UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 08-5348 ADM/JSM

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. THOMAS JOSEPH PETTERS;
PETTERS COMPANY INC.,
PCI; PETTERS GROUP WORLDWIDE, LLC;
2. DEANNA COLEMAN aka DEANNA MUNSON;
3. ROBERT WHITE;
4. JAMES WEHMHOFF;
5. LARRY REYNOLDS dba
NATIONWIDE INTERNATIONAL RESOURCES
aka NIR;
6. MICHAEL CATAIN dba
ENCHANTED FAMILY BUYING COMPANY;
7. FRANK E. VENNES JR. dba
METRO GEM FINANCE,
METRO GEM INC.,
GRACE OFFERINGS OF FLORIDA LLC,
METRO PROPERTY FINANCING, LLC,
38 E. ROBINSON, LLC,
55 E. PINE, LLC,
ORLANDO RENTAL POOL, LLC,
100 PINE STREET PROPERTY, LLC,
ORANGE STREET TOWER, LLC,
CORNERSTONE RENTAL POOL, LLC,
2 SOUTH ORANGE AVENUE, LLC,
HOPE COMMONS, LLC,
METRO GOLD, INC.;

Defendants.

UNITED STATES' MEMORANDUM IN OPPOSITION TO RITCHIE CAPITAL MANAGEMENT'S MOTION TO INTERVENE AND VACATE RESTRAINING ORDER AS TO PETTERS GROUP WORLDWIDE, LLC

I. INTRODUCTION

Ritchie Special Credit Investments, Ltd., Rhone Holdings II, Ltd., Yorkville Investment I., L.L.C., Ritchie Capital Structure Arbitrage Trading, Ltd., and Ritchie Capital Management, L.L.C. ("Ritchie Group," "Ritchie" or "Petitioners") seek to intervene in this matter as of right in order to vacate this Court's § 1345 injunction and receivership over the assets of Petters Group WorldWide, LLC ("PGW"). Despite overwhelming evidence to the contrary, Ritchie contends that PGW and its assets are pristine and played no role in the massive fraud scheme perpetuated by Defendant Thomas J. Petters ("Petters"). Ritchie ignores the fact that PGW has now been indicted by a grand jury not only for money laundering but for mail and wire fraud – the very predicate crimes listed in § 1345 as support for injunctive relief. Ritchie also fails to point out specific evidence already presented to the Bankruptcy Court of fraudulent funds passing through PGW directly to Petters Company, Inc. ("PCI") and to Petters. Moreover, in arguing that Plaintiff United States of America ("United States") lacked authority to seek an injunction against, and appointment of a receiver for, PGW, Ritchie blatantly neglects to cite the subsection of § 1345 that provides explicit support for the relief issued by the Court in this case.

Stripped to its essentials, what Ritchie seeks is to intervene in this District Court action because it has failed to get its way in other forums. Over the last six months, Ritchie filed litigation in at least three forums, pursuing a scorched earth policy. It filed lawsuits and motions similar to this one in Illinois State Court, U.S. District Court, and U.S. Bankruptcy

Court, all in an effort to take control of both PGW and Polaroid Holding Company and its subsidiaries ("Polaroid") and to preserve these "spoils" for itself. Because it has lost at every turn, Ritchie now seeks to intervene in this action for a second time, asking this Court for extraordinary relief: to vacate the § 1345 asset freeze and receivership of PGW. Ritchie is plainly unhappy with Douglas Kelley ("Kelley") as receiver and as bankruptcy trustee, fearing that he will not grant Ritchie the preferential treatment it seeks from among all other debtors and victims of the fraud scheme. This Court previously prevented Ritchie from intervening in this action, and the current motion should meet the same fate.

Ritchie's motion spends much energy arguing that this Court's receivership over PGW is defective and void. The arguments are completely without merit. Ironically, although Ritchie recognizes the need for a receiver over PGW and Polaroid, it simply seeks appointment of its specific choice. This argument is identical to the one made to this Court in Ritchie's first attempt to intervene in this matter to remove Kelley. For the reasons set forth below, Ritchie's motion to intervene and vacate the receivership as to PGW must be denied.

II. PROCEDURAL AND FACTUAL BACKGROUND

PCI, founded in 1987, is a privately-held Minnesota limited liability company, owned 100% by Petters. PCI served as a venture capital arm of the Petters enterprises, utilizing other single purpose entities to obtain billions of dollars of funding and, purportedly, to acquire merchandise for sale to wholesalers and retailers nationwide. PGW, founded in

1988, is a privately-held Delaware limited liability company, also owned 100% by Petters. PGW has investments in companies worldwide, including 100% ownership of Polaroid, among others. PGW obtained some funding from investors/lenders but was largely funded by PCI.

On September 24, 2008, the Federal Bureau of Investigation ("FBI"), together with the Internal Revenue Service Criminal Investigation Division ("IRS"), and the United States Postal Inspection Service ("USPIS") executed a search warrant on the Petters Headquarters at 4400 Baker Road, Minnetonka, and seized records of PCI, PGW, Petters, and other employees allegedly involved in a fraudulent Ponzi scheme.

On Monday, September 29, 2008, Petters resigned his offices and all positions with PCI, PGW, and related entities, also vacating his office at the corporate headquarters on that date. On October 3, 2008, Petters was arrested on charges of mail and wire fraud, money laundering, and conspiracy. Other Petters executives and associates implicated in this scheme have also been arrested on various charges and have pleaded guilty to certain crimes. The United States alleges that more than 20 lenders and lending groups may have been bilked out of more than $3 billion.

As a result of the investigation, numerous employees and agents voluntarily terminated employment with the Petters companies, including the main law firm providing overall corporate counsel, the two senior in-house counsels, the CEO, the CFO, and others with knowledge of the financial transactions among the Petters companies and with outside

lenders and creditors. The Petters companies were left rudderless and adrift, with no one firmly in charge.

A. Illinois Receivership Proceeding

Ritchie is a Chicago-based group of hedge funds and other investment vehicles. Ritchie commenced a civil action in the Circuit Court of Cook County, Illinois, on September 29, 2008. See Declaration of Robyn A. Millenacker, Exhibit A at Attachment C-1.[1] In the lawsuit, it asserted rights to payment under a series of promissory notes executed by Petters and PGW or PCI. Ritchie also averred that it was defrauded by the makers of the notes, claims not unlike those of other creditors and/or victims from whom Ritchie now attempts to distinguish itself. On September 30, 2008, the Cook County Circuit Court granted Richie's *ex parte* temporary restraining order against Petters, PCI, and PGW.

