or public sale of assets of the Wextrust Entities. The Amended Receivership Order is incorporated by reference in the Court's Amended Order on Consent Imposing Preliminary Injunction and Other Relief Against the Defendants and Relief Defendant, entered on October 24, 2008, Document 65 ("P.I. Order").

- (b) ascertain the true financial condition of the Wextrust Entities and Affiliates and the disposition of investor funds;
 - (c) determine the extent of the commingling of funds between and among the multitude of Wextrust Entities and Affiliates;
 - (d) prevent any further dissipation of the property of the Wextrust Entities and Affiliates;
 - (e) prevent the further encumbrance or disposal of the property of the Wextrust Entities and Affiliates;
 - (f) preserve the books, records and documents of the Wextrust Entities and Affiliates;
 - (g) be available to respond to inquiries of Wextrust investors;
- and
- (h) determine if the Wextrust Entities and Affiliates should undertake a bankruptcy filing.

5. To accomplish the foregoing, the Initial Receivership Order provided the Receiver with various powers, including taking immediate possession and control of the numerous hotels, commercial properties, residential developments, mining operations and other Wextrust properties and assets located throughout the United States and overseas; obtaining exclusive control and sole signatory authority over hundreds of bank and brokerage firm accounts owned or otherwise controlled by the Wextrust Entities and Affiliates both here and offshore; succeeding to all rights to manage the Wextrust Entities and Affiliates pursuant to the terms of a multitude of LLC operating and management agreements; paying from funds available to the Receiver necessary business

expenses so as to preserve the assets and properties notwithstanding the Court's Order Freezing Assets⁴; and taking preliminary steps to locate concealed assets and ascertain the disposition and use of funds obtained by the Defendants from the sale of securities issued by the Defendants or entities under their control.

6. The Initial Receivership Order further authorized the Receiver to engage attorneys, accountants and experts to assist him in carrying out the duties prescribed by this Court. To that end, the Receiver retained D&L as legal counsel. The Receiver subsequently retained Jerry Klein, CPA, and Deloitte as his accountants and Hilco Real Estate as his real estate advisors.

7. The tasks presented by the Initial Receiver Order can only be described as monumental. In comparison to many SEC cases alleging Ponzi schemes, this case does not involve a stock fund "boiler room" operation. Rather, Wextrust is a multi-national conglomerate with operations including commodities trading, commercial and residential real estate management and development, diamond mining and commercial lending through its high yield funds. The fact that the Receiver has to fulfill his obligations during one of the most difficult economic environments since the Great Depression only served to amplify the challenges presented.

8. In consultation with the SEC, the U.S. Attorney's Office and the Federal Bureau of Investigation ("FBI"), the Receiver quickly formulated a strategy requiring immediate action on a number of fronts. Because the need for immediate action could not await the overhaul of Wextrust's existing management or the

⁴ On August 11, 2008, the Court entered its Order Freezing Assets ("Freeze Order") (Document 3). The Freeze Order prohibits the Defendants and various other persons from transferring, assigning or otherwise disposing of any assets, funds or other property of the Wextrust Entities and Affiliates.

identification and retention of other professional firms, the Receiver tasked D&L attorneys and other professionals with securing and stabilizing the business operations of the Wextrust Entities and Affiliates and preventing any further dissipation of assets to the detriment of defrauded investors.

9. The Receiver's strategy, implemented during the early days of the First Application Period, produced substantial results. The Receiver took over the management of Wextrust properties, paid necessary business expenses, implemented the Freeze Order, obtained signatory authority over Wextrust bank and brokerage accounts and otherwise took action to preserve the *status quo* and stabilize operations at Wextrust's hotel, commercial leasing and other income-generating properties. The Receiver also retained Klein and Deloitte to act as his forensic accountants and (in September) Hilco to advise the Receiver as to the disposition of Wextrust's assets. With respect to various South African mining operations in which one or more Wextrust Affiliates invested, the Receiver traveled to South Africa to assess the situation and has retained counsel (including attorneys in D&L's Johannesburg office) to take steps to repatriate tens of millions of dollars in investor funds transferred to South Africa. The Receiver has also focused on avoiding a "fire-sale" perception that would inevitably result in a lower return to defrauded investors. The Receiver and Hilco, with assistance from Klein and Deloitte, promptly began an analysis of all the receivership estate's assets to determine their value and whether the sale of the properties would result in a positive return to investors.

10. The Receiver, with the assistance of D&L, Klein and Deloitte, also commenced an investigation of the disposition of investor funds. During the First Application Period, this investigation consisted of numerous interviews with Wextrust

personnel and the location, organization and analysis of electronic data stored in computers and hard copy documents located at Wextrust's ten domestic and foreign offices.

B. Case Status⁵

11. In accordance with Section C.2. of the SEC Fee Guidelines, the Receiver and D&L state as follows:

(a) Based on the Standardized Fund Accounting Reports (“SFARS”)⁶ prepared and filed in the receivership case, as of August 31, 2008, the receivership estate had approximately \$23,000,000 in cash on hand⁷ located in over 280 bank and brokerage accounts, including without limitation those accounts listed in Exhibit A to the Initial Receivership Order, and additional accounts.

