

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

**Jointly Administered under
Case No. 08-45257**

Petters Company, Inc., et al.,

Court File No. 08-45257

Debtors.

Court Files No.'s:

(includes:

Petters Group Worldwide, LLC;

08-45258 (GFK)

PC Funding, LLC;

08-45326 (GFK)

Thousand Lakes, LLC;

08-45327 (GFK)

SPF Funding, LLC;

08-45328 (GFK)

PL Ltd., Inc.;

08-45329 (GFK)

Edge One LLC;

08-45330 (GFK)

MGC Finance, Inc.;

08-45331 (GFK)

PAC Funding, LLC;

08-45371 (GFK)

Palm Beach Finance Holdings, Inc.)

08-45392 (GFK)

Chapter 11 Cases
Judge Gregory F. Kishel

**TRUSTEE'S RESPONSE TO GREENWICH INSURANCE COMPANY'S AND XL
SPECIALTY INSURANCE COMPANY'S MOTION FOR RELIEF FROM
AUTOMATIC STAY, IF APPLICABLE, TO ALLOW PAYMENT OF CERTAIN
DEFENSE EXPENSES AND SUPPLEMENTAL MOTION FOR RELIEF FROM STAY**

Douglas A. Kelley, as Trustee of Petters Group Worldwide, LLC ("PGW") and Petters Company, Inc. ("PCI"), ("Trustee") submits this response to Greenwich Insurance Company's and XL Specialty Insurance Company's Motion for Relief from Automatic Stay, if Applicable, to Allow Payment of Certain Defense Expenses and their Supplemental Motion for Relief From Stay.

INTRODUCTION

Greenwich Insurance Company ("Greenwich") and XL Specialty Insurance Company ("XL") owe substantial defense costs to PGW and PCI in connection with ongoing criminal and

civil actions. It is not clear that the automatic stay is an impediment to their payment. However, to the extent relief from the stay is necessary for such payment, the Trustee does not oppose the insurers' motion for relief from the automatic stay in connection with reimbursement for and advancement of Defense Expenses and requests payment of the \$2,125,110.42 approved Defense Expenses incurred by Insureds to date.¹

With respect to the Supplemental Motion for Relief to assert counterclaims against PGW and PCI in the recently filed declaratory judgment action, the Trustee does not have information sufficient to ascertain whether such relief is necessary or appropriate. To the extent the insurers seek a declaration of non-coverage, the declaratory judgment action filed by PGW and PCI will determine the issues. If the insurers intend to bring any other counterclaims, the Trustee opposes the requested relief.

FACTS

A. The Underlying Actions

PGW, PCI, and certain officers, directors, managers and employees of PCI and PGW, including sole owner and former Chairman and Chief Executive Officer Thomas Petters, became the subject of a federal investigation in September 2008. On or about September 27, 2008, the government informed PGW and PCI that the companies were targets of a pending grand jury investigation. The result of the investigation was a complaint filed in the United States District Court for the District of Minnesota, *United States of America v. Petters, et al*, Civ. No. 08-SC-5348 ("Government Action") on October 2, 2008 alleging an investment fraud scheme, false representations, and false statements and omissions. Individuals specifically named in the Government Action include, but are not limited to, Thomas Joseph Petters, Deanna Coleman aka

¹ Capitalized terms not defined herein are terms defined by the relevant XL and Greenwich insurance policies.

Deanna Munson, Robert White, James Wehmhoff, Larry Reynolds, Michael Catain, and Frank E. Vennes, Jr. In conjunction, the District Court subsequently froze the defendants' assets and appointed a Receiver for the companies.

On or about December 1, 2008, the United States indicted Thomas Petters, PCI and PGW, alleging mail fraud, wire fraud, conspiracy to commit mail and wire fraud, money laundering, and conspiracy to commit money laundering.

In addition to the ongoing criminal action, at least eight civil lawsuits naming PGW, PCI and various directors, officers, managers, and employees were filed shortly after the government's investigation was made public. These actions assert violations of RICO, the Minnesota Consumer Fraud Act, Minnesota's Unlawful Trade Practices Act, Minnesota's Deceptive Trade Practices Act, Securities and Exchange Act of 1934, and Minnesota Securities Act. There are also allegations of fraudulent inducement, common-law fraud, conversion, unjust enrichment, conspiracy, rescission, and breach of contract.