On October 2, 2008, the United States Attorney filed a Complaint in the United States District Court for this District against Petters, PCI and PGW and other individuals. The United States sought various forms of relief related to the assets of Petters and the companies in his business empire, including protection of those assets from use in connection with an elaborate scheme to defraud individual and group investors. The remedies requested included both an accounting of assets, believed to be in excess of $3 billion, and interim injunctive relief to prevent the defendants from taking any further action affecting the assets. The United States also sought the appointment of a receiver under 18 U.S.C.

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[1]For the Court's convenience, documents not part of the district court record are attached as exhibits to the Millenacker Declaration.

§1345(a)(2)(B)(I)-(ii) and "such other additional relief as the Court determined to be just and proper." [Docket Nos. 1, 7 and 8.]

On Friday, October 3, 2008, this Court granted an *ex parte* temporary restraining order, freezing all assets of PCI, PGW, and all related entities owned or controlled by them. Three days later, this Court appointed Kelley as receiver of PCI, PGW, "and any affiliates, subsidiaries, divisions, successors, or assigns owned 100% by PCI or PGW." The United States and Petters, through his counsel, stipulated in writing to the entry of the latter order. On October 14, 2008, the Court appointed Kelley as receiver for all but one of the remaining defendants being prosecuted in conjunction with the criminal case against Petters. [Docket No. 12.]

On October 3, 2008, in its civil action in Cook County, Illinois, Ritchie filed an *ex parte* request for appointment of a single receiver over PCI and PGW. <u>See</u> Millenacker Declaration, Exhibit A at Attachment C-2. Ritchie asserted that its collateral would be in jeopardy, citing the pendency of criminal proceedings, resignation of the companies' management, and the indeterminacy of Kelley's legal authority at that time.

On October 6, 2008, the Illinois court entered an order appointing William "Billy" Procida Receiver for both PCI and PGW. The order gave Procida "the authority to take possession of the collateral." As a term, "the collateral" was not otherwise defined in the order. Apparently, it referred to the assets of PCI and PGW in which Ritchie asserted security interests or liens. The order further granted Procida "all of the usual powers of a

receiver, including with out limitation, management and operation of [PCI and PGW], collections of receivable, rents, and other Collateral." Millenacker Declaration at Exhibit A at Attachment C-3. It gave him other broad powers, including the ability to "hire and fire employees and make all necessary employment decisions" and to make payment of necessary expenses, including reasonable compensation for himself, without the obligation to apply to the Court for approval of such fees.

By order entered October 10, 2008, the Illinois Circuit Court, after reciting its consideration of the proceedings in this Court and the denial of the motions brought by Ritchie and Procida to intervene in these proceedings, ruled that the Illinois court's September 30, 2008, and October 3, 2008, orders had "expired and [were] of no present effect." Millenacker Declaration at Exhibit A at Attachment C-4.

B. Kelley's Receivership and Motions to Intervene

This Court has entered four orders providing for, and granting powers to, the Receivership. It has also heard prior motions of four non-parties to intervene. The first Receivership Order was, as noted, entered pursuant to stipulation on October 6, 2008, and named Kelley as receiver for PCI, PGW, "and any affiliates, subsidiaries, divisions, successors or assigns owned 100% or controlled by" those two entities.[2] The order granted the receiver broad powers regarding the assets of PCI, PGW, and other corporate entities under receivership, including the power to:

[2] Excluded from the receivership were Thomas Petters, Inc. and its subsidiaries, including MN Airlines, LLC, dba Sun Country Airlines.

> [c]onserve, hold, and manage all receivership assets, and perform all acts necessary or advisable to preserve the value of those assets in order to prevent any irreparable loss, damage, or injury to consumers or creditors of the Entities [under the receivership], including but not limited to obtaining an accounting of the assets [and] preventing transfer, withdrawal, or misapplication of assets and including...filing any bankruptcy petitions for any of the Entities [under the receivership] to protect and preserve the assets of any of [them] and acting as management or Debtor in Possession of any of the Entities so filed by the Receiver....

[Docket No. 12 at pp. 11-12.]

On October 7, 2008, Procida, Ritchie's hand-picked Illinois receiver, filed an emergency motion to intervene in this action. [Docket No. 19.] In that motion, Procida argued that he should be allowed to intervene in this case to seek appointment as receiver for both PGW and PCI because he had a substantial interest in the litigation and Kelley was supposedly not qualified to maximize the potential recovery for PGW and PCI's creditors. The Court denied the motion on October 9, 2008. [Docket No. 24.]

A third receivership order was entered on October 22, 2008, on the receiver's motion to amend prior preliminary injunction and receivership orders [Docket Nos. 12 and 43] and to include a Stay of Actions Against Receivership Defendants. [Docket No. 64 at p.2.] Recognizing the existence of 30 or more lawsuits then already filed against the named defendants, and after receiving assurances from Kelley that a stay would act much like an "automatic stay" under the Bankruptcy Code, 11 U.S. C. §362(a)(1), this Court granted the motion, staying all litigation. [Docket No. 70.] The Court also collapsed all corporate entities and individual defendants into one order. Id.

On November 18, 2008, LG Electronics ("LG") moved to intervene in this case, requesting intervention both as of right and permissively, for the limited purpose of arguing that the stay of litigation did not apply to Polaroid. Alternatively, LG requested that the stay be lifted to allow LG to proceed with its lawsuit against Polaroid in another jurisdiction. [Docket No. 79.] Zenith Electronics LLC ("Zenith") [Docket No. 115], and Acorn Capital Group, LLC ("Acorn") [Docket No. 103] joined LG's motion and also asked to intervene for the limited purpose of pursuing their pre-existing litigation against Polaroid.[3]

Kelley also brought a motion to clarify (1) that both the October 6 and October 14 orders were amended by the October 22 order; (2) the names of individuals and entities whose assets are subject to the receivership; (3) his powers and duties to collect, receive, take, and otherwise manage the assets of Defendants and other persons or entities whose interests are held by or under the direction of Defendants; and (4) his powers and duties regarding the filing of bankruptcy petitions to protect and preserve the assets of the entities subject to the receivership. [Docket No. 91.] The motion specifically requested that the Court also clarify that the stay of litigation applied to Polaroid and PGW. Id. The United States joined the receiver's motion.

[3] At the December 5, 2008, hearing on the motions, Interlachen Harriet Investments, Ltd., orally joined the motions to intervene for purposes of determining if Polaroid was subject to the litigation stay or, in the alternative, for lifting the stay against Polaroid. [Docket No. 143.]

