1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF MINNESOTA

3 ---------------------------------------------------

4 In Re: BKY No: 08-45257

5 Petters Company, Inc., et al.,

6 Debtors.

7 ---------------------------------------------------

8

9 BEFORE THE HONORABLE GREGORY F. KISHEL

10 United States Bankruptcy Judge

11

12

13 * * *

14 TRANSCRIPT OF PROCEEDINGS

15 1/22/09

16 * * *

17

18 Proceedings recorded by electronic sound
recording, transcript prepared by transcription
19 service.

20

21

22

NEIL K. JOHNSON REPORTING AGENCY
23 Six West 5th Street, Suite 700
St. Paul, MN 55102
24 LISA M. THORSGAARD, RPR

25

1 A P P E A R A N C E S

2

3 MR. JAMES A. LODOEN and MS. SANDRA

4 SMALLEY-FLEMING, Attorneys at Law, Suite 4200, 80

5 South Eighth Street, Minneapolis, Minnesota 55402,

6 appeared on behalf of Debtors.

7

8

9 MR. MICHAEL E. RIDGWAY and MR. ROBERT

10 RASCHKE, Attorneys at Law, 1015 U.S. Courthouse,

11 300 South Fourth Street, Minneapolis, Minnesota

12 55415, appeared on behalf of U.S. Trustee.

13

14

15 MR. JAMES M. JORISSEN, Attorney at Law,

16 Suite 2500, 100 South Fifth Street, Minneapolis,

17 Minnesota 55402, appeared on behalf of Ritchie

18 Capital.

19

20

21 MR. THOMAS CAULEY, Attorney at Law, One

22 South Dearborn, Chicago, Illinois 60603, appeared

23 via telephone on behalf of Ritchie Group.

24

25

1 P R O C E E D I N G S

2

3 THE COURT: This matter has

4 been set for 2:00 on request of the movant's

5 counsel combined with a request for expedited

6 relief pursuant to the local rules. This is a

7 motion by certain creditors in one or more of

8 the cases jointly administered under case file

9 08-45257, Petters Company, Inc., that motion

10 being fundamentally one to compel discovery

11 responses. We are in open court. There's one

12 appearance by telephone.

13 I'm going to ask counsel to note their

14 appearances for the record.

15 MR. JORISSEN: Good afternoon,

16 Your Honor. James Jorissen on behalf of

17 Ritchie Capital.

18 MR. LODOEN: Your Honor, James

19 Lodoen an behalf of Doug Kelley and also with

20 me is Sandra Smalley.

21 MR. RIDGWAY: Good afternoon,

22 Your Honor. Mike Ridgway and Robert Raschke

23 for the United States Trustee.

24 THE COURT: All right.

25 Additionally appearing by telephone is Thomas

1 Cauley of the Sidley, Austin law firm.
2 Mr. Jorissen asked this morning whether
3 Mr. Cauley could participate by telephone. He
4 was instructed that I will not be hearing
5 argument from Mr. Cauley by telephone but that
6 he could sit in.
7 And, Mr. Cauley, you are still there?
8 MR. CAULEY: I am here.
9 THE COURT: All right.
10 Mr. Jorissen, I'll hear from you. And let me
11 just touch on one thing before I forget about
12 it. The moving documents are wrongly
13 captioned. Comply with the order for joint
14 administration in these cases the same as
15 every other party does. Those documents were
16 generated out of Sidley and Austin. We're not
17 captioning them Chicago style and New York
18 style here. I want all the names of the
19 debtors to appear in the captions of these
20 jointly administered cases because we may have
21 proceedings popping in from any individual
22 case all coming in under one file, and it
23 always helps me anyway, memory not being any
24 better with age, to know exactly which parties
25 this may entail. So next time around those

1 documents are captioned according to the Order
2 for Joint Administration entered on
3 October 22, 2008.
4 MR. JORISSEN: Understood,
5 Your Honor. My apologies.
6 THE COURT: All right. Go
7 ahead, Mr. Jorissen.
8 MR. JORISSEN: Your Honor, as
9 you've noted, we're in front of you today on
10 Ritchie's motion to expedite discovery or, in
11 the alternative, to postpone the hearing
12 currently set for January 27, 2009 to permit
13 discovery to be completed of Mr. Kelley in
14 advance of the hearing.
15 You're as familiar as anyone with the
16 procedural posture. On December 24 of 2008
17 the United States Trustee's Office appointed
18 Mr. Kelley as trustee for all the debtors in
19 these jointly administered cases. Your Honor
20 had earlier ordered that opposition to the
21 appointed Trustee, if any, be made by
22 objection filed and served no later than
23 January 7 of 2009.
24 Your Honor also set a hearing date for
25 the objections, if any, for January 27 of 2009

1 and set a deadline for any responses that
2 might be filed related to any objections. We
3 served an objection on January 7, and on
4 January 9 Ritchie served interrogatories,
5 documents requests, and a notice of deposition
6 on Mr. Kelley's counsel, Mr. Lodoen, at
7 Lindquist & Vennum. We included in the
8 written discovery a return date of January 21
9 of 2009.
10 And the cover letter that I sent to
11 Mr. Lodoen with the materials that we served,
12 we served them by e-mail and by mail, asked
13 Mr. Lodoen to follow up with me with respect
14 to Mr. Kelley's willingness to comply with a
15 shortened notice period given the hearing date
16 that had been set by the Court. And as we
17 detailed in the motion on January 13 of 2009,
18 Mr. Lodoen attempted to respond to me by
19 e-mail and apparently spelled my last name
20 incorrectly and the e-mail did not get to me,
21 nor apparently did it bounce back to
22 Mr. Lodoen.
23 In the e-mail that Mr. Lodoen had
24 attempted to send, he had indicated that the
25 Trustee did not intend to comply with the

1 discovery requests or the shortened notice
2 period. Not having heard from Mr. Lodoen
3 later on in the week, I put a call in to him
4 and I left a message on his voice mail
5 inquiring about the status of the discovery
6 and their positions related to the discovery.
7 And on January 16 of 2009 I received a call
8 from Ms. Smalley-Fleming, Mr. Lodoen's
9 partner. And during that conversation, Your
10 Honor, she indicated that Mr. Lodoen had tried
11 to contact me about this. During the call she
12 also indicated that Mr. Kelley would not be
13 responding to our discovery on an expedited
14 basis or otherwise and she gave me the reasons
15 why Mr. Kelley did not feel obliged to do so.
16 I asked her to put those reasons in writing
17 and she obliged my request and late in the
18 afternoon on January 16 of 2009, I received a
19 letter from Ms. Smalley-Fleming outlining the
20 reasons why Mr. Kelley would not be responding
21 to our discovery requests.
22 And really, the basic reasons expressed
23 in the letter were threefold. One, your order
24 setting the hearing and the procedures for the
25 hearing did not provide for an evidentiary

