UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	**Jointly Administered under Case No. 08-45257**
Petters Company, Inc., et al.,	**Court File No. 08-45257**
Debtors.	
	Court File Nos.:
(includes:	
Petters Group Worldwide, LLC;	**08-45258 (GFK)**
PC Funding, LLC;	**08-45326 (GFK)**
Thousand Lakes, LLC;	**08-45327 (GFK)**
SPF Funding, LLC;	**08-45328 (GFK)**
PL Ltd., Inc.;	**08-45329 (GFK)**
Edge One, LLC;	**08-45330 (GFK)**
MGC Finance, Inc.;	**08-45331 (GFK)**
PAC Funding, LLC;	**08-45371 (GFK)**
Palm Beach Finance Holdings, Inc.)	**08-45392 (GFK)**
	Chapter 11 Cases
	Judge Gregory F. Kishel

UNITED STATES TRUSTEE'S NOTICE OF EXPEDITED HEARING AND MOTION TO APPOINT A CHAPTER 11 TRUSTEE

TO: The Debtors and the other entities listed in Local Rule 9013-3:

COMES NOW the United States Trustee for Region 12, by and through the undersigned attorney, and moves the Court for an order directing the United States Trustee to appoint a chapter 11 trustee in the above-entitled jointly administered Petters Company, Inc.'s bankruptcy cases (collectively "PCI"). In support, the United States Trustee respectfully represents:

1. A hearing on the United States Trustee's Motion to Appoint a Chapter 11 Trustee has been scheduled on December 16, 2008, at 2:00 p.m., in Courtroom 2A at the United States

Bankruptcy Court for the District of Minnesota, Warren E. Burger Building and U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota 55101, or as soon thereafter as counsel may be heard.

2. Because the United States Trustee has requested expedited relief, he will not object to any response to this motion being filed and served within 24 hours prior to the hearing date. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING**.

3. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, Fed. R. Bankr. P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file this motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding is a core proceeding. The petitions commencing the Chapter 11 cases of Petters Company, Inc. and Petters Group Worldwide, LLC were filed on October 11, 2008. The petitions commending the Chapter 11 cases of PC Funding, LLC; Thousand Lakes, LLC; SPF Funding, LLC; PL Ltd., Inc.; Edge One, LLC and MGC Finance, Inc. were filed on October 17, 2008. The petitions commencing the Chapter 11 cases of PAC Funding, LLC and Palm Beach Finance Holdings, Inc. were filed on October 17, 2008 and October 19, 2008, respectively. These cases are now pending in this Court.

4. This motion arises under 11 U.S.C. Section 1104 and is filed under Fed. R. Bankr. P. 2007.1 and 9014 and Local Rules 9006-1, 9013-1 and 9013-2. With this motion, the United States Trustee seeks an order from the Court directing the United States Trustee to appoint a chapter 11 trustee for these jointly administered PCI cases.

FACTS/OVERVIEW

5. On or about September 24, 2008, the Federal Bureau of Investigation ("FBI"), the Internal Revenue Service – Criminal Investigation Division ("IRS-CID") and the United States Postal Inspection Service ("USPIS"), publicly announced that they were conducting a criminal fraud investigation into PCI, its sole owner, Thomas J. Petters ("Petters"), and other employees allegedly involved in a fraudulent Ponzi scheme. On October 2, 2008, after obtaining search warrants for the Debtors' corporate headquarters, a federal criminal complaint was filed against Petters charging him with conspiracy, mail and wire fraud, money laundering, and obstruction of justice in violation of 18 U.S.C. §§ 371, 1341, 1343, 1956, 1957, and 1512. On December 1, 2008, Petters was indicted on many of these same charges. In addition, Petters Company, Inc. and Petters Group Worldwide, LLC, were also indicted.[1] Other Petters executives implicated in this scheme have also been arrested on various charges and have pled guilty to certain crimes. According to the government, more than 20 lenders and investors have been defrauded out of more than $3 billion as a result of this alleged scheme.