The Court heard all three motions on December 5, 2008. During the oral argument, the Court indicated that, when the stay of litigation was ordered on October 22, 2008, it was intended to apply to Polaroid. On December 8, 2008, the Court issued its Second Amended Order for Entry of Preliminary Injunction, Appointment of Receiver, and Other Equitable Relief ("the Second Amended Order"). [Docket No. 127.] It provided that Kelley is:

> ...appointed Receiver for [Petters, PCI, PGW, and the other individual defendants] with the full power of an equity Receiver. The Receiver shall be solely the agent of this Court in acting as Receiver under this Order and shall have judicial immunity. The Receiver shall be accountable directly to this Court and shall comply with any local rules of this Court governing receivers, as well as the Federal Rules of Civil Procedure. He is appointed Receiver for [Petters, PCI, PGW, and the other individual defendants] until such time as real or perceived conflicts arise, at which time he will consult the Court to determine how to proceed.

The order gave Kelley broad and necessary powers to take possession of and manage assets of Petters, PGW, PCI, and other individual and corporate defendants; to liquidate and sell assets; to assume control of and manage ongoing businesses; and to file bankruptcy petitions to preserve assets, among other powers. [Docket No. 127.] This order remains in effect.

By Order of December 12, 2008, LG's, Zenith's and Acorn's motions were granted in part, and denied in part. Their motions to intervene were granted for the limited purpose of determining whether they should be granted relief from the stay of litigation. The Court then denied their motions for relief from the stay, finding that the balance of factors weighed against lifting the stay at that time and that lifting the stay was premature. The Court noted that, "[w]ithout question, once the receivership estate is completed and a distribution is

contemplated, there will come a time for those claiming an interest in assets subject to the receivership to make arguments regarding what preferences those interests should have in the distribution scheme." [Docket No. 143 at p. 9.]

C. The Bankruptcy Cases

Pursuant to his authority, Kelley's attorneys prepared petitions for bankruptcy relief under Chapter 11 for PCI, PGW, and several of PCI's subsidiaries.[4] He signed the petitions in his capacity as receiver. Thereafter, Kelley continued to manage the ongoing business operations of PCI, PGW, and the other debtors, under the authority granted to him by this Court's orders of October 6 and 22 and December 8, 2008. [Docket Nos. 12, 70 and 127.] He worked with the court-approved bankruptcy counsel to meet the various filing deadlines and to comply with various debtor-in-possession duties under the bankruptcy code and rules and U.S. Trustee prescription. With his bankruptcy counsel, Kelley also brought and defended various motions in the bankruptcy proceedings.

During this time, the U.S. Trustee's Office raised concerns as to whether bankruptcy law allowed Kelley to act in the capacity of a debtor-in-possession pursuant to a district court order alone, given that the debtors had no continuing management personnel independent of the bankruptcy process. Millenacker Declaration at Exhibit B. On December 2, 2008, the U.S. Trustee filed a motion for the appointment of a trustee. Id. at Exhibit B. Although

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[4] Pursuant to the authority granted him, Kelley hired counsel to represent him for all legal matters entailed in this receivership. He also hired additional professionals, including forensic accountants to reconstruct and trace the flow of assets through the multitude of entities in Petters' business empire. [Docket No. 160.]

Kelley did not oppose the motion, Ritchie insisted that a separate trustee be named for PGW, different from the trustee for any of the other debtors. The Bankruptcy Court ruled that Ritchie's motion was not ripe. Millenacker Declaration at Exhibit C. When Kelley was appointed trustee, Ritchie objected to the appointment, reviving its demand for a separate trustee for PGW. Millenacker Declaration at Exhibit D.

The Bankruptcy Court concluded that Ritchie's objection lacked foundation and that, since Kelley had been appointed trustee in the Chapter 11 process, Kelley

> ...has acted, de facto, as if he were a managing officer of these Debtors for the purposes of all their post-petition activity, related to the Chapter 11 process or not. There was no one else to do these things. There is no indication in the record for this motion that Kelley has ever taken any action that was self-interested, contrary to the interests of the bankruptcy estates, or in any way inconsistent with the obligations of a fiduciary steward of the estates."

Millenacker Declaration at Exhibit E at p.13.

Kelley's appointment as trustee was approved on February 26, 2009. He was required to post bond, meet all appointment requirements, and execute and file documents memorializing his turnover of the debtors' bankruptcy estate to the trustee.[5] Id. Ritchie's appeal of the Bankruptcy Court order is pending. Millenacker Declaration at Exhibits G, H, and I.

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[5] On March 5, 2009, Kelley filed a Notice by Chapter 11 Trustee of Acceptance of Appointment and a Turnover of Assets. Millenacker Declaration at Exhibit F.

As of yet, Ritchie has not filed a proof of claim in PGW's Chapter 11 case. However, apparently dissatisfied with Kelley's appointment as trustee, Ritchie has now filed a request for the election of one disinterested person to serve as trustee in the Chapter 11 case of PGW. Millenacker Declaration at Exhibit J. The United States Trustee will convene a meeting of creditors on April 22, 2009, for the purpose of electing one disinterested person to serve in the Chapter 11 case.

On February 12, 2009, Polaroid filed an adversary action against Ritchie, contesting the validity of its liens and other security interests. Millenacker Declaration at Exhibit K. That action remains pending.

D. Ritchie and the Petters Entities

According to the Appointed Trustee and the U.S. Bankruptcy Trustee, PGW and Petters, individually, borrowed approximately $146 million from Ritchie, signing promissory notes dated February 1, 2008 through February 19, 2008, and payable to the Ritchie Group. Millenacker Decl., Exhibits A, L, M. Interest accrues on the notes at a rate of 80% per annum.[6] However, as the Appointed Trustee and U.S. Bankruptcy Trustee noted, the notes are only "papered" as obligations of PGW. Every dollar of the $146 million borrowed was wired directly by Ritchie to PCI's bank account at M&I Bank. No funds went to a PGW account. Millenacker Declaration at Exhibits A, L, M. At the same time the funds were

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[6] In May, 2008, PCI, PGW and Petters issued two additional notes totaling $12 million and payable to the Ritchie Group. The two notes accrue interest at a rate of 362.1% per annum.

wired, there was significant activity in and out of PCI's M&I account, showing how loosely funds were transferred among Petters entities. Most of the borrowed funds were used to pay investors or other creditors. Millenacker Declaration at Exhibit A at Attachment D-1.