(b) It is estimated that, as of August 31, 2008, accrued, unpaid administrative expenses amounted to approximately \$2.9 million. These administrative expenses consist of accrued and unpaid professional fees and expenses owed to D&L and Deloitte as of August 31, 2008. In addition to these unpaid administrative expenses, the receivership estate incurred and paid an undetermined amount of payroll and other

⁵ The Receiver and D&L base the information in this section primarily on the receivership’s first Standardized Fund Accounting Reports (“SFARS”) covering the period August 1 through August 31, 2008.

⁶ All references to cash-on-hand, disbursements, assets and liabilities in this section have been derived from the SFARS, which were submitted to the SEC on October 16, 2008. It should be noted that the information contained in the SFARS is incomplete. The Receiver, at the time of this Application, is still in the process of obtaining, verifying and analyzing financial information for many of the Wextrust Entities, which is not currently reflected in the SFARS.

⁷ The cash on hand consists of approximately \$17,600,000 in various investor commodity funds and approximately \$5,400,000 in various other Wextrust Entities, including approximately \$3 million in WEP-related accounts, approximately \$700,000 in WDG-related accounts, approximately \$800,000 in Axela-related accounts, approximately \$500,000 PAM-related accounts, and approximately \$400,000 in WTC-controlled accounts. This figure includes deposits in restricted (including lockbox) accounts.

ordinary operating expenses during the First Application Period (a portion of the ordinary business expenses indicated in paragraph 11(c) below).

(c) As provided in the SFARS, through August 31, 2008, the Wextrust Entities had received approximately \$3 million in cash and cash equivalents. Through August 31, 2008, the Wextrust Entities have disbursed approximately \$3.7 million in ordinary business expenses, including payroll, funded debt service and vendor trade payables. Through the date of this Application, the receivership estate has made no disbursements to its professionals, including D&L, Deloitte or Hilco.

(d) The Receiver cannot at this time state when he expects the case to be concluded. The Receiver expects that it would be a minimum of several months before any distribution could be made due to the complexity of Wextrust's business operations and the Receiver's strategy of avoiding a "fire sale" of real estate properties during a period of declining real estate values and limited credit available to prospective purchasers.

(e) As of August 31, 2008, the primary assets of the receivership estate consist of the following:

(i) Cash and cash equivalents in the amount of approximately \$23,000,000 (details provided above),⁸

(ii) Funded loans, with outstanding principal balances, in excess of \$5 million held by various Wextrust Entities, primarily Wextrust High Yield Debt Funds I and III;

(iii) LLC Entity membership interests held by Axela Hospitality in three hotel properties with a combined book value, net of outstanding debt, of approximately \$17,400,000;

⁸ This includes cash and investments primarily held by Wextrade Diversified Futures Fund I, Wextrade Master Fund I, Wextrade Principal Protected Fund I, Wextrade Principal Offshore Fund I, and Wextrade Diversified Offshore Futures, with a value of approximately \$17,600,000.

(iv) LLC common membership interests held by defendant Wexford Equity Partners, LLC ("WEP") in various office buildings, warehouses and retail shopping centers with a combined book value, net of outstanding debt, of approximately \$42,300,000;

(v) Investments in PAM and other South African mining properties⁹;

(vi) Various investor notes and other payables reflected on the books and records of WDG with a combined value as yet undetermined; and

(vii) Unliquidated litigation recoveries.

12. The Receiver requested valuations of certain real estate projects in which one or more of the Wextrust Entities and Affiliates either hold secured or unsecured debt through the various high yield funds, hold an equity position or exercise control. The Receiver very recently received certain valuations and is currently reviewing the valuations.

13. The Receiver currently holds no liquidated litigation recoveries. The Receiver may have causes of action against a number of third parties, including Byers and Shereshevsky. Pursuit of such claims would require additional expenditures for attorney's fees, forensic accounting services and expert witnesses. The Receiver anticipates that potential defendants will be the subject of one or more lawsuits filed in the District Court and that the likelihood of success would be substantial. However, the Receiver at this juncture cannot estimate the likelihood of collecting on any judgment against potential defendants.

II. FEES AND EXPENSES REQUESTED

⁹ At the time of this First Interim Application, the Receiver is engaged in litigation in South Africa to assert control over the African mining entities and obtain access to their books and records. At this time, the financial information possessed by the Receiver on PAM and other South African and Namibian mining properties is suspect. The Receiver hopes to gain access to this information and disclose it at the appropriate time.

14. In connection with the First Application Period, the Receiver requests interim compensation in the amount of \$57,300. D&L requests interim compensation in the amount of \$2,147,666.75 and reimbursement of expenses in the amount of \$85,840.10.