Because of the Government Action, indictment and various civil lawsuits, all of which allege Wrongful Acts by PCI, PGW and its officers, directors, managers and employees, certain directors, officers, managers, and employees of PGW and PCI have retained legal representation and incurred Defense Expenses as a result of having been named or mentioned in lawsuits, subpoenaed as potential targets, subpoenaed to testify, or questioned by government agencies.

B. The Insurance Policies

Greenwich issued to PGW Private Company Reimbursement Insurance Policy No. ELU105480-08 for the June 25, 2008 to June 25, 2009 policy period ("PGW Policy"). The limit of liability under the Management & Company Liability Coverage Part is \$10,000,000. *See*

Declaration of Kristine Tejano Rickard (“Rickard Decl.”), Ex. 1.² XL issued to PCI liability insurance Policy No. ELU105060-08 for the June 1, 2008 to June 1, 2009 policy period (“PCI Policy”). The limit of liability under the Management & Company Liability Coverage Part is \$5,000,000. See Rickard Decl., Ex. 2. The PCI Policy and PGW Policy contain a Tie In Limits Endorsement, limiting the combined liability under the policies to \$10,000,000. *See* Rickard Decl., Ex. 1, Ex. 2.

The PGW Policy and PCI Policy generally provide coverage for Loss incurred in connection with a Claim first made against an Insured during the Policy Period for a Wrongful Act. Loss, Claim, Insured, Policy Period, and Wrongful Act are all terms defined by the policies. See Rickard Decl., Ex. 1, Ex. 2. A Wrongful Act includes an alleged act, error, omission, misstatement, misleading statement or breach of a duty by an Insured. *See* Rickard Decl., Ex. 1, Ex. 2. In addition to PCI and PGW, persons insured under both policies include past, present or future directors, officers, members, managers and employees. *See* Rickard Decl., Ex. 1, Ex. 2.

PGW and PCI provided notice of and tendered to the insurers the Government Action, the indictment and the various civil lawsuits between October 10, 2008 and December 5, 2008. *See* Affidavit of Paul A. Banker (“Banker Aff.”) at 2-6. Additionally, on February 23, 2009, the insurers were notified that as a result of both the Government Action, indictment and various civil lawsuits, certain directors, officers, managers, and employees have retained legal representation and incurred Defense Expenses because they have been named or mentioned in lawsuits, subpoenaed as potential targets, subpoenaed to testify, or questioned by government agencies. *See* Banker Aff. at 8.

² The Declaration of Kristine Tejano Rickard was filed in support of Greenwich’s and XL’s Motion in Support of Relief from Automatic Stay, if Applicable, to Allow Payment of Certain Defense Expenses. Dock. No. 167.

Importantly, Greenwich and XL issued a joint coverage position letter on December 19, 2008, both reserving their rights and issuing a partial denial of coverage, in response to each of the above-mentioned tenders. *See* Banker Aff. at 7, Ex. F. In the position letter, the insurers did not indicate that they would pay Defense Expenses nor have the insurers offered to make such payments. *See* Banker Aff. at 7, Ex. F. Neither Greenwich nor XL have recognized coverage for Defense Expenses or indemnification under the policies issued to PCI and PGW. *See* Banker Aff. at 7, Ex. F.

As a result, PCI and PGW initiated a declaratory-judgment and breach-of-contract action in the District Court, *Petters Group Worldwide, LLC et al. v. Greenwich Insurance Company et al.*, Case No. 0:09-cv-603 (D. Minn.) seeking a determination of coverage for Defense Expenses and indemnification under the policies in relation to the underlying claims.³ Greenwich and XL now seek this Court's relief from the automatic stay in order to assert counterclaims against PGW and PCI related to the relevant insurance policies, though it is unclear from their request which counterclaims they seek to assert. With PGW and PCI's declaratory judgment complaint pending, the issues regarding coverage under the policies will be determined without additional claims against PGW and PCI. To the extent Greenwich and XL intend to assert claims for declaratory relief, the claims are unnecessary. To the extent the insurers intend to bring other claims against the Insureds, the Trustee opposes the requested relief.