Indeed, according to both the Appointed Trustee and the U.S. Bankruptcy Trustee, it does not appear that Polaroid owes Ritchie any money. Millenacker Declaration at Exhibit A. None of the promissory note funds ended up at Polaroid, nor did Polaroid receive benefit from Ritchie or funds advanced by it. Millenacker Declaration at Exhibit A. As such, claims by Ritchie as creditor of both PGW and Polaroid are in dispute, and this dispute will be addressed in the bankruptcy proceedings.[7]

E. Criminal Proceedings Against PGW and PCI

On or about December 1, 2008, Petters, PCI and PGW were *each* indicted for mail fraud, wire fraud, conspiracy to commit mail and wire fraud, and money laundering conspiracy in United States v. Thomas J. Petters, Petters Company, Inc., and Petters Group Worldwide, LLC (08-CR-364 (RHK/AJB). The Indictment, a true and correct copy of which is attached as Exhibit P to the Millenacker Declaration, charges that PCI and PGW "did knowingly devise and participate in a scheme and artifice to defraud and to obtain billions of dollars in money and property by means of materially false and fraudulent pretenses, representations, and promises." Id. at ¶ 4. The Indictment also charges that "PGW and its

[7] PGW and PCI have each scheduled the Ritchie claims as disputed in the bankruptcy proceedings and, to date, Ritchie has not filed proofs of claim for PCI or PGW. Millenacker Declaration at Exhibit N. However, Ritchie did file a proof of claim for Polaroid. Millenacker Declaration at Exhibit O. Polaroid disputes the claim, as evidenced in its adversary complaint against Ritchie. Id. at Exhibit K.

agents made numerous false statements, false representations and material omissions to fraudulently induce investors to provide defendants PCI and PGW with billions of dollars." Id. at ¶ 5.

In its present motion, Ritchie asserts almost identical objections to those filed in the bankruptcy case. Millenacker Declaration at Exhibit D. In both forums, Ritchie claims that PGW is only minimally implicated in the criminal case in contrast to PCI, because "only one of the twenty Counts (Count 20) of the Indictment mentions a transaction involving PGW" and even that alleged crime names only Petters as a defendant. See Ritchie Memorandum at p. 6. Ritchie's assessment of the Indictment, and its minimization of PGW's alleged complicity in the indicted criminal activity, is incomplete and wholly inaccurate.

The Indictment repeatedly and unambiguously alleges that *both* PCI and PGW were engaged in a fraudulent scheme to mislead investors and divert assets through the actions of conspirators that included Petters, PCI, and PGW, aided and abetted by Deanna Coleman, Robert White, Michael Catain, Larry Reynolds, and "others known and unknown to the Grand Jury" Indictment, ¶ 4. The Indictment does not characterize PGW as a distant benchwarmer to alleged crimes. On the contrary, the Indictment alleges that:

> Defendant PETTERS used defendants PCI and PGW and their affiliates, including subsidiary corporations, to execute an extensive fraud scheme. PETTERS, PCI and its agents . . . and PGW and its agents, made numerous false statements, false representations and material omissions to fraudulently induce investors to provide defendants PCI and PGW with billions of dollars. These funds were purportedly to be used to purchase merchandise which would then be sold at a profit. In fact, there were no such purchases or resales. Instead, defendants PETTERS, PCI and PGW and their co-conspirators would divert the funds to other purposes.

Indictment, ¶ 5.

Paragraph 5 is only one among many in the Indictment articulating the grand jury's probable cause finding that PGW, along with PCI, was an integral player in the fraudulent actions of a consortium of individuals and business entities. See, e.g., Indictment, ¶ 7 ("PETTERS, PCI and PGW and their co-conspirators . . . made false statements, made material misrepresentations and created false documentation"); ¶ 8 ("the proceeds of the fraud were used to . . . fund businesses owned or controlled by the defendants"); ¶ 17 ("to effect the objects of the conspiracy . . . the defendants and their co-conspirators committed and cause to be committed the acts alleged in Counts 1 through 10"). Perhaps even more importantly, the Indictment specifies that PGW is a co-defendant with Petters and PCI with respect to Counts 1-7 (Mail Fraud), 8-10 (Wire Fraud), 11 (Conspiracy to Commit Mail and Wire Fraud), and 12 (Money Laundering Conspiracy). Thus, the Indictment clearly demonstrates that PGW was a participant in the fraud charged, not a mere bystander to be assessed differently from PCI.

In his capacity as receiver, Kelley hired independent forensic accountants, who reviewed bank records of both PCI and PGW. Based on their review of these records, the receiver's accountants have independently concluded that funds invested by Ritchie allegedly in PGW were in fact deposited into PCI's M&I Bank account, and subsequently used to make payments to PCI investors. See Affidavit of Douglas A. Kelley ¶ 8. In addition, the independent forensic accountants reviewing PGW and PCI accounts have determined that PGW's purchase of Polaroid in 2005 was derived from the funds of investors of PCI. Id. at

¶ 7.

III. ARGUMENT

A. Ritchie Has No Standing To Intervene.

Ritchie asserts entitlement to intervene as a matter of right. In particular, it seeks vacation of that portion of the Preliminary Injunction giving Kelley authority over PGW and its subsidiaries. Ritchie Memorandum at pp. 1-2. In the alternative, Ritchie

> ... would consent to the appointment of a receiver qualified to run the business if (I) the Government supplied the required nexus under §1345, and (ii) the Court appointed an independent receiver for PGW, i.e., not Kelley. However, petitioners do not consent to the continuation of the current receiver's control over PGW's untainted assets (whether that control is by virtue of Kelley's receivership power or his new trustee power.) Petitioners are entitled to representation of its interests by a receiver who is conflict-free, which Receiver Kelley cannot supply.

Ritchie Memorandum, pp. 29-30.[8]

Ritchie's motion should be denied because it cannot meet the standard for intervention of right. Under the Federal Rules of Civil Procedure, a movant may, upon timely application, intervene in an action as a matter of right if the movant establishes that (1) it has a cognizable interest in the subject matter of the litigation; (2) the interest may be impaired as a result of the litigation; and (3) the interest is not adequately protected by the existing parties to the litigation. Rule 24(a)(2), Fed.R.Civ.P. See Mille Lacs Band of Indians v. Minnesota, 989 F.2d 997 (8th Cir. 1993). Alternatively, a district court has discretion to grant permissive intervention, when requested, if a movant's claim or defense and the main

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[8] The U.S. Bankruptcy Judge evaluated Ritchie's claim that Kelley could not be a neutral trustee free of conflicts and rejected this claim by order dated February 26, 2009. Millenacker Declaration at Exhibit E.

action share a common question of law or fact. Rule 24(b)(1)(B), Fed.R.Civ.P. See Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC, 485 F.3d 1006, 1009 (8th Cir. 2007). If the movant's interest is not relevant to the main action, or if it promotes a different purpose than asserted in the original complaint, intervention should be denied. Finally, although not conclusive, "the opposition of all the original parties to the main action to intervene is an element for the Court's consideration." Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 207 F. Supp. 252, 257 (N.D. Ill. 1962).

1. Ritchie Does Not Have a Cognizable Interest in the Subject Matter of the Litigation.

a. Ritchie has not demonstrated a legitimate interest in PGW or Polaroid.