1 hearing nor did it provide explicitly for
2 discovery and we didn't -- I didn't ask for
3 discovery or an evidentiary hearing during the
4 December hearing that preceded the issuance of
5 your order.
6 The letter also expressed the view that
7 Judge Montgomery's December 8 order in the
8 receivership proceeding bars us from taking
9 the discovery we would like to take from
10 Mr. Kelley in his capacity as Trustee in these
11 proceedings.
12 And finally, the letter indicated that
13 the verified statement that was submitted with
14 Mr. Kelley's appointment, as well as publicly
15 available information, would provide all the
16 information needed to determine the issue in
17 play at the January 27, 2009 hearing which is
18 Mr. Kelley's disinterest in this.
19 Now, in their response to our motion
20 Mr. Kelley has asserted that because Rule 2009
21 does not provide for discovery, parties
22 objecting to the appointment of a trustee are
23 not entitled to take discovery. And the
24 argument appears to be, Your Honor, that
25 Rule 2009 contains exhaustive procedures for

1 objecting or opposing the appointment of a
2 particular trustee in a jointly administered
3 case.
4 The rule itself doesn't contain any
5 procedural provisions related to an objection
6 to the appointment of a trustee. All the rule
7 really says about process is set forth in
8 Rule 2009(d). And Rule 2009(d) says that the
9 court shall order appointment of separate
10 trustees, quote, on a showing that creditors
11 or equity security holders will be prejudiced
12 by conflicts of interest of a common trustee
13 who has been elected or appointed.
14 So the rule itself doesn't contemplate
15 how the showing will be made. And in the
16 regular course the way that you would object
17 would be to file a motion objecting to the
18 appointment, and the filing of that motion
19 would, in turn, under Rule 9014 kick into
20 effect the discovery procedures available
21 under Part 7 of the rules.
22 And in this case, Your Honor, the
23 process is a little bit different because in
24 your order you had indicated that if Ritchie
25 continued to object to the trustee who was

1 ultimately appointed by the United States
2 Trustee, that those objections should be made
3 in the way of objections and that's what we
4 did.
5 Now, in this context the objection is
6 the functional equivalent of a motion. It is
7 we're contesting the appointment of the -- of
8 Mr. Kelley as trustee through our objection,
9 and we believe that under these circumstances,
10 the discovery provisions of part 7 do apply
11 and are available to allow us to examine
12 Mr. Kelley on issues that are germane to his
13 fitness to serve as trustee in these jointly
14 administered cases; namely, whether he has
15 conflicts of interest given the directives
16 contained in Judge Montgomery's order in the
17 receivership case, among other things, and
18 given the divergent interest that we believe
19 exists between the creditors of PGW and the
20 creditors of PCI in these cases.
21 The first time that I got any sense
22 that they were taking the position that these
23 discovery requests are overbroad is when I
24 read their memorandum this morning. And I
25 understand that this hearing was scheduled

1 late. They had to get a response together
2 quickly. But in any case, the first time
3 anyone said anything to me about overbreadth
4 was in -- or nobody said anything to me about
5 overbreadth. The first time I heard about it
6 was in the motion.
7 Now, we did indicate expressly in the
8 correspondence that we served with our
9 discovery that we would work with Mr. Kelley
10 and his counsel to try to focus the discovery
11 to facilitate getting it done in time to be
12 ready to go by the hearing date. And we're
13 not, I don't think, Your Honor, in front of
14 you today seeking to compel discovery. We're
15 seeking to expedite discovery. We've received
16 no responses or objections to the discovery
17 that we've served, and at this point we don't
18 have any concrete specific objections to any
19 particular category of our discovery that we
20 can sit down and negotiate with Mr. Kelley and
21 his counsel to try and narrow to appease their
22 concerns that we're maybe trying to get into
23 information that isn't germane to what we're
24 trying to figure out and the information that
25 we think is germane to the decision that Your

1 Honor will have to make ultimately relative to
2 our objection.
3 We do think that the discovery that
4 we've served is reasonably calculated to lead
5 to the discovery of admissible evidence. All
6 the requests that we made go to areas of
7 potential conflicts which arise from the
8 multiple roles that Mr. Kelley currently
9 serves in and has served in throughout the
10 duration of his involvement with, first, the
11 receivership and then these Chapter 11 cases,
12 and we've outlined what we think some of those
13 pertinent areas are. His representation of
14 PGW and PCI and Mr. Petters prior to becoming
15 receiver. His work with the United States
16 Attorney related to forfeiture, related to
17 piercing the veil, related to analyzing
18 transactions between PCI and PGW and other
19 entities in these cases. And we think those
20 all go to the issues that are going to be
21 presented at this hearing, potential bias,
22 potential lack of disinterestedness, and
23 potentially having prejudged some of the
24 issues that you'll be called and he will be
25 called on to tackle as trustee.

1 Now, Mr. Kelley's contention that
2 there's no legal authority to take discovery
3 from a trustee I think is just wrong.
4 Trustees submit to discovery all the time. My
5 partner is a panel trustee in this district.
6 He submits to discovery. He's been deposed.
7 And the cases that they cite to support the
8 premise that a trustee can't be subject to
9 discovery don't fit with what's going on here.
10 The Tri-State Ethanol case that they
11 cite prevented discovery because the court
12 found in that case that the record had been
13 completely developed by the parties and that
14 allowing further inquiry would just create
15 more bad feelings among the parties.
16 The Discovery Zone case allowed
17 discovery to proceed and the court in dicta
18 noted that the request was considered to be
19 unusual because of the statutory duties of a
20 trustee, the fiduciary duties trustees owe to
21 creditors. And it's precisely because we do
22 not believe that Mr. Kelley in view of his
23 obligations to the district court, to the
24 United States Attorney and as the trustee of
25 estates who have competing claims can fulfill