6. On October 6, 2008, pursuant to 18 U.S.C. § 1345(a)(2), the United States District Court for the District Court of Minnesota appointed Douglas A. Kelley, Esq., as a Receiver for PCI, and all of its affiliates and subsidiaries except for MN Airlines, LLC dba Sun Country Airlines (the "Receiver").[2] On October 11, 2008, October 17, 2008, and October 19, 2008, respectively, the Receiver filed bankruptcy petitions for the Debtors in these cases under Chapter

[1] *See United States of America v. Thomas Joseph Petters, et al., United States District Court, District of Minnesota*, Criminal No. 08-364.

[2] *See United States of America v. Thomas Joseph Petters, et al.*, United States District Court, District of Minnesota, Civil No. 08-5348.

11 of the Bankruptcy Code in this Court. By its order of October 22, 2008, this Court ordered these cases be jointly administered. (DE # 21).

7. According to the Debtors' pleadings, the Debtors sought relief under Chapter 11 "to reorganize and/or preserve their operations, sell assets and preserve potential avoidance [actions] and claims." Upon information and belief, the Receiver is currently: (I) operating the Debtors' businesses, (ii) preserving the Debtors' assets, and (iii) based on the district court's order appointing him as a receiver, purporting to act as a debtor-in-possession under §§ 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in the Debtors' cases.

8. Pursuant to 11 U.S.C. §1104(a)(1), the Court may order the appointment of a chapter 11 trustee for cause after notice and hearing. Cause under § 1104(a)(1) includes fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case. The cause listed in § 1104(a)(1) is not exclusive. Cause exists in these cases because PCI's management has either been indicted and/or pled guilty to certain federal crimes, and the Receiver is not empowered under the Bankruptcy Code to exercise those powers and duties.

9. Under 11 U.S.C. § 1104(a)(2), the Court can also order the appointment of a chapter 11 trustee if such appointment is "in the interests of creditors." For the reasons set forth herein, the appointment of a chapter 11 trustee is clearly in the interests of creditors.

REQUEST FOR EXPEDITED RELIEF

10. The Receiver has filed his Motion to Amend and Clarify the Preliminary Injunction and Receivership Orders to recognize that Chapter 11 of the United States Code and the Federal Rules of Bankruptcy Procedure govern the bankruptcy cases filed by the Receiver.

Such motion has been scheduled to be heard in the district court on Friday, December 5, 2008, at 9:00 a.m. It is anticipated that the District Court will grant the Motion. As the Receiver, and "custodian" under the Bankruptcy Code, Kelley has does not have the powers of a trustee or debtor-in possession granted under *11 U.S.C. § 1106*. The PCI entities cannot proceed further in this chapter 11 proceeding without a trustee with the legal authority and the proper legal standing to pursue litigation, collect assets and propose an appropriate methodology for distribution of those assets. As a result, cause exists to hear this motion on an expedited basis.

LEGAL ANALYSIS AND ARGUMENT

11. Under the Bankruptcy Code, the court must order the appointment of a chapter 11 trustee when "cause" exists or when "such appointment is in the interests of creditors." *11 U.S.C. § 1104(A)(1)(2)*. Like all other chapter 11 cases where the debtor is not in possession, the PCI cases must be administered by a trustee who has clear legal authority to pursue litigation and to propose a plan. The Bankruptcy Code defines all receivers, including Kelley, as custodians, and the Bankruptcy Code severely limits the ability of a custodian or receiver to act as a fiduciary in a bankruptcy case. "Cause" therefore exists for the appointment of a chapter 11 trustee — PCI cannot exercise the powers and perform the duties of a trustee as a debtor in possession, and the Receiver is not empowered under the Bankruptcy Code to exercise those powers and duties. Furthermore, appointing a chapter 11 trustee will serve the "interests of creditors" by assuring that the fiduciary duties and powers of a trustee are exercised by an officer clearly empowered under the law to do so.

