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October 18, 2021

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VIA E-MAIL (GARRITY.CHAMBERS@NYSB.USCOURTS.GOV)

The Hon. James L. Garrity, Jr.
United States Bankruptcy Court
One Bowling Green
New York, NY 10004-1408

Re: In re CFG Peru Investments Pte. Ltd. (Singapore)

Dear Judge Garrity:

This letter is submitted on behalf of William A. Brandt, Jr. (the “Trustee”) in response to correspondence from the “Plan Proponents” concerning discovery that the Plan Proponents have propounded regarding his pending Fee Application¹, and to which the Trustee has responded.

The Trustee does not object to reasonable, relevant, and timely discovery, nor to the right of any party in interest to object to his Fee Application. For this reason, the Trustee promptly responded to the Plan Proponents’ delayed discovery, producing documents within 24 hours of the request; he engaged a third party to recreate a 2020 production of emails made in response to a 2004 exam (by counsel to one of the Plan Proponents, no less) using copies of original email files and, separately, obtained documents from the emails and files of the Trustee and key staff. The production that was completed – within just five days of receipt of the Plan Proponents’ discovery requests – includes 857 responsive documents.

Because many of the Plan Proponents’ delayed demands are irrelevant to the issues before this Court in connection with the Fee Application, and appear to be propounded solely for purposes of harassment and delay, the Trustee has declined to provide certain requested documents, and has declined the Plan Proponents’ request for a voluntary continuance of this Court’s hearing on the Fee Application, set for October 27, 2021. He did, however, offer his availability for a deposition in advance of the Plan Proponents’ opposition deadline.

¹ Capitalized terms not defined herein carry the meaning ascribed to them in the Fee Application.

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The Trustee's Fee Application was not filed in a vacuum. On August 12, 2021, the Trustee provided the U.S. Trustee with an advance copy of his draft Fee Application. Over the following seven weeks, the Trustee and the U.S. Trustee engaged in more than twenty telephone discussions and exchanged at least fifteen emails in connection with the U.S. Trustee's specific requests for information (such as the example, attached), and issues concerning the draft Fee Application. In response to those negotiations, the Trustee reduced his requested commission from \$29.9 million to the flat \$25 million that has been reserved for his commission, a number to which the U.S. Trustee's office agreed. This number represents 28.2% of the statutory cap. Thus, the Trustee's Fee Application has already been substantially vetted, and amended to address the concerns that were raised.

The Trustee has remained willing to work with parties-in-interest to address concerns that they might raise in response to his Fee Application, but the discovery and delay demands made by the Plan Proponents are improper, irrelevant, and untimely demands made for purposes of harassment and delay.

The Plan Proponents have known since April 2017 that the Trustee believes that a proper calculation of the statutory cap includes the MOR Distributions of the Peruvian Opcos, plus all value that he would turn over to creditors or to a successor party such as a plan administrator. *See* Fee Application at p. 72. The Plan Proponents took no discovery in response.

The Plan Proponents have known about the nature of the commission that the Trustee anticipated he would request in a future fee application for at least six months, since the parties filed briefs concerning the Trustee's commission during the plan confirmation process, and engaged in informal discussions. But the Plan Proponents took no discovery.

At the very least, given the above, the Plan Proponents should have been prepared to propound discovery the day after the Trustee filed his Fee Application. Instead, the Plan Proponents waited eleven days before sending out a discovery request in the early hours of Tuesday, October 12, 2021, only eight days before their opposition brief would be due.

The Trustee has no objection to responding to legitimate, relevant, and timely discovery. But the Plan Proponents have not filed their document requests for a legitimate purpose. Two examples demonstrate this point.

First, the Plan Proponents have demanded documents pertaining to the Trustee's role in the \$75 million Interim Distribution recently made to the hedge funds that now own the Peruvian Opcos, apparently because they plan to argue that this \$75 million figure should not be included in the statutory cap calculation if the Trustee did not sign the checks or make the final decision on payment. But this reflects a misunderstanding of the law, and a complete irrelevance of the requested documents. A chapter 11 trustee's commission is calculated on the basis of the cash/value that the trustee has turned over by the conclusion of the trustee's term, whether it is to creditors, to a reorganized debtor, or to a successor such as a plan administrator. The Trustee turned over \$211 million of cash to the Plan Administrator. The fact that \$75 million of that cash is subsequently being used for an Interim Distribution is irrelevant to the simple fact that it is part

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of the cash/value that the Trustee created by reorganizing the Peruvian Opcos and by fulfilling his mandate, and is part of the cash/value that he turned over pursuant to Section 326(a). Every document that the Plan Proponents have requested related to this issue is irrelevant because the question of *how* the funds were used *after* the Trustee turned them over has nothing to do with the calculation of his commission. Yet the Trustee has complied with the discovery request, and has turned over all relevant documents he has been able to locate, including re-creating a 2004 exam production at his own expense.