C. Unreimbursed Defense Expenses Incurred By Insureds

Douglas A. Kelley, as Receiver, moved the District Court on December 17, 2008 for approval to make payments of \$1,181,624.89 in Receiver and Attorney fees. *See United States*

³ Nothing in this brief regarding relief from the stay shall be construed as altering the scope of the declaratory judgment action against Greenwich and XL. For example, this brief does not address the insurers' obligations to pay Loss for judgments or settlements in connection with the underlying claims.

of America v. Thomas Joseph Petters et al., Case No. 08-5348, Dock. No. 152-154. The District Court granted that motion without reduction on December 23, 2008, specifically directing the Receiver “to seek reimbursement of the foregoing sums to the extent possible under applicable insurance policies, including directors and officers liability policies maintained by Petters Company Inc., Petters Group Worldwide, LLC or any other related entity.” *See Banker Aff.* at 9, Ex. H.

In relation to Defense Expenses to be reimbursed under the PGW and PCI policies, the Court approved a \$62,361.26 payment to Greene Espel, P.L.L.P. (“Greene”), which represents James Wehmhoff in ongoing civil and criminal proceedings. *See Banker Aff.* at 9, Ex. H. The Court approved payment of \$247,905.35 to Felhaber, Larson, Fenlon & Vogt (“Felhaber”), which represents Thomas Petters in ongoing civil and criminal proceedings. *Id.* The Court also approved payment of \$39,607.50 to Kelley & Wolter, P.A. (“Kelley”) and \$607,050.78 to Lindquist & Vennum P.L.L.P. (“Lindquist”) for work done by or on behalf of the Receiver. *Id.*

On February 17, 2009, the Receiver made a second motion in the Government Action to approve payments for the Receiver and Attorney’s fees. In its second motion, the Receiver sought approval for payment of \$1,280,429.85 in incurred Receiver and Attorney fees. *See Case No. 08-5348, Dock. No. 191-193.* On March 16, 2009, the Court approved the request, in part, authorizing payment to Kelley for \$368,428.25 and to Lindquist for \$312,038.93. *See Banker Aff.* at 10, Ex. I. The Court again directed the Receiver to seek reimbursement under applicable insurance policies, including the Greenwich and XL directors and officers liability policies. *Id.*

The Court issued a supplemental Order on March 20, 2009, approving payment of certain other fees. *See Banker Aff.* at 10, Ex. J. Specifically in relation to Defense Expenses to be reimbursed under the PGW and PCI policies, the Court approved payment to and payment to

Pretzel & Stouffer, Chartered for \$3,695.50, Neal, Gerber & Eisenberg, LLP for \$38,412.27, Peter B. Wold, P.A. for \$17,188, James E. Ostgar for \$6,800, Birrell & Newmark, Ltd. for \$19,237.50, Best & Flanagan for \$18,163.02, and Sands & Moskowitz, P.A. for \$5,000. *Id.* Once again, the Court directed the Receiver to seek reimbursement under available directors and officers liability policies maintained by PCI, PGW and related entities. *Id.* On March 25, 2009, the Court approved payments of \$332,910.20 to Felhaber and \$46,311.86 to Greene. *See Banker Aff.* at 10, Ex. K.

Although Defense Expenses continue to be incurred, the Insureds have incurred not less than \$2,125,110.42 in approved Defense Expenses reimbursable under the policy upon this Court's determination regarding the application of, or relief from, the automatic stay.

II. LEGAL AUTHORITY

A. Obligation to Reimburse and Advance All Defense Expenses.

Greenwich and XL are obligated under the terms of their policies to pay Defense Expenses incurred in connection with a Claim first made against an Insured during the Policy Period for a Wrongful Act. PGW, PCI and its officers, directors, manager and employees currently are facing criminal and civil Claims for which Defense Expenses are being incurred and for which they are entitled to reimbursement under the Greenwich and XL policies.