15. These amounts generally reflect, and are determined primarily on the basis of, the hours worked by D&L attorneys, including the Receiver, legal assistants and other support personnel and the hourly rates in effect at the time the services were rendered, as modified by a substantial public service discount, described below, which was approved by the SEC and the Court in the appointment of the Receiver. These amounts also take into account all relevant circumstances and factors as set forth in the New York Lawyer's Rules of Professional Responsibility, as it applies to D&L as attorneys, including the nature of the services performed, the amount of time spent, the experience and ability of the lawyers and legal assistants working on this engagement, the novelty and complexity of the specific issues involved, the time limitations imposed by the circumstances, and the responsibilities undertaken by the Receiver and D&L.

16. Pursuant to the public service discount applicable to this matter, the hourly fee for all services performed by the Receiver personally has been reduced from Mr. Coleman's standard hourly rate of \$850 to \$250. Fees for legal services performed by other D&L professionals are subject to a capped blended hourly rate, such that the blended hourly rate for all professionals performing legal services will not exceed \$550 per hour. Fees for D&L professionals performing non-legal receivership services, including non-legal case administration, business operations and investor relations activities, are billed at a capped rate of not more than \$200 per hour.

17. Pursuant to the public service discount described above, the fees for the Receiver have been reduced from \$210,290 to \$57,300, a reduction of \$152,990. A description of the Receiver's activities is under Task Codes B420 and 430 (B430 lists travel time only and has been billed at \$125 per hour, half the reduced rate of \$250 per hour).

18. Based on the \$200 cap for non-legal receivership services, the fees for services in three activity categories -- Business Operations (B210); Case Administration/ Receivership Non-Legal (B320) and Investor Relations (B400) -- have been reduced from \$534,367.25 to \$279,653.75, a reduction of \$254,713.50. The blended hourly rate for legal services performed by D&L professionals in August (excluding the Receiver) was approximately \$478 per hour. Accordingly, no further reduction was necessary to ensure that the blended rate for legal services did not exceed \$550 per hour.

19. The Receiver and D&L submitted this First Interim Application to the SEC on October 17, 2008 to allow for a thirty-day review. At the conclusion of its review, the SEC requested an additional reduction amounting to \$70,620.50. The Receiver and D&L have agreed to this further reduction. After accounting for the travel time described in paragraph 41, the fees for all D&L professionals, including the Receiver, have been reduced from \$2,725,467.75 to \$2,204,966.75, a reduction of \$520,501.

20. With respect to this First Interim Application only, the Receiver and D&L have agreed to write off all computer legal research expenses (Lexis and WestLaw) in the amount of \$10,795.27.

21. The Receiver and D&L have agreed to write off part of the Receiver's airfare of \$14,218.40 for his trips to Tel Aviv, Israel and Johannesburg, South Africa, for an expense reduction of \$9,833.20. This reduction accounts for the marginal cost increase resulting from upgrade to business class. These two reductions decrease D&L's total request for expense reimbursement from \$106,468.57 to \$85,840.10.

22. This First Interim Application includes certain exhibits:

(a) The SEC's Standardized Fund Accounting Reports ("SFARS"), dated October 16, 2008, is attached as **Exhibit A** hereto.

(b) A Fee Schedule showing the total fees billed and hours worked during the First Application Period by each D&L professional, along with the billing rates of each such professional, is attached as **Exhibit B** hereto.

(c) In accordance with Section D.3.c of the SEC Fee Guidelines, a summary reflecting the total fees billed and the hours worked by each professional in each of the activity categories in which D&L has divided its time is attached as **Exhibit C** hereto.

(d) In accordance with the Section D.5 of the SEC Fee Guidelines, all time records of D&L professionals for the First Application Period, arranged in chronological order within each activity category, are attached as **Exhibit D** hereto.

(e) In accordance with Section E.1.a. of the SEC Fee Guidelines, a summary of all expenses for which D&L seeks reimbursement organized by expense category is attached as **Exhibit E** hereto.

(f) Also submitted herewith is the Certification required by Section A.1 of the SEC Fee Guidelines.

23. The Receiver and D&L have not filed any prior fee and expense applications in this case. D&L received no retainer in this case and the Amended Receivership Order limits the Receiver and D&L to obtaining compensation solely from the assets and properties of the Wextrust Entities and Affiliates.

24. The Amended Receivership Order permits the Receiver and his advisors to be paid on a monthly basis during the first six months of the case and on a quarterly basis thereafter. In accordance with the SEC Fee Guidelines, and as noted above, the Receiver and D&L submitted the First Interim Application and all Exhibits to SEC counsel prior to filing the Application with the Court and SEC Counsel has reviewed the Application and requested additional reductions.

25. The Receiver and D&L professionals recorded all services performed in time increments of one tenth (0.10) of an hour. All services by D&L paralegals and other paraprofessionals support staff were professional in nature and, if not performed by the indicated paraprofessionals, would have been performed by attorneys.

26. D&L took considerable care to insure that paraprofessionals and other support staff were utilized to perform ministerial tasks, such as the creation of electronic and hard copy data bases. These tasks were placed within the Case Administration/Receivership Non Legal activity category (B320) and billed at a flat rate of \$200 per hour.