Under Rule 24(a)(2), Fed.R.Civ.P., an interest is cognizable only where it is "direct, substantial, and legally protectable." United States v. Union Elec. Co., 64 F.3d 1152, 1171 (8th Cir. 1995). If a movant seeking to intervene cannot demonstrate that its interest relates to the property or transaction which is the subject of the underlying suit, intervention is not proper. See Medical Liability Mutual Ins. Co. v. Alan Curtis, LLC, 485 F.3d 1006 (8th Cir. 2007)(holding that interest to ensure that defendants in a parallel state case had sufficient resources to satisfy a potential judgment was too remote and indirect to qualify as a cognizable interest under Rule 24 (a)(2)); Arkansas Power & Light Co. v. Arkansans Public Service Com'n, 107 F.R.D. 335 (E.D. Ark. 1985)(holding parties do not have a right to intervene in litigation simply because it indirectly affects their financial position); Morgan v. Sear, Roebuck and Co., 124 F.R.D. 231 (N.D. Ga. 1988) (same). The Eighth Circuit has

made clear that "[a]n economic interest in the outcome of the litigation is not itself sufficient to warrant mandatory intervention." Medical Liability, 485 F.2d at 1008 (citation omitted). At best, Ritchie has no more than a mere economic interest in the outcome of this action, insufficient under Eighth Circuit precedent for intervention as of right. See id.

Even Ritchie's economic interest is a matter of considerable doubt, according to both the Appointed Trustee and the U.S. Bankruptcy Trustee. Its claim for intervention regarding PGW appears to be based on the principal and accrued interest on its investments of $146 million in February 2008, with interest at the rate of 80% per annum, and an additional $12 million in May 2008, with interest at a rate of 362.1% per annum. Copies of the notes are attached to the Millenacker Declaration as Exhibit A at Attachments D-2 and D-3. However, according to the Appointed and U.S. Trustees, virtually all of the funds from Ritchie's February 2008, investment were directly wired to the account of *PCI* at M&I Bank. The funds were used to pay investors of *PCI* and its subsidiary entities.

While Ritchie purports to be a creditor of PGW, according to the Appointed and U.S. Bankruptcy Trustees, neither PGW nor any of its subsidiary entities received *any* funds or benefit from the transactions at issue. PGW and PCI have each scheduled Ritchie's claims in bankruptcy court as disputed; without funds or benefit to PGW, Ritchie's claims may be voidable, according to the Trustees. Moreover, the bankruptcy docket shows that Ritchie has not yet filed its proof of claims to establish the legitimacy of its PGW interests. Millenacker Declaration at Exhibit N. And, Polaroid has filed its own adversary action in Bankruptcy

Court to contest the validity of Ritchie's liens and security interests against it. Millenacker Declaration at Exhibit K. That being the case, it is questionable whether Ritchie has even a legitimate "economic interest" in this litigation.

According to the Appointed Trustee, the questionable value of the Ritchie notes is underscored by the fact that months after the funds were transferred, Ritchie attempted to secure the repayment obligations by obtaining third-party pledges from Polaroid, a PGW subsidiary, to various trademarks, as evidenced by UCC filing statements dated September 19, 2008. Millenacker Declaration at Exhibit A at Attachment D-4. Ritchie also filed a financing statement on September 22, 2008, which reflects a purported security interest from *PCI* in a Polaroid note in the original principal amount of $28,982,645, payable from the Polaroid entities to *PCI*. Millenacker Declaration at Exhibit A at Attachment D-5. Ritchie also filed a financing statement on September 26, 2008, which reflects a purported security interest from *Petters Capital LLC* in the original principal amount of $135,000,000, payable from the Polaroid entities to *Petters Capital LLC*. Millenacker Declaration at Exhibit A at Attachment D-6.

Ritchie cites United States v. Payment Processing Center., LLC, 435 F.Supp.2d 462 (E.D. Pa. 2006) and 461 F.Supp.2d 319 (E.D. Pa. 2006), in support of its contention that a "third-party who owns an interest in assets restrained pursuant to § 1345 has standing to challenge the factual basis for the restraint." Ritchie Memorandum at p. 10. Payment Processing Center is inapposite. The third-party interest there was owned by Wachovia

Bank, which held a multi-million dollar account alleged by the government to be subject to a restraining order under § 1345 because of fraud on the part of a bank customer. Wachovia's claim was not as a mere creditor, but rather arose because some of the transactions apparently funding the bank customer defendant's account, in fact, "never became final," and thus reflected funds *actually still owned* by the bank. See 435 F.Supp.2d at 464; 461 F.Supp.2d at 322. The Payment Processing Center opinions contain no analysis of Wachovia's standing or right to intervene, apart from the magistrate's statement that the parties "consented" to the judge's referral of the bank's motion to him. 435 F.Supp.2d at 464. The case lends no support to the Ritchie's motion to intervene.

Moreover, were the Court to accept Ritchie's intervention theory, every person or group claiming an interest in any asset owned by named defendants, or owned or related entities, could intervene in this action as a matter of right. This expansive interpretation of Rule 24(a)(2) is unsupported by any authority. In truth, Ritchie's interest in seeking to collect on its purported security interest is not relevant to this litigation, involves claims that are separate and distinct from this litigation, and promotes a wholly different purpose.

Ritchie also asserts that, because previous non-parties, LG, Zenith and Acorn, were permitted to intervene, so too should it. Ritchie notes that the Court earlier explained that the requirements of Rule 24 were flexible and that a practical analysis was appropriate. See Ritchie Memorandum at p. 9; Docket No. 143. Ritchie's position here differs. First, Ritchie has not sought permissive intervention, as did the previous group of interveners. Second,

LG, Zenith and Acorn had pre-existing intellectual property lawsuits in a Texas federal court, which were on a fast track system for liability and damage calculations at issue against Polaroid. This Court found that granting the intervention motions was merely a "threshold event" before it could consider the "heart of the dispute," that is, whether the litigation stay could be lifted so as to allow the potential intervenors to pursue their pending actions against Polaroid. So, while this Court granted the motion to intervene, it was for the limited purpose of allowing consideration of LG, Zenith and Acorn's motion. The request to lift the stay was ultimately denied. [Docket No. 143.] Here, by contrast, there is no pre-existing litigation that is moving forward in another forum. As such, there is no need for Ritchie, a non-party, to insert itself here.

b. Kelley is no longer Receiver for PGW and Polaroid because they are in bankruptcy.