12. The federal district court appointed Kelley as a federal equity receiver. "[A receiver is the agent only of the court appointing him; he represents the court rather than the

parties. He is the custodian of property which is under the control of the court." *Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147, 150 (4th Cir. 1944). "The scope of federal equity receivership in this country has diminished sharply as the scope of bankruptcy practice and other statutory receiverships have enlarged." Charles A. Wright & Arthur R. Miller *Federal Practice & Procedure* § 2966.

13. Upon the filing of the bankruptcy cases, the Receiver became a custodian and his role in the case is accordingly limited. "A receiver or trustee of any of the property of the debtor, appointed in a case . . . not under this title" is a "custodian." *11 U.S.C. § 101(11)(a-b).* As a custodian, the Receiver cannot "take any action in the administration of [] property of the debtor . . . or property of the estate . . . except such action as is necessary to preserve such property." *11 U.S.C. § 543(a).*

14. The Receiver must turn over "any property of the debtor held by or transferred to such custodian" to a trustee or the debtor-in-possession. *11 U.S.C. § 543(b)(1)*; *cf. 11 U.S.C. § 1107(a) (defining duties of debtor-in-possession as echoing those of a trustee).* Because PCI's management has either been indicted or pled guilty to certain federal crimes, the Receiver cannot turn the property over to a debtor-in-possession.

15. The Court cannot order the appointment of a receiver under the Bankruptcy Code. "A court may not appoint a receiver under . . . title [11]." *11 U.S.C. § 105(b).* "[T]he bankruptcy judge is prohibited from appointing a receiver . . . under any circumstances. The Bankruptcy Code has ample provision for the appointment of trustees when needed. Any appointment of a receiver would simply circumvent the established procedures." *H.R. Rep. No. 595, 95th Cong., 1st Sess. 316 (1977).*

16. Even when the turnover requirements are modified pursuant to § 543(d)(1), a receiver is not a trustee or debtor in possession. "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 obligations and duties of a Chapter 11 trustee nor 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 prerogative and burden of a debtor-in-possession and a trustee." *In re Madison Ave. Ltd. Partnership*, 213 B.R. 888 (Bankr. S.D.N.Y. 1997). When a debtor- in-possession cannot perform these obligations and duties, these tasks must be delegated to a trustee. While the District Court was certainly within its power in appointing the Receiver for any non-bankruptcy entities, once an entity filed for relief in bankruptcy, the Bankruptcy Court's obligation to establish proper fiduciary control of the case in accordance with the requirements of the Bankruptcy Code must be recognized. In fact, the Receiver, in his Motion to Amend and Clarify the Preliminary Injunction and Receivership Orders,[3] has requested the federal district court recognize that Chapter 11 of the United States Code and the Federal Rules of Bankruptcy Procedure govern the bankruptcy cases filed by the Receiver. *See Plaintiff's Proposed Second Amended Order for Entry of Preliminary Inunction, Appointment of Receiver, and other Equitable Relief, Section IV, ¶ B. 2. c.* (noting "(a)ny 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"). The appointment of a chapter 11 trustee avoids standing and procedural issues.

[3] Docket Entry # 91 of Civ. No. 08-5348, U.S. District Court, District of Minnesota.

17. The need to establish control in the PCI cases in a properly empowered officer of the court establishes cause to appoint a chapter 11 trustee. Section 1104 mandates appointment of a trustee "for cause, including fraud, dishonesty, incompetence or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar case" *11 U.S.C. § 1104(a)(1).* The Court of Appeals of the Second Circuit has recognized that the phrase "cause, including" encompasses other types of cause than the examples in the itemized list. *See C-TC 9th Ave. Partnership v. Norton Co. (In re C-TC 9th Ave. Partnership),* 113 F.3d 1304, 1311 (2d Cir. 1997) (construing "cause, including" in context of section 1112, the dismissal or conversion statute; specifying that list following "including" is "illustrative not exhaustive;" and holding that "bad faith" could be additional type of cause); *11 U.S.C. § 102(3)* ("including" is "not limiting").