27. Although 47 attorneys billed time during the First Application Period, a core group of attorneys performed the lion's share of the services. However, in its initial stages the receivership case required the involvement of senior attorneys with background and experience in the multitude of litigation and transactional disciplines relevant to this case. Accordingly, in some instances relatively small amounts of time were spent by attorneys with expertise relevant to specific issues in the case (e.g. Harvey Kurzweil in connection with the South African investments; William Schrag in connection with substantive consolidation). These less significant involvements benefited the receivership estate because it gave the core group of attorneys particular insight into and knowledge of important legal issues.

III. SERVICES RENDERED BY RECEIVER AND D&L DURING FIRST APPLICATION PERIOD

28. In accordance with Section D.3 of the SEC Billing Guidelines, D&L segregated its time during the First Application Period into 14 activity categories. Narrative summaries of these activity categories follow:

29. Asset Analysis and Recovery (B120) Total Fees: \$634,001.50¹⁰

Although Wextrust sold securities to private placements investors through a registered-broker dealer (Wextrust Securities), it also organized, provided initial capital and in most instances managed the real estate and other projects in which it solicited investments. Thus, much of the first three weeks of the receivership consisted of identifying and analyzing real estate and other assets either owned or controlled by the Wextrust Entities. This identification and analysis was critical to obtaining any

¹⁰ As noted above, **Exhibit C** hereto shows each professional working on a particular activity category and the total hours he or she billed in that category. The fees for each activity category are stated herein without showing the reductions discussed in paragraph 16-21 above.

meaningful recovery for defrauded investors because, as in most alleged Ponzi schemes, Wextrust suffered from substantial liquidity issues at the receivership's inception. Timely identification and a preliminary understanding of asset values were necessary to fund ongoing costs of administering the receivership estate. Examples of services performed in this activity category and particular professionals involved include:

(a) Reviewing and analyzing employee interviews, available project-level financial statements, capitalization structures, and immediate funding needs at particular hotel and other real estate projects (Vincent P. Schmeltz III, Bryan M. Westhoff, Jeffrey H. Newhouse, Dean C. Gramlich, Mohsin N. Khambati, David D. Cleary, Robin L. Moore, Jennifer O. Whitener, Kristien M. Kahn, Matthew L. DiRiso, Thomas Feeney, Ilona B. Coleman, Boaz I.Green);

(b) creating written summaries of each real estate project (Bryan M. Westhoff, Jeffrey H. Newhouse, Dean C. Gramlich, Mohsin N. Khambati, Robin L. Moore, Matthew L. DiRiso);

(c) identifying all Wextrust bank and brokerage accounts, contacting financial institutions to inform them of the Freeze Order and Initial Receivership Order and engaging in extensive follow-up discussions with such institutions to resolve various issues and to ensure compliance with the Orders (Mark S. Radke, James R. Cotner, Nancy M. Riley, Teresa N. Chen);

(d) negotiating with banks and other financial institutions regarding fund and wire transfers, cash management and funding issues (Dean C. Gramlich, Bryan M. Westhoff, Jeffrey H. Newhouse, Nancy M. Riley);

(e) identifying and providing preliminary analysis of loans by the various high yield funds and related fraud issues and negotiating with participating lender HPC (Mohsin N. Khambati, Nancy M. Riley);

(f) analyzing Wextrust's commodity pool assets and regulatory issues concerning the status of those assets (Timothy J. Carey, Vincent P. Schmeltz III, Nancy M. Riley, Joanna Collias);

(g) preparing inventories of artwork and other personal property located at the various office sites (Timothy C. Welch, Boaz I. Green);

(h) determining ownership of the Wextrust Affiliates (David D. Cleary, Vincent P. Schmeltz III, Dean C. Gramlich, Mohsin N. Khambati, Bryan M. Westhoff, Robin L. Moore, John K. Warren);

(i) identifying Wextrust properties and interests in Africa and developing and executing the Receiver's strategy to gain control of those assets (Harvey Kurzweil, Richard Reinthaler, Arthur S. Radke, Leo V. Gagion, Greg Nott, John K. Warren, Ilona B. Coleman, Miatta T. Dabo, Rajen Ranchhoojee, Nathan D. Larsen); and

(j) identifying various assets subject to the Freeze Order, including real estate titled to the individual Defendants and their associates, and Wextrust personal property located in the United States and Israel, and taking steps to secure and prevent dissipation of such assets (Arthur S. Radke, Christine Y. Chi, Vincent P. Schmeltz, III, Boaz I. Green).

30. Asset Disposition (B130) Total Fees: \$12,544.50

Given the magnitude and complexity of Wextrust's business operations, it comes as no surprise that the Receiver did not immediately focus on dispositions of

assets. As previously noted the Receiver and his attorneys made every effort to avoid a "fire-sale" perception which would serve to lower returns on asset dispositions and ultimately to defrauded investors. Also the Receiver required the services of an experienced consultant like Hilco before decisions could be made on the marketing of real estate assets. As result, very little time was billed to the Asset Disposition category during the First Application Period.