1 those obligations. And we think that
2 discovery into the extent to which he has
3 formed opinions which might work to prejudice
4 of one creditor body in one case or another is
5 germane to the question of whether he's
6 disinterested.
7 So we believe not only is the discovery
8 that we've asked for something that we should
9 be able to get under the rules, but we believe
10 that the discovery will be useful in helping
11 the Court to understand whether Mr. Kelley has
12 conflicts of interest which would prevent him
13 from acting in a fiduciary capacity as trustee
14 in these jointly administered proceedings.
15 Now, we are willing, Your Honor, to
16 work with Mr. Kelley and his counsel to narrow
17 the focus if they believe that the requests
18 are overly broad or if they tell us that some
19 category or another is unduly burdensome or
20 irrelevant. We're willing to work with them
21 on that. We're willing to talk to them about
22 that. We expressed that willingness when we
23 sent the discovery out.
24 And we're also willing and would
25 encourage a postponement of the hearing if

1 that's what's necessary to get the discovery
2 done in a time line that works for Mr. Kelley
3 given the things that he has going on.
4 We do believe that there are serious
5 issues that warrant some discovery in this
6 case. And under the circumstances, we would
7 request that the Court grant our motion and
8 either order that discovery be expedited or,
9 in the alternative, postpone the hearing so
10 that we can complete discovery prior to the
11 date set for the hearing.
12 THE COURT: All right. Thank
13 you.
14 MR. JORISSEN: Thank you.
15 THE COURT: All right.
16 Mr. Lodoen.
17 MR. LODOEN: Thank you, Your
18 Honor. From day one in the Petters fiasco the
19 Ritchie Group has been taking steps to try to
20 intervene or control these proceedings. They
21 were flying up here very few days after the
22 raid trying to take control of the Petters
23 enterprises. They were in state district
24 court in Illinois seeking to have their own
25 hand-selected receiver, Billy Procida,

1 appointed as a trustee or as a receiver over
2 the PGW and PCI cases. They have sought to
3 intervene in the district court proceedings
4 and were denied that request and now are
5 continuing to try to wrestle away the ongoing
6 operations of these proceedings as well.
7 The discovery requests that we received
8 just in terms of timing came in at about
9 6:00 on a Friday night. And I attempted to
10 respond, as Mr. Jorissen said, on Tuesday and
11 sent to the wrong e-mail address. He called
12 and left a message on Friday morning. We got
13 back to him sometime in that Friday or
14 Ms. Smalley did on my behalf and then got a
15 letter to him that day. So that's just the
16 chronology of the time line. We ended up
17 having a couple days slippage as a result of
18 the improper e-mail address.
19 But we are here before the Court today
20 and it's our position that the information
21 being requested by the Ritchie Group is
22 certainly -- it's discovery which was not
23 contemplated by this Court's order and ruling
24 in terms of how we would proceed with
25 objections in this case. We don't believe

1 it's authorized by the rules but,
2 nevertheless, even if it is and even if the
3 Court contemplated possible discovery, it's
4 certainly irrelevant, duplicative, and overly
5 broad. We simply need to look at a few of the
6 interrogatories and we get a real sense as to
7 what's being asked for. And Mr. Kelley
8 objects to all of the requests because it's
9 all irrelevant information that is otherwise
10 available.
11 Interrogatory one, state any and all
12 actions you have taken as a receiver for
13 Petters Group Worldwide and PGW subsidiaries.
14 Number two, state any and all actions you have
15 taken as a receiver for Petters Company.
16 Number three, identify the date and persons
17 participated and describe the substance of all
18 of your communications with the United States
19 Attorney with respect to Petters and the
20 various entities. Identify all of your
21 communications with all creditors of PGW, the
22 PGW subsidiaries, PCI and the PCI
23 subsidiaries, United States Trustee, Houlihan
24 and any representatives or agents of Polaroid
25 Corporation. Interrogatory number five,

1 describe and identify any analysis of actual
2 or potential claims or actions by or against
3 PGW, PGW subsidiaries, all of the entities.
4 Number six, identify and describe what you
5 have done to investigate and your future plans
6 for investigation of the fraud allegedly
7 perpetrated by Petters and his accomplices.
8 It continues on and asks any analysis
9 or consideration of forfeiture claims.
10 Identify, describe, and state the conclusions
11 of all of your analysis or considerations with
12 respect to the various entities and your
13 various legal theories that you might pursue
14 including veil piercing, single business
15 enterprise, alter ego, or any other legal
16 theory. And it goes on and on and on like
17 that.
18 These are clearly, clearly over the top
19 requests for discovery and actually it's
20 discovery that's being requested of a trustee
21 who has not even yet been formally -- well,
22 approved by this Court. They've been
23 appointed by the U.S. Trustee's office but
24 this Court has issued no order appointing
25 Mr. Kelley as trustee and, quite frankly, it's

1 unclear in what capacity he is at the moment.
2 He's been recommended and appointed but not
3 yet approved by this Court. So I'm not,
4 frankly, quite sure whether he is a trustee or
5 not at the moment. It seems to be in limbo.
6 Your Honor, the information that's
7 relevant to whether Mr. Kelley ought to be the
8 trustee in these cases, which, by the way, the
9 U.S. Trustee's Office has recommended, they've
10 consulted with, as they identified in their
11 appointing documents, with various other
12 creditors, each of whom approved of Mr. Kelley
13 and indicated that the only objecting creditor
14 they had was the Ritchie Group. Ritchie Group
15 suggested they're different, that they loaned
16 to PGW. Well, every one of their dollars went
17 into PCI just like all the other creditors.
18 And in fact, in their allegations they've --
19 in their complaint in Illinois they've
20 identified in numerous places where they
21 allege that they've been defrauded just like
22 everyone else. So, in essence, they're really
23 not different than the other creditors in
24 these cases. Perhaps defrauded in a little
25 bit different way according to their

1 representations but, nevertheless, make the
2 same allegations of fraud that various other
3 creditors do.
4 But what is available here in order for
5 the Court to determine whether Mr. Kelley
6 ought to be appointed are these documents all
7 available in the public record. Mr. Kelley
8 has a six-page verified statement which he
9 filed with the United States Trustee's Office
10 and was filed with this Court. He has a
11 12-page first report of receiver filed with
12 Judge Montgomery in terms of his ongoing
13 obligations to keep her informed and apprised
14 of the various receivership proceedings and
15 what he is doing. There is a 21-page order
16 from judge Kelley -- or excuse me, from Judge
17 Montgomery that is appointing him as the
18 receiver that sets forth his duties,
19 obligations, requirements, et cetera. And we
20 have bankruptcy schedules filed in the various
21 ten cases that are affiliated with PGW and
22 PCI, all scheduling and listing the
23 intercompany claims between the various
24 creditor entities as best as that information
25 is available.