Under Minnesota law, an insurer's contractual obligation to pay defense expenses is broader than its duty to indemnify. *Wooddale Builders, Inc. v. Maryland Cas. Co.*, 722 N.W.2d 283, 302 (Minn. 2006); *St. Paul Fire & Marine Ins. Co. v. Lenzmeier*, 309 Minn. 134, 139, 243 N.W.2d 153, 156 (1976). An insurer is obligated to pay defense expenses for those claims that arguably fall within the scope of the policy. *Meadowbrook, Inc. v. Tower Ins. Co., Inc.*, 559 N.W.2d 411, 415 (Minn. 1997); *Inland Const. Corp. v. Continental Cas. Co.*, 258 N.W.2d 881, 884 (Minn. 1977), *citing Christian v. Royal Ins. Co.*, 185 Minn. 180, 240 N.W. 365 (Minn.

1932). Defense expenses include those costs to investigate and determine liability. *Westling Mfg. Co. v. W. Nat'l Mut. Ins. Co.*, 581 N.W.2d 39, 47 (Minn. Ct. App. 1998), *review denied* (Minn. Sept. 22, 1998).

Furthermore, under the director's and officer's liability policies issued to PGW and PCI, the insurers are required to immediately pay all legal bills incurred in defending the underlying action. *See, i.e., Julio & Sons Co. v. Travelers Casualty & Surety Co.*, 591 F. Supp. 2d 651 (S.D.N.Y. 2009) (holding that insurers must immediately pay the legal bills officers and directors incur in defending against all the charges in an underlying action, not just the covered claims).

Under the terms of the Greenwich and XL policies, the insurers are obligated to advance or reimburse Defense Expenses for any Insured Person, which includes PCI, PGW past, present or future directors, officers, members, managers and employees. Along with PCI and PGW, certain directors, officers, members, managers and employees Defense Expenses have been incurred in defending or otherwise responding to Claims for Wrongful Acts against Insured Persons. As such, Greenwich and XL are contractually obligated to immediately reimburse the Debtor Entities for those amounts.

B. The Trustee Takes No Position on Whether the Proceeds of the Policies Are the Property of the Estate.

Like Greenwich and XL, the Trustee does not take a position at this time on whether or not the insurance proceeds are property of the estate. However, the Trustee notes that, although the Eighth Circuit has not ruled on the specific issue, several courts have determined that while the insurance policies were considered property of the estate, the proceeds from such policies typically are not included in the property of the estate as the debtor has no interest in that interest unless terms were satisfied. *See, i.e., Marchfirst, Inc. v. Megliola*, 288 B.R. 526, 529-530 (N.D.

Ill. 2002); *In re Louisiana World Exposition*, 832 F.2d 1391 (5th Cir. 1987); *In re CHA Electronics, Inc.*, 261 B.R. 538 (Bankr. S.D. Fla. 2001); *In re Daisy Systems Sec. Litig.*, 132 B.R. 752 (N.D. Cal. 1991); *Pintlar Corp. v. Fidelity & Casualty Co.*, 124 F.3d 1310, 1313 (9th Cir. 1997). As the *Marchfirst* court explained, the “filing of a bankruptcy petition does not expand or change a debtor’s interest in an asset . . . whatever rights a debtor has in property at the commencement of the case continue in bankruptcy – no more, no less.” *Marchfirst*, 288 B.R. at 530. Thus, several jurisdictions suggest that the insurance proceeds are not property of the estate.

Because it is unclear that the automatic stay precludes payment of the Defense Expenses under these circumstances and because the District Court already has ordered that the Receiver may properly seek reimbursement under the relevant insurance policies, the Trustee takes no position regarding whether or not the insurance proceeds are the property of the estate.