The principal asset disposition efforts conducted in the first few weeks of the receivership were analyses of the potential distribution of funds in Wextrust commodity pools and hotel assets managed by Axela.

31. Case Management (B140) Total Fees: \$233,985.75

This activity category consisted of a number of in-person and telephone conferences conducted by the Receiver and his attorneys at the inception of the case to, *inter alia*, coordinate site visits, employee and third-party interviews, insure that as little disruption as possible occurred as to business operations and formulate a strategy for recovering PAM's investment in South African mining operations. These conferences occurred on practically a daily basis to facilitate the exchange of relevant information and to avoid duplication of effort. The Receiver maintained oversight over the legal work being done through these conferences. The Receiver conducted periodic team meetings with representatives of the SEC, U.S. Attorneys' Office and FBI to coordinate the Receiver's efforts with those of the governmental agencies.

This category also includes interviews by Martin J. Bienenstock, head of D&L's Business Solutions and Governance Department, with potential accountants and consultants to be retained by the receivership estate and the administration of the South

African investigation and issues relating to South African corporate governance. D&L partner Patrick Gennardo worked on analyzing and maintaining insurance coverage.

32. Bankruptcy Analysis (General) (B160) Total Fees: \$127,766

The Initial Receivership Order required the Receiver to determine whether any Wextrust entity should file a bankruptcy case. In connection with that determination, the Receiver's bankruptcy counsel considered the equitable doctrine of substantive consolidation. Substantive consolidation permits a bankruptcy court to order the consolidation of the assets and liabilities of separate legal entities when their financial affairs are so intertwined that it becomes impossible to separate them. Byers and Shereshevsky's management of the Wextrust entities, particularly the intermingling of the various entities' cash through the mechanism of intercompany loans, gave rise to substantive consolidation issues analyzed by D&L insolvency attorneys shortly after the Receiver's appointment. Partners Martin J. Bienenstock and William Schrag analyzed the relevant precedent and advised the Receiver on the use of substantive consolidation as a means of equalizing the treatment of investors with interests in disparate assets.

In addition to substantive consolidation, D&L partners Lewis S. Rosenbloom, David D. Cleary and several other D&L insolvency attorneys prepared an extensive written analysis of the ownership, capitalization and business prospects of the hotels, WEP properties and WDG properties. The Receiver needed the analysis to determine which entities might most benefit from chapter 11 reorganization and how such filings might be accomplished where third-party joint venture partners shared ownership with an Axela, WEP or WDG LLC Entity. D&L partner Martin J. Bienenstock researched issues relating to the Receiver's duties. Other attorneys

researched issues relating to SIPC coverage and the commencement of chapter 11 cases by the various LLC Entities.

33. <u>Evidence Preservation (B170)</u>	Total Fees:
\$747,659.75	

At the inception of the receivership, the Wextrust Entities and Affiliates operated principally out of offices in Chicago; Hinsdale, Illinois (a Chicago suburb); New York; Bethesda, Maryland; Nashville, Tennessee; Atlanta, Georgia; Norfolk, Virginia; Boca Raton, Florida; Pretoria, South Africa; and Tel Aviv, Israel. After the FBI executed search warrants at the Chicago and Norfolk offices, D&L attorneys took custody of those and the other Wextrust offices and began the process of securing each site; changing locks, preserving, collecting, and reviewing hard copy documents; making forensic copies of all electronic media at each site; preparing charts summarizing relevant data; photographing sites prior to any disposition of office contents; and documenting the chain of custody for all physical evidence. D&L attorneys conducted interviews of dozens of Wextrust employees and prepared memoranda reflecting those interviews. They reviewed the email and other files of Wextrust personnel regarding South African investments through PAM and other entities, obtained commodities trading information needed for the National Futures Association, arranged for the imaging of hard copy documents and prepared third party subpoenas of Northern Trust, Ralph Sabine, Tom Coorsh and other persons. In addition to the Receiver, D&L professionals conducting the evidence collection at each site were:

Chicago: Vincent P. Schmeltz III, Nancy M. Riley, Mohsin N. Khambati, Nathan D Larsen, Timothy C. Welch and Jill Friedman.

Hinsdale, IL: Dean C. Gramlich.

New York: Kristien M. Kahn, Ilona B. Coleman, Matthew L. DiRisio, Jeffrey J. Amato and Thomas Feeney.

Norfolk, VA: Ilona B. Coleman, Thomas Feeney and Teresa Chen.

Bethesda, MD: Robin L. Moore, Sarah J. Gans and Sherika L. Jones.

Nashville, TN/Atlanta, GA: Bryan M. Westhoff and Jeffrey H. Newhouse.

Boca Raton, FL: Bryan M. Westhoff.

Tel Aviv, Israel: Boaz I. Green and Miatta T. Dabo.