Second, the Plan Proponents have demanded documents relating to the Trustee's time records—not the records he has already filed with his Fee Application, but any time entries that he edited or deleted in his exercise of judgment before filing his Fee Application. In other words, the Plan Proponents want records of time entries that the Trustee has not put forward in support of his commission. The reason? The Plan Proponents want to argue that the Trustee's hours are too high, and have made it clear that they intend to do so in a manner akin to character assassination. Anyone who knows William A. Brandt, Jr. knows that work is his life. But anyone who understands applicable case law also knows that chapter 11 trustees—who are paid a commission, not hourly compensation—operate a business akin to a CEO, and will readily record far more hours of work in a day than an attorney who is paid by the hour (subject to the many limitations that affect attorneys). An attorney cannot bill time for reading an ABI article on developments in bankruptcy law. But a trustee acting as CEO of a fishing enterprise is properly doing his job if he reads articles about future allocated catches, about predicted weather patterns that will affect next year's catch and therefore next year's budget, or other such articles. An attorney cannot bill time for networking. But a trustee operating a business is doing his job if he networks with a political or civic figure who can assist in the operations of the business—such as the diplomatic overtures that helped the Peruvian Opcos address criminal proceedings arising from unpaid Chinese and Russian workers on a factory vessel. These CFG Peru cases operated in at least eight different time zones at every moment for five years, and the Trustee was on call at all hours of the day, seven days a week.

Moreover, a chapter 11 trustee's commission is based on a statutory calculation, not a strict hourly basis in the manner of an attorney's compensation. The lodestar calculation is a guide. The Trustee's Fee Application put into evidence three final fee applications of chapter 11 trustees in large, recent chapter 11 cases pending in the Southern District of New York. *See* Brandt Declaration, at Exhibits I, J & K. All three chapter 11 trustees were paid multi-million-dollar commissions without putting a single page of time records into evidence. Here, this Trustee chose to put time records into evidence to provide context for nearly five years of work, and to explain by a lodestar calculation how he has come to his request for 28.2% of the statutory cap, rather than a request for 100% of the statutory cap. But he could far more easily have left out every page of time records, and simply rested on his right to a statutory commission at any proposed percentage of the statutory cap.

The Plan Proponents' efforts to engage in delay and character assassination are improper, and are contrary to how applicable law provides for the payment of a chapter 11 trustee's commission. The Trustee submits that his Fee Application should be heard as scheduled on

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October 27, 2021, unless the Plan Proponents can demonstrate to this Court how any of their requested discovery and related requests for delays are relevant, timely, and made in good faith.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Richardson", with a stylized flourish at the end.

David J. Richardson
Counsel

cc: Christopher Shore, Esq. (cshore@whitecase.com)
Richard Morrissey, Esq. (Richard.Morrissey@usdoj.gov)
Gregory Pesce, Esq. (gpesce@whitecase.com)
Evan Goldenberg, Esq. (egoldenberg@whitecase.com)

From: [Morrissey, Richard \(USTP\)](#)
To: [William A. Brandt, Jr.](#)
Subject: China Fishery/CFG Peru -- Commissions
Date: Tuesday, September 21, 2021 6:32:07 AM

Mr. Brandt:

I am writing with respect to your request for commissions. The commissions are based on disbursements totaling \$89 million.

I have been asked to ask you whether you had a chart that shows how you computed the disbursements. In other words, what were the components of your total disbursements and which entity (or entities) was the source of the funds disbursed.

I know I have asked you this before, but if you would prefer to communicate with your counsel, please let me know. If so, please let me know with which attorney at Baker & Hostetler I should be communicating.

Thank you. Hope all is well.

Richard C. Morrissey
Trial Attorney
Office of the United States Trustee
Southern District of New York