1 There is plenty of information that's
2 out there that's already available and we
3 submit that there is nothing more that is
4 germane to the issue of whether Mr. Kelley can
5 serve as the receiver in these ten proceedings
6 or as a receiver over some -- excuse me. As a
7 trustee in these ten proceedings or as the
8 trustee over some lesser number of them.
9 If the Court, is at the moment, unclear
10 as to whether ongoing discovery is appropriate
11 or not, we would submit that the best way to
12 proceed would be to hold the hearing on
13 Tuesday. The Court could determine at that
14 time whether any additional information is
15 necessary or available for the Court to
16 address the issue as to whether Mr. Kelley
17 should be the trustee in these cases. And at
18 that point in time the Court concludes that
19 additional discovery or facts are relevant or
20 necessary, the Court could continue that
21 hearing and set forth some type of a guidance
22 with respect to discovery at that point in
23 time. Hopefully any such guidance would
24 provide for a much narrowed scope of what's
25 being asked both in terms of the

1 interrogatories, the requests for production
2 of documents, and the request to depose
3 Mr. Kelley.
4 For the good of all of these entities
5 and the good of the creditors who are -- you
6 know, the creditors, the victims, whatever you
7 want to call them of Petters enterprises, we
8 submit that it's time to stop this
9 obstructionist nonsense and allow the cases to
10 go forward, allow the ongoing investigations
11 of the assets to proceed, allow the various
12 causes of action to be pursued and allow
13 everyone to get back to the business at hand
14 of figuring out where did the money go, who
15 are the creditors, and where do you go to try
16 to recover some of that money for those
17 creditors.
18 So, Your Honor, we'd respectfully
19 request that the motion to expedite discovery
20 be denied. And we'd also ask the Court
21 provide that the discovery should not proceed
22 and that we can proceed with the hearing on
23 Tuesday based upon the record that's already
24 available before the Court or that can be
25 before the Court based upon the public

1 information that's available. Thank you.
2 THE COURT: Thank you. All
3 right. This is coming on awful quickly, so
4 does the U.S. Trustee's Office want to pitch
5 in on anything, Mr. Ridgway?
6 MR. RIDGWAY: We do, Your
7 Honor.
8 THE COURT: Sure.
9 MR. RIDGWAY: Good afternoon,
10 Your Honor. And thank you, counsel. Your
11 Honor, what we've heard here today is sort of
12 a preview, I guess, for the upcoming hearing
13 on the 27th relative to the approval or not of
14 the appointment by the United States Trustee
15 of Douglas A. Kelley as trustee for these
16 jointly administered estates. I think there's
17 a tendency here and it continues even today by
18 the proper reference to what Mr. Kelley is.
19 On the one hand he's serving as a receiver by
20 virtue of Judge Montgomery's order in the
21 district court. He is a receiver of the
22 non-bankruptcy entities. For purposes of
23 these ten jointly administered cases, he now
24 is, I guess for lack of a better term because
25 he hasn't been approved yet by the Court as a

1 trustee designee or a trustee elect, if you
2 will, and as such, he's kind of sitting in a
3 position of limbo, not really being authorized
4 by the Court to go forward with all the powers
5 and obligations the Bankruptcy Code
6 contemplates under Section 1106, and in that
7 regard, the office of the United States
8 Trustee, as it does in all of these Chapter 11
9 cases, make sure that they are conducted
10 expeditiously, orderly, and in an efficient
11 manner.
12 I guess it's troubling that based upon
13 the reasons we brought our motion in the first
14 place seeking to nominate a trustee under 1104
15 is kind of being sidelined in a manner of
16 speaking that we're here doing all these
17 little side show things which distracts from
18 the overall importance of what it is we're all
19 about, getting somebody on board because it's
20 our argument and it has been our position
21 since day one that his receivership by virtue
22 of Judge Montgomery's order terminated by
23 operation of law and that as the trustee
24 designee or in the event the Court approves
25 it, as the trustee, he is authorized to go

1 forward to carry on the business at hand under
2 1106 as trustee of the bankruptcy estates, not
3 receiver. As such, he is duty bound under
4 Title 11. And that's clearly set forth in
5 Judge Montgomery's order by virtue of the
6 second amended order which was entered, I
7 believe, December 8. And that's getting into
8 some of the argument that we will be prepared
9 to discuss on Tuesday.
10 I guess the question that the United
11 States Trustee has is what specific
12 information does Ritchie Group need in order
13 to advance its position on Tuesday that it
14 doesn't already have. We know that they're
15 saying that they should have their own trustee
16 appointed for PGW. And they seem to be saying
17 also that Douglas Kelley, in any event, should
18 be disqualified from serving in any capacity
19 for any of these bankruptcy entities.
20 That being said, the discovery that we
21 have reviewed does seem to be asking for a lot
22 more stuff that goes beyond the parameters of
23 what it would be that is necessary for them to
24 advance their position to say that, A, he's
25 not disinterested or has an actual conflict

1 that prejudices them or that he's
2 disinterested period.
3 We would respectfully ask that in the
4 event the Court does grant some discovery,
5 that it be very, very narrowly limited and in
6 any event, to allow the already scheduled
7 proceeding on the 27th to go forward so that
8 we can deal with this question of limbo.
9 Mr. Kelley needs to get bonded and it's
10 doubtful that any bonding company is going to
11 issue a bond without any requisite court
12 approving his appointment as the trustee.
13 Again, it makes for a very tenuous
14 situation and the office of the United States
15 Trustee as an overseer of the process appears
16 here today to say look, this has to be done
17 expeditiously and in an orderly fashion. And
18 the unnecessary expense I would postulate in
19 having debtor's counsel and Kelley coming in
20 here to defend all of these other side shows
21 doesn't do any good for any of the creditors
22 out there and most of them are going to be
23 unsecured creditors.
24 And I guess we'll leave for another day
25 whether or not Ritchie Group is an unsecured