Pretoria, South Africa: Greg Nott, Rajen Ranchhoojee and Miatta Dabo

34.	<u>Business Operations (B210)</u>	Total Fees:
	\$200,993	

With its two principals under arrest for securities fraud, the Receiver, charged with the duty to prevent further dissipation of asset values and to preserve the status quo, succeeded to what was initially a highly challenging business environment. With respect to the Park View Hotel and other properties, trade vendors in many instances refused to provide necessary goods and services, the Freeze Order created issues with the use of operating bank accounts and mortgage lenders threatened foreclosure and other measures. The Receiver and D&L attorneys managed and directed employees on the resolution of a number of liquidity, office lease, budget, payroll, cash management and other business issues. Vincent P. Schmeltz III, Nancy M. Riley and other D&L attorneys also worked closely with Deloitte in analyzing accounting issues. The Receiver and D&L attorneys answered questions raised by concerned employees

about the receivership and addressed issues relating to the termination of particular employees. D&L attorneys Dean C. Gramlich and Bryan M. Westhoff negotiated a funding arrangement with the mortgage lender on the Rogers Plaza retail mall (one of the WEP properties) which avoided a shut down of essential services at the mall over the Labor Day weekend. D&L attorneys also began the development of a mechanism (implemented in September) for expeditiously requesting the Receiver's approval of business decisions through use of a Request for Action Form (or RFA).

35. <u>Financial Analysis (B230)</u>	Total Fees:
\$41,522.50	

This activity category primarily consisted of analyses of various hotel, WEP and WDG properties to determine their continued viability, their capitalization structures and funding needs based on data provided by the Wextrust Entities and Affiliates and from interviews conducted with Wextrust personnel. D&L partner David D. Cleary and other insolvency attorneys used this information to develop the bankruptcy analysis described in paragraph 31 above. Attorneys Vincent P. Schmeltz III and Mohsin N. Khambati also assisted internal management and Deloitte in analyzing budget, cash management and forensic accounting issues. Associate Robin L. Moore worked extensively on expense reduction issues at the hotel properties.

36. <u>Litigation (General) (B240)</u>	Total Fees:
\$51,440.50	

Although the pursuit of various claims and causes of action is likely to become of importance as the case progresses, it was not a priority item at the inception of the receivership. The Receiver assigned D&L partner Leo V. Gagion, an experienced

insolvency litigator, to prepare an inventory of the numerous pending litigation matters involving the Wextrust Entities and Affiliates.

37. Receivership Court Proceedings (B270) Total Fees: \$47,536

This activity category covers work done by D&L partners Martin J. Bienenstock, Mark S. Radke, David C. Cleary and associate James R. Cotner in preparing an amendment to the Court's Initial Receivership Order and related affidavits. The amendment (entered by the Court on September 11, 2008) gave the Receiver additional authority in connection with the sale of assets, the incurring of business debt and other business issues, established the Southern District of New York as the venue for any bankruptcy and gave the Receiver standing as a debtor in possession with respect to chapter 11 filings by any Wextrust Entity or Affiliate.

This activity category also covers associate John K. Warrens's work in assisting the SEC in its application for a freeze order concerning relief against Elka Shereshevsky, including the preparation of a detailed declaration of the Receiver setting forth evidence in support of that application. Associate Nathan D. Larsen also worked on ex parte motions relating to certain evidentiary matters.

38. Case Administration/Receivership Non-Legal (B320)

Total Fees:\$89,461

This activity category covers work primarily done by D&L paralegals and litigation support personnel in creating and maintaining electronic and hard copy filing systems and a document depository; creating and maintaining an investor relations website; gathering, memorializing and responding to investor inquiries; uploading interview memoranda and other documents to the extranet; creating mailing and contact

lists; sorting and delivering mail from the Receiver mail box; transcribing investor voicemails; and printing and sorting investor emails. D&L litigation support specialist Adam Lew coordinated the collection and organization of documents at several sites and negotiated arrangements with Encore and other outside vendors for the scanning and imaging of these documents.

39.	<u>Investor Relations (B400)</u>	Total Fees:
		\$243,913.25

During the First Application Period, the Receiver and his counsel conducted in-person meetings with investors in Chicago, New York, Norfolk and Israel. The Receiver considered such face-to-face contact essential to ensure that defrauded investors understood his efforts on their behalf and that he understood how Byers and Shereshevsky had solicited their investments.

D&L attorney Nancy M. Riley also worked extensively on setting up an investor website as an additional means of educating investors on what had occurred, keeping them apprised of ongoing developments and giving investors another channel for communicating with the Receiver. D&L attorneys Margaret V. Dennis, Miatta T. Diabo, Ying Lin, Nancy M. Riley and various paralegals worked on setting up an investor call-center, responded to investor inquiries, drafted memoranda regarding their interviews with investors, trained personnel to staff the call-center, reviewed requests for redemptions from the commodities funds and other investor requests and prepared correspondence to investors.