III. CONCLUSION

Based on the foregoing, the Trustee does not oppose the motion for relief from the automatic stay to the extent necessary to reimburse the \$2,125,110.42 in Defense Expenses incurred thus far by Insureds in connection with the ongoing criminal and civil actions and for the insurers to continue to reimburse Defense Expenses as they are incurred on an ongoing basis. However, because PGW and PCI already have filed a declaratory judgment complaint that will determine the coverage issues under the XL and Greenwich policies, the Trustee opposes the insurer’s request for relief from the stay to bring counterclaims against them.

DATE: April 2, 2009

LINDQUIST & VENNUM P.L.L.P.

By: e/ James A. Lodoen

James A. Lodoen (#173605)

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**ATTORNEYS FOR DOUG KELLEY,
TRUSTEE**

under Policy No. ELU105480-08. The notice and tender included a copy of the complaint. A true and correct copy of the October 10, 2008 correspondence with attachment is attached hereto as Exhibit A.

3. On or about October 10, 2008, PGW and PCI provided notice of and tendered to XL Specialty Insurance Company (“XL”) the federal government’s October 2, 2008 action captioned *United States of America v. Thomas Joseph Petters, et al.*, Case No. 08-SC-5348, under Policy No. ELU105060-08. The notice and tender included a copy of the complaint. A true and correct copy of the October 10, 2008 correspondence with attachment is attached hereto as Exhibit B.

4. On or about October 13, 2008, PGW and PCI provided notice of and tendered to XL Specialty Insurance Company (“XL”) the federal government’s October 2, 2008 action captioned *United States of America v. Thomas Joseph Petters, et al.*, Case No. 08-SC-5348, under Policy No. ELU105056. The notice and tender included a copy of the complaint. A true and correct copy of the October 10, 2008 correspondence with attachment is attached hereto as Exhibit C.

5. On or about November 17, 2008, PGW and PCI provided notice of and tendered to XL and Greenwich (the “Insurers”) eight separate civil lawsuits. The notice and tender included a copy of each of the eight lawsuits. A true and correct copy of the November 17, 2008 correspondence is attached hereto as Exhibit D.

6. On or about December 5, 2008, PGW and PCI provided notice of and tendered to the Insurers the indictment in *United States of America v. Thomas Joseph Petters, Petters Company, Inc., and Petters Group Worldwide, LLC*. The notice and tender included a copy of

the indictment. A true and correct copy of the December 5, 2008 correspondence and its attachment is attached hereto as Exhibit E.

7. On or about December 19, 2008, the Insurers issued a joint coverage position letter wherein they reserved their rights and partially denied the claims under the above-referenced policies. The Insurers did not agree to advance/reimburse Defense Expenses in their position letter. A true and correct copy of the December 19, 2008 correspondence is attached hereto as Exhibit F.

8. On or about February 23, 2009, in response to requests from the insurers, PGW and PCI provided the Insurers with information regarding the legal representation obtained by certain officers, directors, managers or employees. This correspondence included the attorneys' hourly rates, the basis for retaining legal representation, and copies of certain federal subpoenas. A true and correct copy of the February 23, 2009 correspondence with attachments is attached hereto as Exhibit G.

9. In response to a December 17, 2008 request from the Receiver for approval of payment of certain defense costs, the District Court approved payment of defense costs in an Order dated December 23, 2008. A true and correct copy of the Court's Order is attached hereto as Exhibit H

10. In response to a February 17, 2009 request from the Receiver for approval of payment of certain defense costs, the District Court approved payment of such costs in a series of orders. A true and correct copy of the Court's March 16, 2009 Order is attached hereto as Exhibit I. A true and correct copy of the Court's March 20, 2009 Order is attached hereto as Exhibit J. A true and correct copy of the Court's March 25, 2009 Order is attached hereto as Exhibit K.

Executed on this 2nd day of April, 2009.



Paul A. Banker

Subscribed to and sworn to before me
this 2nd day of April, 2009.


Notary Public



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Jointly Administered Under
Case No.: 08-45257

Petters Company, Inc. et al., Court File No. 08-45257

Debtors.