1 creditor or a victim or a combination. But
2 the fact remains fees are being generated and,
3 we would submit, unnecessarily generated. We
4 would ask that the Court severely limit
5 discovery or deny it altogether, but in any
6 event, to allow the proceeding on the 27th to
7 go forward so the Court can listen to the
8 arguments and make a decision as to whether or
9 not Mr. Kelley should be approved. Thank you,
10 Your Honor.
11 THE COURT: All right. Well,
12 one more round here, Mr. Jorissen. Do you
13 have anything else you want to add?
14 MR. JORISSEN: Thank you, Your
15 Honor. Your Honor, I'll be very brief. The
16 universe of information that is available
17 regarding Mr. Kelley's activities spans a
18 four-month period. And we are interested in
19 knowing if he has made commitments relative to
20 forfeiture, relative to consolidation, if he
21 has prejudged those issues, if he has
22 determined at this point in time that he is
23 going to be taking a position that may be
24 prejudicial to the creditors of PGW or PCI.
25 His pre-receivership relationships, do those

1 affect his ability to serve as trustee in
2 these matters. We know very little about his
3 representation, his criminal representation of
4 PGW, PCI, and Mr. Petters.
5 THE COURT: Well, it sort of
6 lasted about a week, didn't it?
7 MR. JORISSEN: Well, I
8 understand that, Your Honor.
9 THE COURT: You know, and the
10 references sprinkled throughout your brief
11 make it sound like he was, you know, general
12 corporate counsel or something of the sort.
13 It gets a little rhetorical.
14 MR. JORISSEN: Well, I think
15 at the end of the day, Your Honor, with
16 respect to this issue of overbreadth, I heard
17 it for the first time today. I am willing to
18 sit down with them, go through this stuff.
19 They can tell me what they think is onerous,
20 unduly burdensome and we'll negotiate a
21 resolution to it. And we're ready to proceed.
22 If they want to get it done before the
23 hearing, we'll get it done before the hearing.
24 We're ready to move forward if that's the
25 appropriate thing to do. We don't think that

1 you need to postpone the hearing. We're
2 proposed to try to work with Mr. Kelley and
3 Mr. Lodoen to pare these things down to a
4 manageable level so that we get the
5 information that we want and think is germane
6 and they don't have to do all kinds of extra
7 work that they think is unnecessary.
8 But we -- we didn't file this
9 bankruptcy case and the bankruptcy court and
10 the rules apply and the response that we got
11 when we served our discovery wasn't well,
12 you're too broad or this is unreasonable. The
13 response that we got was we don't have to
14 respond to this because of the receivership
15 order in the district court. And we think
16 that the rules of bankruptcy procedure apply
17 in this case and we think that we're entitled
18 in a contested proceeding to take discovery.
19 And as I indicated, we're perfectly
20 willing to try and get all the stuff done
21 before the hearing on the 27th. I'll sit down
22 all day with Mr. Lodoen or whoever and go over
23 this stuff and figure out what we can agree on
24 and get it done.
25 THE COURT: Okay.

1 MR. JORISSEN: Thank you.
2 THE COURT: All right.
3 Mr. Lodoen, anything else?
4 MR. LODOEN: Your Honor, this
5 whole forfeiture issue at this point is really
6 a red herring. It's not Mr. Kelley who makes
7 a decision whether to forfeit. It is the
8 United States Trustee's Office -- or excuse
9 me, United States Attorney's Office --
10 THE COURT: Careful. You're
11 outside of the -- you're the other side of the
12 fence when you're talking about forfeiture.
13 MR. LODOEN: The United States
14 Attorney's Office who makes that particular
15 decision. And if they raise that issue and
16 they pursue it, there are plenty of parties
17 who will be involved in the proceedings who
18 can resist it. Mr. Kelley will also be the
19 trustee of the bankruptcy estate and will be
20 in a position to deal with that as well.
21 It's been my experience or at least my
22 understanding in some prior cases that these
23 things are discussed and dealt with in some
24 type of a reason basis. To date as a receiver
25 Mr. Kelley has been paying creditors from

1 certain of the particular entities where
2 assets have been liquidated, paying the trade
3 creditors, and that has been okay with Judge
4 Montgomery and presumably with the U.S.
5 Attorney's Office as well. So to reach the
6 conclusion that we're just automatically going
7 to have everything forfeited here is not a
8 fair conclusion to be reaching.
9 And furthermore, for Ritchie to suggest
10 that if that happens, they're unique from
11 everybody else is certainly not an assumption
12 that is appropriate at this point as well.
13 That will all be dealt with in due course.
14 Your Honor, the order that Judge
15 Montgomery issued provides that Mr. Kelley is
16 the sole agent of the district court for
17 purposes of his role as the receiver of those
18 entities. He has accountability directly to
19 the Court. He has been taking that
20 accountability seriously. He's been providing
21 information to the Court. He's been providing
22 a report to the Court that talks about his
23 investigations, his activities, what he's
24 doing, his various assets that he's been
25 collecting, how things are going, et cetera.

1 And his verified statement before this
2 Court explains what his role was as he was
3 involved during that week prior to ultimately
4 being appointed as a receiver. I believe he
5 had one moment of or one or two moments of
6 communication with Mr. Petters in the first
7 day or two and basically was somebody that the
8 United States Attorney's Office was
9 comfortable having there in a position of
10 holding things together until everybody
11 figured out what was going to be happening.
12 His verified statement provides that his
13 authority was certainly in question, that he
14 didn't take any, you know, major acts or
15 engage in any major -- I can't remember the
16 words he used exactly but basically, you know,
17 managerial type actions but basically was just
18 holding things together until it was figured
19 out what would happen. And much of that week,
20 in fact, was spent with dealing with phone
21 calls and meeting with Mr. Procida who came up
22 here and was wanting to take over control of
23 the company because he was the receiver
24 appointed from the Cook County District Court
25 in Illinois.