40.	<u>Receiver Time (B420)</u>	Total Fees: \$179,350
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This category covers work performed by the Receiver during the First Application Period. The Receiver's activities ranged from daily conferences with working groups of D&L attorneys and paralegals to the meetings with investors described above. The Receiver visited several domestic Wextrust offices and Wextrust's office in Israel to interview employees and gain first-hand knowledge of the businesses operated by the Wextrust Entities and Affiliates. The Receiver also traveled to Johannesburg, South Africa to investigate the transfer of funds to Africa and consult with legal counsel, accountants and professional advisors. The Receiver held meetings with the SEC counsel and the U. S. Attorneys' Office on a variety of issues, coordinated the difficult process of freezing Wextrust's offshore accounts and generally supervised the activities of D&L attorneys described herein. Although the Receiver's standard billing rate is currently \$850 per hour, D&L has reduced his hourly rate to \$250 as part of its public service as discussed in Section II above.

41. Travel Time Total Fees: \$115,294

This activity category covers all non-working travel time of D&L professionals during the First Application Period. **Exhibits B, C and D** and the amount stated above reflect the actual travel time of the professionals. Section E.2.j. of the SEC Fee Guidelines permits non-working travel time to be billed at fifty percent of the professional's billing rate. The actual 50% reduction was \$26,390 with respect to the Receiver, with the Receiver billing his travel time at half his reduced rate (or \$125 per hour). D&L reduced its portion of this category (\$84,354) to \$42,177.

IV. EXPLANATION OF EXPENSES AND RELATED POLICIES

42. D&L seeks reimbursement of its out-of-pocket costs in the amount of \$85,840.10. **Exhibit E** sets forth the various categories of expenses for which D&L

seeks reimbursement. Also, pages 145 through 200 of **Exhibit D** to the First Interim Application contain further detail regarding each of the expense categories for which D&L seeks reimbursement. D&L will retain the documentation supporting these expenses for a period of seven years in accordance with the SEC Fee Guidelines and will provide the SEC with copies upon request.

43. D&L observed the following policies in connection with its expenses during the First Application Period:

(a) In accordance with Section E.2.b. of the SEC Fee Guidelines, D&L seeks its internal photocopying expenses (listed as reproduction expenses in **Exhibit E**) at a rate of \$.15 per page. D&L made 54,572 internal photocopies during the First Application Period at the \$.15 rate.

(b) In accordance with Section E.2.g., D&L seeks reimbursement of outgoing facsimile charges at a rate of \$1.00 per page for outgoing transmissions. D&L made 686 outgoing facsimile transmissions during the First Application Period. D&L cannot readily determine its toll charges. D&L has not charged for incoming facsimile transmissions.

(c) Pages 164 and 192 of **Exhibit D** list charges of \$6,303.06 and \$3,835.19, respectively. These charges are for the mass mailing of notice of the receivership sent out by D&L to both domestic and foreign recipients on August 15, 2008. D&L utilized a third party vendor in Chicago, Discovere, LLC, to facilitate this mailing.

(d) **Exhibit E** reflects a charge for professional fees in the amount of \$25.00. This charge is for reimbursement of a \$25.00 *pro hac vice* admission fee paid by D&L partner Mark S. Radke.

(e) **Exhibit E** reflects a charge of \$54.00 described as Corporate Service fees. This charge is for reimbursement of the cost of obtaining certified copies of documents from the Clerk's Office of the United States District Court for the Southern District of New York.

(f) With respect to all expenses, D&L seeks reimbursement only for the actual cost of its filing and court reporting fees, postage and overnight delivery fees, locksmith charges (relating to the changing of the locks at various Wextrust office sites) and long distance telephone charges. D&L has not included in any request for expense reimbursement the amortization of the cost of any investment, equipment or capital outlay (except to the extent that any such amortization is included within the permitted allowable amounts set forth in the SEC Billing Guidelines for photocopies and facsimile transmissions).

(g) Whenever possible, D&L has used email to transmit documents via portable document format, thereby reducing facsimile, overnight courier and copying costs otherwise chargeable to the receivership estate.

(h) In accordance with Section E.2.j. of the SEC Billing Guidelines, D&L has not sought reimbursement for local travel expenses, including mileage, taxis and meals.

(i) With respect to long distance travel expenses, D&L professionals have used the lowest available airfare and train fare and have not sought

reimbursement for luxury accommodations or deluxe meals. In maintaining its expense documentation, D&L retains copies of receipts relating to long distance travel. As noted in Section II above, D&L has not sought reimbursement for the Receiver's upgrade to business class in connection with his trips to Israel and South Africa.

(j) D&L has not sought reimbursement for secretarial, word processing, proofreading or document preparation expenses (other than by professionals or paraprofessionals), data processing and other staff services (exclusive of paraprofessional services) or clerical overtime.

(k) As noted in Section II above, D&L has not charged for its Lexis and WestLaw research expenses with respect to this Application.