Ritchie brings the instant motion "to remove PGW and its assets from the receivership." Ritchie Memorandum at p. 9. Ironically, as Ritchie is well aware (being on the service list of the actions in both this Court and in the Bankruptcy Court and an active participant in each), PGW's assets are now in bankruptcy and controlled by a bankruptcy trustee. See Millenacker Declaration at Exhibit E; Docket No. 127. Even were Ritchie to show a legitimate interest in the subject matter of the litigation, there is now a bankruptcy trustee that has authority or rights over PGW, PCI and their estates. While Kelley had authority, under this Court's order, to file the petitions initiating the bankruptcy cases, once they were filed, the authority of the bankruptcy trustee controls. See, e.g., In re 400 Madison

Ave. Ltd. Partnership, 213 B.R. 888, 894-95 (Bankr. S.D. N.Y. 1997) ("Since no section of the Code includes a receiver who remains in possession within the definition of trustee, the receiver does not take on the obligation and duties of a Chapter 11 trustee or the somewhat different ones of a debtor-in-possession. Simply put, the receiver has absolutely no responsibility to perform any other duties which are the prerogatives and burden of a debtor in possession and a trustee.")

This distinction between Kelley's roles as receiver for Petters and the Petters' entities and as a potential trustee in the bankruptcy cases was underscored by this Court in its Second Amended Order. "Any bankruptcy cases so commenced by the Receiver shall during their pendency be governed by and administered pursuant to the requirements of the United States Bankruptcy Code, 11 U.S.C. section 101 et. seq., and the applicable Federal Rules of Bankruptcy Procedure." [Docket No. 127 at IV, ¶ B.2.c.] Kelley is bound by both Court order and the Bankruptcy Code to administer the PGW and Polaroid estates according to the dictates of the bankruptcy statute and rules. Contrary to Ritchie's assertion, Kelley now controls PGW and Polaroid Corporation in his capacity as bankruptcy trustee. The Bankruptcy Court's order recognized this change in roles, advising that:

> the assets of these Debtors will no longer be subject to administration through the receivership; they will be committed to the bankruptcy process, and absent the override of court-ordered forfeiture or restitution process, their value first will be funneled through bankruptcy to the holders of allowed claims.

Millenacker Declaration at Exhibit E, p. 26.

The Bankruptcy Court also required Kelley to meet all requirements for his appointment as trustee in bankruptcy and to formally turn over receivership assets to the bankruptcy estates. Id. at p. 34. On March 5, 2009, Kelley as receiver over the Petters' entities in bankruptcy executed and filed the turnover, ending the receiver's jurisdiction and control over the entities at issue in Ritchie's motion to intervene. Millenacker Declaration at Exhibit F.

Because Ritchie fails to meet the first requirement of intervention as of right, the Court should deny its request.

2. Ritchie's interest in the subject matter of the litigation will not be impaired or impeded if intervention is denied.

Even assuming Ritchie has a cognizable interest in this litigation, any such interest would not be impaired or impeded if this litigation proceeds without its intervention. Ritchie has already sought to protect its interest in Bankruptcy Court and has been vigorously litigating its interests in that forum as evidenced by its objection to approval of Kelley as trustee, its appeal of that order, and its current motion for election of a trustee. Millenacker Declaration at Exhibits I, J, and K. Ritchie does not need to intervene in this action in order to protect those interests.

Ritchie's claims regarding potential forfeiture in the criminal case also fail to show the requisite impairment should intervention be denied. See Ritchie Memorandum at p. 24. First, its complaint that the receiver holds assets of PGW and Polaroid that could be forfeited

is in error. The receiver no longer holds such assets.[9] Second, Ritchie will have an opportunity in any criminal forfeiture proceeding to assert its interest in assets during the ancillary proceedings required by 21 U.S.C. §853(k) and 853(n). See, e.g., United States v. Puig, 419 F.3d 700, 703 (8th Cir. 2005) (discussing ancillary proceedings). Such proceedings provide a complete remedy for adjudication of third-party interests in forfeited property, so that those interests may be protected from the forfeiture of the defendant's interests. See United States v. Totaro, 345 F.3d 989, 993-994 (8th Cir. 2003). Ritchie's claimed interests in PGW and Polaroid are not impaired by the possibility of criminal forfeiture.

Because Ritchie's interest will not be impaired or impeded if it is prevented from intervening in this litigation, the Court should deny its motion to intervene as a matter of right.

B. The Receivership Was and Remains Fully Justified as to PGW.

As discussed above, Ritchie's challenge to the receivership as it pertains to PGW assets is essentially moot now that PGW is in bankruptcy proceedings. Nonetheless, to the extent that any question remains as to the validity of the § 1345 process, that process complied with the law in all respects. Richie's untimely request to unwind the receivership lacks merit and should be rejected.

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[9] The asset freeze injunction and receivership were not sought pursuant to any asset forfeiture statutes; therefore, much of Ritchie's argument about asset forfeiture is wholly irrelevant.

1. The United States met its burden under 18 U.S.C. § 1345.

The Complaint, motion for injunctive relief and accompanying memorandum of law filed by the United States, together with the 22-page affidavit of FBI Special Agent Eileen Rice, properly set forth the elements required under § 1345 to justify granting the relief requested by the United States. The Rice affidavit in particular details the fraud scheme and includes specific descriptions of corroborating recorded conversations, examples of falsified documents, and other substantial evidence showing that employees of both PCI and PGW were engaged in ongoing bank fraud and other violations of federal law. [Docket No. 5.] The Complaint and supporting evidence were sufficient to meet the requirements of § 1345.

Had a preliminary injunction hearing been necessary, additional evidence was available to support the requested relief. However, the defendants stipulated to the entry of a preliminary injunction and the appointment of a receiver,[10] and this Court granted the government's motion and issued various orders pursuant to § 1345, including the orders appointing Kelley as Receiver to manage and preserve the defendants' assets. [Docket Nos. 12, 43, 70 and 127.] The orders were fully justified based on § 1345(b), which allows the Court to make such orders and to take such action as "is warranted to prevent a continuing or substantial injury to the United States or any other person . . . for whose protection [an

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[10] Apart from the stipulation on behalf of Petters, no separate stipulation was needed on behalf of PCI or PGW, which were in essence "rudderless ships" at the time. See Docket No. 14 at ¶ 8. See also id. at ¶¶ 4-5 (explaining that, although "Defendant Petters is the sole owner, CEO, and ultimate 'leader' of PGW," Petters "stepped down from his position as CEO of PGW" on September 24, 2008, and no successor was evident in the following days); See also Millenacker Declaration Exhibit A at Attachments C-1 - C-4, Exhibit R.

anti-fraud] action is brought." 18 U.S.C. § 1345(b).