18. Two circuits have held that "cause" exists when appointing a chapter 11 trustee "is the only effective way to pursue reorganization." *Cajun Elec. Power Coop., Inc. v. Central La. Elec. Coop., Inc. (In re Cajun Elec. Power Coop., Inc.),* 74 F.3d 599, 600 (5th Cir) (adopting on rehearing the opinion of dissent in 69 F.3d 746, 751), *cert. denied*, 519 U.S. 808 (1996); *see also In re Marvel Entertainment Group, Inc.*, 140 F.3d 463 (3d Cir. 1998) (adopting reasoning of *Cajun Electric* and affirming appointment of trustee when acrimony between debtor's management and creditors undermined any ability to prosecute bankruptcy). While *Cajun Electric* and *Marvel* have factual distinctions, both *Cajun Electric* and *Marvel* focused on the underlying problem that exists in the PCI cases: these cases can proceed properly through the chapter 11 process only if a chapter 11 trustee is appointed.

19. Alternatively, the court must order the appointment of a chapter 11 trustee

because the appointment will assure that Bankruptcy Code duties and powers are performed and exercised by a properly empowered person. This resolution "is in the interests of creditors." *11 U.S.C. § 1104(a)(2).* The "interests of creditors" standard is flexible. *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 474 (3d Cir. 1998).

20. The PCI investors and creditors have an interest in having these cases resolved cost-effectively and quickly. As litigation commences to recover avoidable transfers, those defendants will invoke any available defenses. Skirmishes about the Receiver's standing and his compliance with bankruptcy law will undoubtedly delay case administration, increase costs, and undermine public confidence in the efficacy of the bankruptcy process. The appointment of a chapter 11 trustee will remove any doubt over the authority of the person administering the estates and will therefore foster the interests of both the investors and the creditors.

CONCLUSION

It appears as though Petters and others associated with him and/or his many affiliates and subsidiaries may have defrauded investors and creditors before the filing of these cases. "This is a large and messy bankruptcy that promises to get worse without a disinterested administrator at the helm." *Cajun Elec. Power Coop., Inc. v. Central La. Elec. Coop., Inc. (In re Cajun elec. Power Coop., Inc.),* 74 F.3d 599 600 (5th Cir.) (adopting on rehearing the opinion of dissent in 69 F.3d 746, 751), *cert. denied*, 519 U.S. 808 (1996). Further, the Receiver is unable to comply with the turn over requirements of 11 U.S.C. §543 because PCI's management has either been indicted or have pled guilty to certain federal crimes, the Receiver cannot turn the property over to a debtor-in-possession. Whether the Court orders the appointment "for cause" or for the "interests of creditors" and the public, the facts here mandate the appointment of a chapter 11

trustee.

WHEREFORE, the United States Trustee respectfully requests that this motion be heard on an expedited basis and the Court enter a final order granting this Motion, directing the United States Trustee to appoint a chapter 11 trustee, and for such other and further relief as may be just and equitable.

Dated: December 2, 2008

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

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VERIFICATION

I, Michael E. Ridgway, trial attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: December 2, 2008

Signed: /e/Michael E. Ridgway
Michael E. Ridgway
Trial Attorney

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UNITED STATES TRUSTEE'S MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION TO APPOINT A CHAPTER 11 TRUSTEE

A. Facts/Background

The facts as set forth in the United States Trustee's Motion for Appointment of Chapter 11 Trustee are hereby incorporated.[1]

[1] For convenience, these jointly administered cases will be referred to collectively as "PCI entities;" the federal receiver, Douglas A. Kelley as "the Receiver;" and the district court's Amended Order for Entry of Preliminary Injunction, Appointment of Receiver, and Other Equitable Relief as "the Receivership Order."

B. The Appointment of a Trustee is Required Upon a Finding of Cause, or Where it is in the Interests of Creditors.

11 U.S.C. § 1104(a)(1) provides, in pertinent part:

> At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee --
> (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor;
>
> (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor [].