(includes:	Court File Nos.:
Petters Group, Worldwide, LLC;	08-45258
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Palm Beach Finance Holdings, Inc.)	08-45392

Chapter 11 cases
Judge Gregory F. Kishel

**ORDER GRANTING IN PART AND DENYING IN PART GREENWICH
INSURANCE COMPANY'S AND XL SPECIALTY INSURANCE COMPANY'S
MOTION FOR RELIEF FROM AUTOMATIC STAY, IF APPLICABLE,
TO ALLOW PAYMENT OF CERTAIN DEFENSE EXPENSES
AND SUPPLEMENTAL MOTION FOR RELIEF FROM STAY**

This case came before the Court on April 7, 2009, on the Motion of Greenwich Insurance Company and XL Specialty Insurance Company, for Relief from the Automatic Stay, to the Extent Applicable, to Allow Payment of Certain Defense Expenses of Petters Group Worldwide LLC and Thomas Petters under the PGW Policy and PCI Policy and the Supplemental Motion for Relief from Stay. Appearances are noted on the record. Based on the arguments of counsel, moving documents and the record made at the hearing,

IT IS HEREBY ORDERED:

1. The request for the automatic stay, to the extent applicable, to be lifted to allow XL and Greewich to pay \$2,125,110.42 in approved Defense Expenses and future approved Defense Expenses incurred in the Actions by the Insureds under the PGW Policy and PCI Policy is GRANTED.

2. The request for the automatic stay, to the extent applicable, to be lifted to allow XL and Greenwich to assert counterclaims against PGW and PCI is DENIED.

3. The request that nothing in this Order modify or alter the contractual rights and obligations provided for under the terms of the Policies is GRANTED.

4. The request that nothing in this Order be construed as an express or implied finding by the Court that the Policies and/or their proceeds are property of the Debtors' bankruptcy estates pursuant to 11 U.S.C. §541 or that the automatic stay, 11 U.S.C. §362, applies to the Policies and/or their proceeds is GRANTED.

5. This Order shall take effect immediately upon entry.

Dated _____, 2009

Gregory F. Kishel
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

**Jointly Administered under
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08-45392 (GFK)

Chapter 11 Cases
Judge Gregory F. Kishel

CERTIFICATE OF SERVICE

Gretchen Luessenheide of the City of New Hope, County of Hennepin, State of Minnesota, being first duly sworn on oath, states that on April 2, 2009 she served the following document:

1. Debtors' Response to Greenwich Insurance Company's and XL Specialty Insurance Company's Motion for Relief from Automatic Stay, if Applicable, to Allow Payment of Certain Defense Expenses and Supplemental Motion for Relief from Stay;
2. Affidavit of Paul A. Banker;
3. Proposed Order Denying Greenwich Insurance Company's and XL Specialty Insurance Company's Motion for Relief from Automatic Stay, to the Extent Applicable, to Allow Payment of Certain Defense Expenses and Supplemental Motion for Relief from Stay.

upon

Arrowhead Capital Management LLC c/o James N. Fry 601 Carlson Parkway, Suite 1250 Minnetonka, MN 55305	Mark R. Jacobs Pryor Cashman LLP 410 Park Avenue New York, NY 10022
Ronald R. Peterson Jenner & Block, LLP 330 North Wabash Avenue Chicago, IL 60611-7603	Taunton Ventures LP c/o Paul Taunton 990 Deerbrook Drive Chanhassen, MN 55317

Petters Aviation LLC 2005 Cargo Road Minneapolis, MN 55450	Huron Consulting Group, Inc. 4795 Paysphere Circle Chicago, IL 60674-4795
Douglas A. Kelley Kelley & Wolter PA Centre Village Offices 431 South 7 th Street, Suite 2530 Minneapolis, MN 55415	Connie Lahn David Runck Fafinski Mark & Johnson, P.A. Flagship Corporate Center 775 Prairie Center Drive, Suite 400 Eden Prairie, MN 55344
Elite Landings, LLC 2005 Cargo Road Minneapolis, MN 55450	

via U.S. Mail to the addresses listed above, and electronically by Notice of Electronic Filing upon all parties who have requested service in these cases by filing the same via ECF with the Bankruptcy Court in the District of Minnesota.

/e/ Gretchen Luessenheide
Gretchen Luessenheide