This Court need not now decide the question, novel in this Circuit, of whether § 1345 requires the United States to establish the relevant violations based on probable cause or a preponderance of the evidence before injunctive relief may be granted. The government met the legal requirements of § 1345 under either standard, and the Court's stipulated orders included as a factual finding that "The United States is *likely to succeed on the merits* of its Amended Complaint for Permanent Injunction and Other Equitable Relief." [Docket No. 127 at p.6.] (emphasis added). While not identical to a preponderance finding, the "likely to succeed on the merits" finding exceeds a showing of mere probable cause. See United States v. Hoffman, 560 F. Supp.2d 772, 777 (D. Minn. 2008) (Doty, J.) ("The United States may demonstrate a likelihood of success of the merits under §1345 by proving a violation of the predicate offense statute by a preponderance of the evidence.")[11]

In any event, none of the cases cited by Ritchie in its attempt to show that the stipulated findings and other evidence here provides insufficient support for the § 1345 orders are on point. See Ritchie Memorandum at pp. 16-19. They are all contested cases with other significant issues presented. For example, in United States v. Cohen, 152 F.3d

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[11] Ritchie is off the mark in suggesting that the standard of proof required under § 1345 is a settled question. Many courts have held that the government need establish only probable cause that a defendant has violated a predicate statute. See United States v. Fang, 937 F.Supp. 1187, 1197 (D. Md. 1996) (equating "probable cause" standard with traditional "reasonable probability" standard for granting injunctive relief); United States v. Weingold, 844 F. Supp. 1560, 1571-72(D.N.J. 1994) (§1345 case) (probable cause needed); United States v. Savran & Assoc. Inc., 755 F.Supp. 1165, 1177 (§1345 case) (E.D. N.Y. 1991) (same); United States v. Belden, 714 F.Supp. 42, 45-46 (N.D. N.Y. 1987) (same).

321, 323-4 & n.1 (4th Cir. 1998), the district court froze defendant's assets following a preliminary injunction hearing at which it "erroneously shifted the burden of proof" to the defendant. In United States v. Brown, 988 F.2d 658, 659-60, 665 (6th Cir. 1993), the district court froze 100% of defendants' assets despite specific evidence that 75% of their business was "unrelated" to alleged fraud. In United States v. Cacho-Bonilla, 206 F. Supp.2d 204, 206, 208 (D. Puerto Rico 2002), there were no fraud allegations; instead the government attempted to use § 1345 for an inappropriate purpose: to reorganize a corporation thought to be ill-run. What the Ritchie Group has not cited is a single case – under §1345 or otherwise in which a third party succeeded in overturning a stipulated order well within the court's jurisdiction. The authority it cites simply does not provide a basis to overturn the stipulated order.

Interestingly, when the Court held a hearing on Ritchie's earlier failed attempt to intervene, Ritchie did not challenge the basis for the government's § 1345 motion, nor did it object to the entry of the § 1345 orders. See United States v. Endotec, Inc., – F.3d – , 2009 WL 804399, *6 (11th Cir. March 30, 2009) (since party did not challenge or raise the issue, court declined to speculate as to what the government's burden would be under a statutory injunction). At the hearing, Ritchie acknowledged the need for a receiver to manage PGW's assets and sought only to replace Kelley with a receiver appointed at its request by the Illinois state court. Moreover, Ritchie has itself sued PGW, together with PCI and Petters, alleging they had all engaged in fraud and that PGW and PCI both made "materially incorrect

statements" concerning their financial statements. See Millenacker Declaration at Exhibit A at Attachment C-1.

2. Information learned subsequently bolsters the case for the receivership.

Since the § 1345 injunction and receivership order was entered, additional information has come to light, which supports the appropriateness of this Court's actions as to PGW. For example, PGW has now been charged by a grand jury to have engaged in mail and wire fraud and money laundering. In fact, the December 8, 2008 amendment to the preliminary injunction order was entered after the Indictment returned on December 1, 2008. Millenacker Declaration at Exhibit P.

Recognizing the threat the Indictment poses to its legal position, Ritchie's motion is largely premised on its emphatic but wholly inaccurate argument that "***money laundering under 18 U.S.C. § 1956(h) is the only offense alleged against PGW***." Ritchie Memorandum at p. 21 (emphasis in original). This characterization of the Indictment is grossly misleading. The grand jury, in fact, found that the actions of both PCI and PGW were intertwined in a complex criminal scheme:

> Defendant PETTERS used defendants PCI **and PGW** and their affiliates, including subsidiary corporations, to execute an extensive fraud scheme. PETTERS . . ., and PGW and its agents, made numerous false statements, false representations and material omissions to fraudulently induce investors to provide defendants PCI **and PGW** with billions of dollars. These funds were purportedly to be used to purchase merchandise which would then be resold to retailers at a profit. In fact, there were no such purchases or resales. Instead, defendants PETTERS, PCI **and PGW** and their co-conspirators would divert the funds to other purposes.

Indictment ¶ 5 (emphasis added).

Far from being named only in a money-laundering count, PGW stands charged with mail fraud (Counts 1-7), wire fraud (Counts 8-10), and conspiracy to commit mail and wire fraud (Count 11). The Indictment's allegations cannot be ignored in any reconsideration of the basis for the receivership as to PGW.

In addition to the Indictment, other post-TRO developments strengthen the § 1345 case against PGW. In the bankruptcy proceedings, PGW filed schedules detailing its financial activities and present assets and liabilities. Partly based on that submission, the Appointed Trustee submitted to the Bankruptcy Court summary spreadsheets indicating, for example, that the bulk of Ritchie's investment (which Ritchie now characterizes as an investment in PGW) in fact went to a PCI account at M&I Bank. That PCI account has been directly tied to the fraud. Millenacker Declaration at Exhibits A, L, M. While far from a complete picture of the relationship among these entities, such evidence reveals much about the considerable interconnection between PCI and PGW.[12]

Finally, the results of asset tracing conducted to date are not consistent with Ritchie's efforts to paint PGW as a pristine company walled off from the fraud at PCI. For example, in the course of his service as receiver and bankruptcy trustee for the various Petters-related entities, Kelley has learned that virtually every dollar used to fund the purchase of Polaroid

[12] As explained below, however, the law does not require that every dollar frozen or made subject to a receivership under § 1345 must be specifically traced to fraudulent conduct.

in 2005 was derived from PCI investors, that funds invested by Ritchie allegedly in PGW were in fact deposited into PCI's M&I Bank account, and that these same funds were subsequently used to make payments to PCI investors. Affidavit of Douglas A. Kelley ¶¶ 6-8.

Thus, although no substantive hearing proved necessary to establish the basis for the stipulated entry of the preliminary injunction here, evidence has continued to accumulate to support the appropriateness of that order. Accordingly, entry of the preliminary injunction orders in this case, and appointment of Kelley as receiver over the assets of PGW, should not be revisited now. Ritchie's motion should be denied.