11 U.S.C. § 1104(a)(1), (a)(2).

A finding of "cause" under § 1104(a)(1) mandates the appointment of a trustee. *Oklahoma Refining Co. V. Blaik (In re Oklahoma Refining Co.)*, 838 F.2d 1133, 1136 (10th Cir. 1988); *In re V. Savino Oil & Heating Co., Inc.*, 99 B.R. 518, 525 (Bankr. E.D.N.Y. 1989). The list of wrongs constituting "cause" is non-exclusive; thus "[f]actors relevant to the appointment of a trustee under § 1104(a)(1) include: conflicts of interest, including inappropriate relations between corporate parents and the subsidiaries; misuse of assets and funds; inadequate record keeping and reporting; various instances of conduct found to establish fraud or dishonesty; and lack of credibility and creditor confidence." *In re Altman*, 230 B.R. 6, 16 (Bankr. D. Conn**.** 1999), *aff'd in part, vacated in part*, 254 B.R. 509 (D. Conn. 2000). The "court need not find any of the enumerated wrongs to find cause for appointing a trustee." *Oklahoma Refining*, 838 F.2d 1136.

Through section 1104(a)(1) of the Bankruptcy Code**,** Congress has mandated that a chapter 11 debtor-in-possession, who acts as a fiduciary of the bankrupt estate, be an honest broker. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985)

("[T]he willingness of courts to leave debtors in possession 'is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee.'"). When a debtor in possession, its management, or its professionals have exhibited an inability or unwillingness to comply with their basic fiduciary duties, there is but one remedy established by Congress to supplant management while allowing the case to remain in chapter 11:

the appointment of a trustee pursuant to 11 U.S.C. § 1104(a). *See V. Savino Oil*, 99 B.R. at 526 ("And if the debtor-in-possession defaults in this respect, [s]ection 1104(a)(1) [of the Bankruptcy Code] commands that stewardship of the reorganization effort must be turned over to an independent trustee.").

In turn, § 1104(a)(2) of the Bankruptcy Code allows appointment of a trustee even when no "cause" exists. *See In re Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3d Cir. 1989); *In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 168 (Bankr. S.D.N.Y. 1990). Under § 1104(a)(2), the Court may appoint a trustee, in its discretion, to address the "interests of the creditors, any equity security holders, and other interests of the estate." 11 U.S.C. § 1104(a)(2). *See, e.g., Sharon Steel* 871 F.2d at 1226; *Comm. of Dalkon Shield Claimants v. A.H. robins Co.*, 828 F.2d 239, 242 (4th Cir. 1987).

Under § 1104(a)(2), courts look to the practical realities and necessities. *In re Euro-American Lodging Corp.*, 365 B.R. 421, 427 (Bankr. S.D.N.Y. 2007). Accordingly, the standard for appointment of a Chapter 11 trustee under § 1104(a)(2) is flexible. *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 474 (3d Cir. 1998).

In these cases, "cause" exists under 11 U.S.C. § 1104(a)(1) for the appointment of a

Chapter 11 trustee because Kelley, as receiver, is not empowered under the Bankruptcy Code to exercise the powers and duties of a trustee under 11 U.S.C. § 1106. Furthermore, appointing a Chapter 11 trustee serves the "interests of creditors" by assuring that the fiduciary duties and powers of a trustee are exercised by an officer clearly empowered under the Bankruptcy Code.

C. The District Court's Order Made Kelley A "Receiver" Within the Meaning Of The Bankruptcy Code And Nothing Else.

It is clear from the district court's order that the court appointed Kelley as a receiver and any management duties were to be exercised as part of that receivership. The Receivership Order authorized the receiver to perform a number of duties and responsibilities, including the responsibility for "Receivership Powers and Duties." *See Receivership Order, Section IV, ¶ B.* There is nothing unusual in giving a receiver authority to manage the affairs of a business estate.