1 So, Your Honor, that is a red herring.
2 Certainly Judge Montgomery reached the
3 conclusion that she was comfortable with him
4 being a receiver over all those entities based
5 upon her understanding of what limited
6 involvement or role he had during the few days
7 prior to him being appointed. The United
8 States Attorney's Office is not troubled by
9 that. The United States Trustee's Office is
10 not troubled by that. And that information is
11 all disclosed in the reports that are
12 available.
13 So again, Your Honor, I'm not
14 interested in spending the next three days
15 spending time on this when other matters
16 surrounding all of this warrants more of my
17 attention. I know Mr. Kelley would not be
18 interested in doing that either. But, you
19 know, we'll do whatever the Court directs.
20 But we believe this is just a burdensome
21 expensive exercise that's being pursued by the
22 Ritchie Group and there is no merit to
23 proceeding with the discovery. Thank you.
24 THE COURT: Okay.
25 Mr. Ridgway, was there anything you wanted to

1 note?
2 MR. RIDGWAY: Nothing further,
3 Your Honor.
4 THE COURT: All right. Well,
5 I need to take another look at a couple parts
6 of the record. I've been scrambling since the
7 response came in this morning before I even
8 got into the office because I had a personal
9 commitment that kept me out most of the
10 morning.
11 I'm going to ask the parties to come
12 back in half an hour, twenty after three, and
13 I'm going to give you a decision then.
14 Unfortunately, I can't tell you to go
15 downstairs and get a quick cup of coffee. We
16 could do that in Minneapolis. We cannot do
17 that here without food service in the building
18 other than machine service which I'll let you
19 make your own decision as to the quality
20 thereof, but it's going to take me about half
21 an hour here.
22 So I will be back out at twenty after
23 three courtroom clock time and I'll give you a
24 decision then. All right. We're in recess.
25

1 (A break was had in the proceedings)
2
3 THE COURT: I have reviewed
4 such things as the latest iteration of Judge
5 Montgomery's order for appointment of a
6 receiver Section 1104(d), Rule 2009(d),
7 definitional provisions of Section 101.14 as
8 well here. I'm not prepared at this point to
9 adopt the position that Mr. Kelley and the
10 debtors are advancing that is the broadest
11 which is to say discovery simply isn't
12 available in this kind of proceeding, and it's
13 not necessary to go that far here to deny the
14 motion which I'm going to. Thought I'd jump
15 right to the chase on that one and then give
16 you the basis of my decision in the first
17 instance.
18 Discovery here is sought going to a
19 very, very broad range of matters, actions,
20 statuses, performances of various sorts all
21 centering around Mr. Kelley in his role as
22 receiver appointed by the U.S. District Court.
23 Ultimately, I am left to conclude that given
24 the nature of the issue that's before me as I
25 construe the issues raised by the Ritchie

1 Group's objection, the subject matter for the
2 proposed discovery really is not relevant to
3 the issues under the governing law and is not
4 calculated to lead to the discovery of
5 admissible evidence.
6 Now, I will say that when I first
7 reviewed the motion and then the response this
8 morning, the motion yesterday and yesterday
9 evening again and the response this morning
10 and then again just before the hearing, I
11 mean, I was a little annoyed by what seemed to
12 be a fairly dismissive tone that Mr. Lodoen
13 had used in responding to Mr. Jorissen's
14 entreaties to do something to work with them.
15 Among other things, you know, Mr. Lodoen
16 simply refused under what he would I'm sure
17 characterize as color of the U.S. District
18 Court's appointment of Mr. Kelley, refused to
19 submit Mr. Kelley to any form of discovery at
20 all. I did skim over the order for
21 appointment of a receiver and was unable to
22 find any provision that went specifically to
23 it other than something that was actually
24 probably all-encompassing which was the grant
25 of judicial immunity to Mr. Kelley and that is

1 probably the source of that basis for refusal.
2 My initial take on Mr. Lodoen's
3 statement to Mr. Jorissen that, number one,
4 the hearing on January 27th wasn't
5 contemplated for the taking of evidence;
6 number two, it wasn't really a "contested
7 matter" or "contested proceeding" so as to
8 trigger the right to discovery under
9 Rule 9014. And that in any event, Judge
10 Kishel clearly saw the issues as being ones of
11 law alone. I thought all those are maybe a
12 little presumptive. Frankly, I don't remember
13 saying anything very pointed at all at the
14 original hearing. I may have put some
15 characterization on what I saw the issues as,
16 at that point, as relatively unformed as they
17 were since the issues really weren't in play.
18 The Ritchie Group had made a shot across the
19 bow already both in writing and in oral
20 argument but nothing was really brought into
21 focus. So any attempt to characterize
22 whatever I said as sort of tracking the
23 inquiry at that point a month ago or so was a
24 little presumptive.
25 However, in the last instance, now that

1 we get right down to the pinches here in
2 having to focus in on whether discovery is
3 appropriate requires me to get back into what
4 the nature of the issues are. And I guess I
5 can see maybe where Mr. Lodoen may have
6 derived his inference as to my perception of
7 the issues. I think he was probably acting a
8 little in advance of my thought process.
9 Ultimately here the factual dimension of
10 what's going to be aired next Tuesday is not
11 dramatic, quite frankly. Despite some of the
12 rhetorical hyperbole and I think the
13 rhetorical presumptiveness of a lot of
14 phrasing of the Ritchie Group's briefing,
15 there's a lot of very conclusory accusations
16 of disabling conflicts there without really
17 having the goods for them and want to seek the
18 goods after the fact by way of discovery.
19 But ultimately the issues as they are
20 framed up by the objection to the appointment
21 are twofold here. They both basically are an
22 allegation that Mr. Kelley, if appointed as
23 trustee, and if appointed and court approved
24 to act as trustee for all of the estates in
25 all of these cases would have divided

1 loyalties. The phrase conflict of interest is
2 kind of thrown around too much and
3 unfortunately it's passed out into the public
4 lexicon where it has far more a connotative
5 than a denotative meaning. So I hesitate to
6 use the phrase conflict of interest. But what
7 we're talking about here is an accusation of
8 actual division of loyalties.
9 As the Ritchie Group frames it up, this
10 would be twofold because of the dual status
11 that Mr. Kelley would have or if viewed from
12 the broad scope of a four to five month
13 history would have had in succession as to the
14 various Petters entities. The first one would
15 be a conflict arising out of the duties and
16 loyalties that he has in his status as
17 receiver versus those duties and loyalties he
18 would have as a status of trustee in a
19 Chapter 11 case.
20 The second, then, would be the
21 allegation of conflict of interest as among as
22 a common trustee over several different
23 bankruptcy estates in cases that were related
24 and in cases of entities that were related
25 among one another and that had acted jointly