(l) As indicated above, D&L has created an investor relations website. To the extent possible, D&L has utilized clerical or paralegal staff to handle communications with investors. D&L has also established an investor call center staffed by Trak Legal at a cost below the \$200.00 per hour rate applied to the Investor Relations activity category (B320).

(m) In some instances, cost incurred during a particular application period will not be reflected in D&L's records until a subsequent application period. D&L will seek reimbursement for such "trailing" expenses in subsequent fee application periods.

V. FACTORS TO BE CONSIDERED BY THE COURT IN AWARDING FEES

The case law on equity receiverships sets forth the standards for approving receiver compensation and the fees and expenses for the receiver's counsel. The District Court has discretion to determine compensation to be awarded to a court-appointed equity receiver and his or her counsel and "may consider all of the factors involved in a

particular receivership in determining the appropriate fee.” *Gaskill v. Gordon*, 27 F.3d 248, 253 (7th Cir. 1994). Many authorities (some quite dated) provide “convenient guidelines”, but in the final analysis, “the unique fact situation renders direct reliance on precedent impossible.” *Securities & Exchange Comm’n v. W.L. Moody & Co.*, 374 F. Supp. 465, 480 (S.D. Tex. 1974), *aff’d*, 519 F. 2d 1087 (5th Cir. 1975).

In allowing counsel fees in Securities Act receiverships, “[t]he court will consider . . . the complexity of problems faced, the benefit to the receivership estate, the quality of work performed, and the time records presented.” *Securities & Exchange Comm’n v. Fifth Ave. Coach Lines, Inc.*, 364 F. Supp. 1220, 1222 (S.D.N.Y. 1973); *see also United States v. Code Prods.*, 362 F.2d 669, 673 (3rd Cir. 1966) (court should consider the time, labor and skill required (but not necessarily expended), the fair value of such time, labor and skill, the degree of activity, the dispatch with which the work is conducted and the result obtained). “ “[R]esults are always relevant.”” *Securities & Exchange Comm’n v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992), *quoting Moody*, 374 F Supp. at 480. However, a good result may take a form other than a bare increase in monetary value. *Id.* (“Even though a receiver may not have increased, or prevented a decrease in, the value of the collateral, if a receiver reasonably and diligently discharges his duties, he is entitled to compensation.”). Obviously, overall results can be determined only at the conclusion of the case.

Another "basic consideration is the nature and complexity of the legal problems confronted and the skill necessary to resolve them." *Moody*, 374 F. Supp. at 485. Moreover, “[t]ime spent cannot be ignored.” *Id.* at 483. This is particularly true when the dimension and complexity of a receivership prevent counsel from taking on other full

time assignments. *Id.* at 483-486 (describing the efforts of the receiver counsel's in the difficult task of determining ownership and disposability of a bank's assets and the high priority given to the matter by counsel). Another "significant factor is the amount of money involved." *Id.* at 486; *see also Gasser v. Infanti Int'l, Inc.*, 358 F. Supp 2d 176, 182 (E.D.N.Y. 2005) (receiver's legal fees "must be reasonable in light of the services rendered by counsel and the amount of property held in the receivership").

Under these standards the Receiver and D&L have adequately demonstrated that the amount of fees requested is appropriate. The Receiver and D&L have acted quickly to take control of other assets of the Wextrust Entities and Affiliates and prevent further dissipation by Byers and Shereshevsky. The benefit to investors, though not quantifiable at this early stage at the receivership, will become quantifiable as the case proceeds. Investors now have a forum in which they may present their views (including their criticisms) and monitor the Receiver's efforts to marshal the valuable assets of Wextrust, expeditiously dispose of these assets unlikely to generate a return and investigate the Ponzi scheme allegedly perpetrated by Byers, Sherevesky and others acting under their direction. The amounts at issue are substantial by any measure; hundreds of millions of dollars of assets and investments are within the scope of the receivership.

The issues being addressed by the Receiver and D&L are highly complex, ranging from commodities trading to real estate finance to diamond mining to the investigation of complex fraud perpetrated over a multi-year period. The magnitude of this case largely precludes the Receiver and his core group of attorneys from accepting other employment at this time. Nor will comparisons with other receiverships adequately reflect the effect of the unprecedented crisis in the nation's financial markets that accelerated just as the

receivership commenced, making the Receiver's efforts only that much more difficult and time consuming. Based on the foregoing, we respectfully submit that the compensation sought by the Receiver and D&L is wholly warranted.

WHEREFORE, PREMISES CONSIDERED, the Receiver and D&L respectfully request that the Court:

- (a) grant interim approval of the Receiver's compensation in the amount of \$57,300;
- (b) grant interim approval of D&L compensation in the amount of \$2,147,666.75;
- (c) grant interim approval of D&L's request for reimbursement of its out-of-pocket expenses in the amount of \$85,840.10; and
- (d) order the Wextrust Entities to pay within ten (10) business days from available cash the approved fees of the Receiver and D&L in the amounts set forth herein and reimburse D&L for its approved expenses; and
- (e) grant such other relief as the Court deems appropriate.

Dated: New York, NY
November 14, 2008

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