C. Section 1345 Does Not Require Meticulous Tracing of Every Asset to be Frozen.

Ignoring the plain language of § 1345, Ritchie argues that the statute authorizes the Court to restrain only assets directly traceable to the fraud. Ritchie Memorandum at pp. 20-24. Ritchie fails to acknowledge, however, that § 1345 expressly allows restraint of "property of equivalent value." 18 U.S.C. § 1345(a)(2)(B)(I).

Here, the government provided evidence that PGW was part of a massive fraud scheme and that its assets should be restrained and placed into a receivership. Based on such evidence, this Court properly prevented dissipation of PGW's assets equal to the amount of the fraud. See id. Ritchie's narrow view to the contrary finds no support in the case law. Indeed, the Eleventh Circuit specifically rejected an identical argument in United States v. DBB, Inc., 180 F.3d 1277 (11th Cir. 1999).

In DBB, the Eleventh Circuit interpreted subsection (a)(2) of § 1345, added to the statute in 1990 to cover banking law violations and amended in 1996 to cover health care fraud. The defendant in DDB argued that subsection (a)(2) required the United States "to trace to the fraud any assets that it wished to freeze through a preliminary injunction." Id. at 1280. The Eleventh Circuit emphatically rejected this contention, holding that subsection (a)(2)(b)(I) specifically authorizes a court to issue an order restraining dissipation of property traceable to the violation, *or property of an equivalent value.* Id. at 1282-84. In so holding, the Eleventh Circuit adopted the government's interpretation of § 1345, stating:

> [U]nder the United States' interpretation of the statute, the Attorney General would have broad power to freeze assets and prevent the dissipation of them prior to a final judgment. The Attorney General could obtain an *ex parte* TRO upon the filing of the complaint to freeze assets of equivalent value until a hearing on a motion for a preliminary injunction could be held. At the hearing, the United States could obtain an injunction **freezing assets of equivalent value** and secure the appointment of a receiver to administer the assets pending a final decision in the case. This construction of the statute would preserve the defendant's assets until a judgment requiring restitution or forfeiture could be obtained.

180 F.3d at 1284 (emphasis added). See United States v. Sriram, 147 F. Supp. 2d 914, 947 (N.D. Ill. 2001) ("Once again, we begin with statutory language, which states that what may be frozen is 'property which is traceable' to the predicate violation, *or if that property is unavailable, property 'of equivalent value.*')(emphasis added).

The United States established that the amount of the fraud perpetuated by Defendants Petters, PCI, and PGW was $3 billion and that all of the assets of the defendants up to and including $3 billion should be enjoined from dissipation. Millenacker Declaration at Exhibit

S. This Court's orders are clearly supported by the plain language of § 1345 and the case law interpreting it.[13] Ritchie's arguments, based on its misreading of the Indictment charging PGW with not only money laundering, but also mail and wire fraud, and on its erroneous view of the case law, must be rejected. See Ritchie Memorandum at p. 21.

D. Ritchie's Asset Forfeiture Arguments Are Beside the Point.

Ritchie's memorandum argues that, rather than proceeding under 18 U.S.C. § 1345, the government "could have used" another vehicle, 21 U.S.C. § 853(e), to seek a pre-indictment restraining order. While the government may have other tools to restrain assets, Ritchie's argument is irrelevant here. The government chose to proceed under § 1345, rendering Ritchie's arguments regarding § 853(e) or any other forfeiture-related statute beside the point.

Moreover, it is not the receiver who pursues criminal or civil forfeiture. It is rather the United States. Kelley's responsibilities as receiver do not preclude him from opposing or otherwise objecting to any forfeiture actions the United States may take on behalf of the victims of the defendants' alleged fraud. Consequently, the arguments concerning asset forfeiture have no relevance here.

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[13] The Ritchie Group's suggestion (at pg. 26-28) that this Court was not entitled to rely on its general equitable powers in establishing the Receivership flies in the face of Section 1345(b)'s express grant of authority "to take other action as is warranted to prevent a continuing and substantial injury." As the Eighth Circuit has recognized, "all the inherent equitable powers of the district court are available" where, as here, "Congress allows resort to equity for the enforcement of the statute." Fed. Trade Comm. v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1314 (8th Cir. 1991).

E. No Basis Exists for Imposing Costs on the United States.

Because the preliminary injunction was and is fully justified under 18 U.S.C. § 1345 as to PGW, there is no need for this Court to consider Ritchie's contentions that the receivership is "void" or that the United States should be made to pay for the costs of the receivership. Ritchie Memorandum at pp. 28-32. Nonetheless, even if the Court were to determine that the receivership should not extend to PGW, Ritchie's conclusions on these issues are misplaced.

The two § 1345 cases in which the government was made to pay expenses of any kind involved highly unusual situations. In United States v. Guess, 2005 WL 1819382 (S.D. Cal. June 28, 2005), the receivership truly was "improvidently granted." Indeed, in that case the United States conceded that the court had discretion to apportion receivership costs to the government where the court denied a preliminary injunction for lack of evidence, no indictments were ever brought, and the government ultimately dismissed its own case. Id. at *1-*2. In an even more unusual case, the court in United States v. Cacho-Bonilla, 206 F.Supp.2d 204 (D. Puerto Rico 2002), concluded that the government's position was not "substantially justified" within the meaning of the Equal Access to Justice Act ("EAJA") when the United States improperly sought to use § 1345 "as a precaution" in order to compel the reorganization of a corporation that had received federal grants. Id. at 206-7. The court granted EAJA fees, given the government's "admission that its purpose [in seeking a TRO under § 1345] was not to enjoin the commission of [§ 1345's] predicate acts." Id. at 208.

The old, private receivership case law on which the Ritchie Group relies is similarly off point. As the court emphasized in Finneran v. Burton, 291 F. 37 (8th Cir. 1923), it was "uncontroverted" in that case that the state court had been "without jurisdiction" to appoint a receiver, and the company whose assets were subject to the receivership had performed "no voluntary act" to bring about the receivership. Id. at 39. Here, by contrast, any doubts about the strength of the evidence under 18 U.S.C. § 1345 would amount, at most, to a factual rather than a jurisdictional issue. Moreover, the defendants in this case stipulated to the appointment of the receiver – and even Ritchie concedes the appropriateness of a receiver to manage PGW's affairs. Ritchie Memorandum at p. 29. Kelley's appointment, therefore, is not "void *ab initio*" under Finneran, even if Ritchie's challenge had merit. See Bowersock Mills & Power Co. v. Joyce, 101 F.2d 1000, 1003-4 (8th Cir. 1939) (indicating receiver "was properly appointed;" private litigant made to pay excess expenses only because receiver was appointed "for [its] sole benefit").

IV. CONCLUSION

For the foregoing reasons, the Court should deny Ritchie's Second Emergency Motion to Intervene and to Vacate the Restraining Order as to PGW.

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