1 or in consort, at the behest, at the direction
2 and through the manipulation of Tom Petters
3 prepetition in a way that had so intermingled
4 their financial affairs, their assets, their
5 finances, their transactions and so forth that
6 there would be cross running allegiances.
7 Because, of course, in bankruptcy a trustee in
8 bankruptcy, number one, has a fiduciary
9 obligation as steward of the estate in the
10 case that the trustee is appointed for, the
11 trustee is obligated to gather in assets,
12 liquidate them, recover avoidable transfers,
13 and then, in turn, to administer the results
14 of liquid value in a way that's consonant with
15 the prioritization of claims under the
16 Bankruptcy Code and also honors the right of
17 recovery that any particular creditor had as
18 against that prepetition debtor.
19 That's kind of the issue here because,
20 of course, as soon as you have related
21 entities in bankruptcy that have been operated
22 without respect to corporate formalities as to
23 which there's been comingling of assets,
24 intercompany transfers and the like, one of
25 the possible remedies that the code makes

1 available is so-called substantive
2 consolidation of the estates. In other words,
3 bringing all of the assets of all the debtors
4 together and then bringing all of the claims
5 together as if it were all one entity's debt
6 and asset structure and distributing in
7 accordance.
8 This is one of the things that
9 apparently really scares the Ritchie Group.
10 And, you know, I mean it's -- Mr. Lodoen has
11 said that's one of the possibilities that's
12 contemplated here that would be invoked if
13 warranted. And at this point I think the
14 emphasis has to be on if warranted.
15 I will say that I'm literally about
16 four months shy of my 25th anniversary of my
17 appointment to the Bench and I'm not sure I've
18 ever ordered substantive consolidation of
19 bankruptcy estates. I don't know that it's
20 been done any more than one or two times in
21 that 25 years in this district. The showing
22 is pretty stiff. And there are a lot of
23 factors that have to be used in connection
24 with it.
25 There's also a lot of due process

1 entailed with the imposition of the remedy
2 because everybody should be given the right to
3 oppose it and everybody will be. In any
4 event, those are the two conflicts that are
5 alleged here.
6 Well, it's my conclusion here and I
7 guess this ends up sort of ratifying the
8 theory of the response that Mr. Lodoen made to
9 Mr. Jorissen that it's only a ratification
10 after the fact. I'm not going to say I really
11 had this formed thought in my observations
12 that I may have made a month ago.
13 As to the first alleged division of
14 loyalties, the existence or nonexistence of
15 any division of loyalties between Mr. Petters'
16 status as receiver appointed by the district
17 court for a fairly specific purpose as set
18 forth in Judge Montgomery's order's can be
19 gleaned from the face of that order. He has a
20 charge to the district court there. He has to
21 perform certain functions. And then, of
22 course, there's that provision in term 6 down
23 on page 16 and 17 of Judge Montgomery's order
24 obligating him to "Coordinate with
25 representatives of the United States

1 Attorney's Office and court personnel as
2 needed to ensure that any assets subject to
3 the terms of this order are available for
4 criminal restitution, forfeiture, or other
5 legal remedies and proceedings commenced by or
6 on behalf of the United States."
7 The question of whether that charge,
8 that obligation to the district court imposes
9 an allegiance on him that conflicts with the
10 allegiances that he will have as trustee to
11 the estate in any particular case in the
12 Petters group of cases can be determined as a
13 matter of law based upon the facial
14 recitations throughout Judge Montgomery's
15 order and the legal obligations he will have
16 as fiduciary if approved and fully empowered
17 over the estates in these cases. I think this
18 goes back to Section 101.14, the definition of
19 disinterested person which, of course, he has
20 to be in order to be appointed and then fully
21 empowered under Section 1104(d).
22 And Section 101.14 defines
23 disinterestedness in relevant part under
24 Section 101.14(c) as, "Does not have an
25 interest materially adverse to the interest of

1 the estate or of any class of creditors or
2 equity security holders by reason of any
3 direct or indirect relationship to, connection
4 with, or interest in the debtor or for any
5 other reason."
6 Well, the nature of his direct or
7 indirect relationship to or connection with
8 these debtors is going to be measured by the
9 terms of that order. It's all determinable as
10 a matter of law. And he doesn't have any
11 interest in the debtors per se and he's not a
12 shareholder. He's not a creditor. So it's
13 all going to come back to a matter of law to
14 be gauged from the face of the order versus
15 the requirements that would be imposed upon
16 him by the Bankruptcy Code.
17 The second allegation of divided
18 loyalty would be one allegedly stemming from
19 the conflicting interests as among the estates
20 that would be an administration by him going
21 forward at the same time. Rule 2009(d) is
22 really sort of the reference point for the
23 determination of relevance there. I think
24 Rule 2009(d) which was obviously -- it was, of
25 course, drafted by the Committee on Rules of

1 Bankruptcy Procedure, the Judicial Conference
2 of the United States which includes a few
3 bankruptcy judges and at least one
4 practitioner and some Article III judges,
5 people kind of know the lay of the land in
6 this area, there's a recognition there that,
7 of course, if cases are going to be in joint
8 administration and a single trustee is to be
9 appointed for the reasons that otherwise merit
10 administration by a single trustee, economy
11 having only one person have to get up to speed
12 on any complex of history, structure,
13 transactions and so forth as opposed to
14 multiple trustees dealing with the same
15 subject matter duplicating transactional
16 costs, reducing distributions to creditors,
17 that sort of consideration is what militates
18 in favor of appointing a common trustee for
19 different estates.
20 There, of course, is obvious
21 recognition here that, you know, if you got
22 related entities, there may well be conflicts
23 of interest as between these estates,
24 competing claims to the same assets, cross
25 running claims between the debtors because

1 they transferred assets between them, because
2 they created liabilities between them or
3 whatever. So there's a recognition there that
4 the mere existence of conflicts of interest in
5 the abstract is not enough really to bar
6 across the board the appointment of a common
7 trustee for several different related -- for
8 several different estates arising out of
9 related cases.
10 The question is whether creditors of
11 the different estates "will be prejudiced" by
12 conflicts of interest of a common trustee who
13 has been appointed. That's something that
14 also can be measured by the content of
15 statements in schedules and other documents
16 that are available of public record. It's
17 much more an abstract issue of law than it is
18 as a matter of fact.
19 Now, the interesting things about
20 Rule 2009(d) is that, you know, there's no
21 specific time line, no deadline for the
22 bringing of such a motion, and if an active
23 conflict were to emerge later as a result of a
24 trustee's performance, the issue can be raised
25 again. There's in my mind sort of a lower

1 threshold or higher threshold I should say for
2 a disqualification or the order of a trustee
3 from one or more of related cases and the
4 direction to appoint a separate trustee for
5 separate estates. We'll see what comes
6 forward and what can be alleged when we get to
7 the hearing next Tuesday.
8 I'm also just going to point out the
9 fact, and this is no secret and I'm not
10 telling anybody anything that I haven't
11 already said on the record because I
12 specifically remember interrupting
13 Mr. Jorissen and remarking to him that the
14 whole process of administration of bankruptcy
15 estates, as dependent as it is on court
16 approval for finality and enforceability of
17 the trustee's acts and administration, is
18 loaded, some people may say overloaded, with
19 opportunities to prevent actual prejudice.
20 That's one of those considerations, the mere
21 existence of, that is another check. It's
22 another stop gap as the process goes forward
23 against the possibility of compromised
24 allegiances which is sort of what we're all
25 about here.

1 Ultimately, however, I have to conclude
2 that really the factual matter that the
3 Ritchie Group seeks to burrow into by way of
4 this really very broad, and I'm going to
5 characterize it, it is overbroad, is way too
6 broad even if it's only limited to four months
7 in scope, the factual matter that the Ritchie
8 Group wants to burrow into by way of discovery
9 does not go to facts that are relevant to the
10 issues that I have to be concerned with next
11 Tuesday that's not calculated to lead to the
12 discovery of relevant evidence.
13 So, therefore, there isn't any basis
14 for the discovery in the first instance here.
15 So I'm certainly not going to either order the
16 expediting of the responses nor am I going to
17 delay the hearing. I'm going to address the
18 issues as have been framed and as I have
19 further defined them in my analysis when we
20 reconvene next Tuesday for the formal hearing
21 on the motion on the record as it stands and
22 addressing these questions as matters of law.
23 Ultimately, the rhetorical tone of both
24 the Ritchie Group's objection and certainly
25 this discovery motion is that there's some

1 kind of conspiracy out there or there could be
2 and we really should be allowed to get into
3 it. Mr. Kelley's presently accountable to the
4 United States District Court. He has an awful
5 lot more to lose by violating the trust that
6 Judge Montgomery has put in him than he would
7 have to gain by conflicted allegiances.
8 If we are talking about the issue of
9 the looming omnipresence of the possibility of
10 forfeiture by the United States, we'll get
11 into that issue under that term 6 of Judge
12 Montgomery's order and just what legally his
13 position is in that whole process next
14 Tuesday. Nothing has been brought forward by
15 way of public pronouncement by Mr. Kelley
16 through Mr. Lodoen or otherwise, to my
17 knowledge, that says that he's working in
18 consort with the United States of America to
19 ensure that the United States grabs it all
20 after it's brought back in. There's nothing
21 that can prevent the government from going
22 forward on that. Whether it will is another
23 question entirely and it's still far too early
24 in these cases, let alone the development of
25 all of the Petters related legal proceedings,

1 to draw any conclusions about anything in
2 relation to what the government intends.
3 I'm going to make a side observation
4 that forfeiture would pluck or could pluck
5 conceivably assets away from these bankruptcy
6 estates whether a separate trustee is
7 appointed or not. Whatever due process there
8 is in the forfeiture process will be made
9 available in the district court. That too is
10 a consideration. So I'm going to deny the
11 motion.
12 Now, in terms of any abstract
13 obligation to respond in any other fashion,
14 timely or otherwise, and I -- the response
15 that Mr. Kelley put in here in conclusion just
16 requests the Court deny the motion for
17 expedited discovery which I'm doing. I'm not
18 going to order any expedited responses here.
19 I don't know that I can read into
20 Mr. Kelley's response that he's asking me just
21 to terminate the discovery process in its
22 entirety. I'm going to move forward with the
23 January 27 hearing. That is the other request
24 here but I'm not going to consider on
25 January 27 the prospect of allowing further

1 discovery at this point. These issues I think
2 have to be brought to a head. I agree
3 wholeheartedly with Mr. Ridgway here. These
4 issues of status, who's in charge of the
5 estate, who's chargeable properly and legally
6 responsible and legally accountable for the
7 administration of these estates have to get
8 finalized as quickly as possible because these
9 cases have been pending for long enough. So
10 I'm going to go ahead and hear that matter as
11 scheduled on Tuesday and make a disposition of
12 it appropriate after that point.
13 So I'm just going to see that a fairly
14 summary order denying the motion is entered
15 and it will probably go out yet today.
16 Counsel have anything else to note for
17 the record?
18 MR. LODOEN: Your Honor, in
19 view of the Court's ruling here, would it be
20 appropriate for the Court to just entertain an
21 oral motion to quash the existing discovery so
22 that the matter is settled as a matter of the
23 record so --
24 THE COURT: I'll do that. All
25 right. Mr. Jorissen, do you have anything you

1 want to note?
2 MR. JORISSEN: No, Your Honor.
3 I would just reiterate what we had said
4 earlier.
5 THE COURT: Okay. All right.
6 I'm going to grant that motion. I'm just
7 going to quash the discovery process. This is
8 just going to be put at an end and there will
9 be no overhanging issue of whether Mr. Kelley
10 or these debtors have any continuing
11 obligation to respond in kind to those
12 discovery requests. They will not.
13 So I'll see that the order provides
14 that accordingly. All right. Good enough.
15 Anything else? All right. That should take
16 care of it. Stand adjourned.
17 MR. JORISSEN: Thank you, Your
18 Honor.
19 MR. LODOEN: Thank you, Your
20 Honor.
21
22 * * *
23
24
25

1 STATE OF MINNESOTA )
) ss.
2 COUNTY OF WASHINGTON)
3
4 BE IT KNOWN, that I transcribed the
5 electronic recording relative to the matter
6 contained herein;
7
8
9 That the proceedings were recorded
10 electronically and stenographically transcribed
11 into typewriting, that the transcript is a true
12 record of the proceedings, to the best of my
13 ability;
14
15
16 That I am not related to any of the
17 parties hereto nor interested in the outcome of
18 the action;
19
20
21 IN EVIDENCE HEREOF, WITNESS MY HAND.
22
23
s:/ Lisa M.Thorsgaard
24
25