The portion of the order dealing with these "Receivership Powers and Duties," however, also included the ability "to fil[e] any bankruptcy petitions for any of the entities to protect and preserve the assets of any of the entities **and acting as management or Debtor in possession of any of the entities so filed by the Receiver, and to appear and be heard in any bankruptcy of any of the entities not filed by the receiver**." Amended Order for Entry of Preliminary Injunction, Appointment of Receiver, and Other Equitable Relief, Section IV, ¶ B. 2. c. (emphasis added). The Receiver has now filed a motion seeking to "amend and clarify the preliminary injunction and receivership orders" by, *inter alia,* deleting the highlighted language above and in lieu thereof inserting the following language:

> 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. Notwithstanding the foregoing, any claims arising under federal laws relating to forfeiture and restitution (1) against or to recover assets,

> assets of the bankruptcy estates of such bankruptcy cases, or (20 (sic) for distribution from such bankruptcy cases, are preserved and not affected in any way by this paragraph.

See Motion to Amend and clarify the Preliminary Injunction and Receivership Orders, ¶ 4.

Thus, if the district court adopts this amendment to the Receivership Order, it will specifically recognize that Title 11 of the United States Code governs the administration of the jointly administered bankruptcy estates herein.

D. Once Bankruptcy Petitions Were Filed, Kelley Became A "Custodian" Within the Meaning Of The Bankruptcy Code.

The Bankruptcy Code expressly prohibits courts from appointing receivers in Chapter 11 bankruptcy cases. 11 U.S.C. § 105 (b). When Kelley caused the PCI entities to file voluntary petitions for bankruptcy, Kelley's authority as receiver was circumscribed by operation of the Bankruptcy Code. Upon filing, he became a "custodian" within the meaning of the Code and subject to the turnover obligations set forth in § 543.

The statutory definition of "custodian" is broad, and it includes any "receiver . . . of property of the debtor" appointed in a non-Chapter 11 case, and any "receiver, or agent . . . appointed in a non-Chapter 11 case, and any "receiver, or agent . . . appointed or authorized to take charge of property of the debtor . . . for the purpose of general administration of such property for the benefit of the debtor's creditors." 11 U.S.C. § 101(11)(A), ©. Kelley qualifies under both of these provisions. That is, the court appointed Kelley to be "receiver . . . of the property of the debtor . . . in a case or proceeding not under [title 11]" of the U.S. Code. Moreover, Kelley plainly was a "receiver or agent" who was "authorized to take charge of property of the debtor . . . for the purpose of general administration of such property for the benefit of the debtor's creditors." Nothing in section 101(11)(A) or © excludes Kelley from the

definition of "custodian" because, as receiver, he was authorized to manage the affairs of the debtor.

As a custodian, Kelley was subject to the requirements of 11 U.S.C. § 543. Under § 543, "[a] custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property." *Id. §* 543(a). Instead, the custodian must "deliver to the trustee any property of the debtor held by or transferred to such custodian" and "file an accounting of any property of the debtor . . . that, at any time, came into the possession, custody, or control of such custodian." *Id. §* 543(b). Since PCI's management has either been indicted or pled guilty to certain federal crimes , the Receiver cannot turn the property over to a debtor-in-possession.

Furthermore, this straightforward reading of the definition of "custodian" is consistent with the framework of the Bankruptcy Code. Prior to bankruptcy, any number of persons may be engaged in helping to manage the property of a struggling company, but once the company declares bankruptcy, the Code authorizes only the debtor itself or a trustee to administer the estate. Thus, anyone previously serving as receiver or agent to manage the company's property becomes a custodian who must account for and turn over the property. 11 U.S.C. § 543.

This analysis is buttressed by the Code's prohibition on the appointment of receivers in bankruptcy. See 11 U.S.C. § 105(b); see also S. Rep. No. 95-989, at 23 (1978), *reprinted in* U.S.C.C.A.N. 5787, 5809 ("custodian" means "a prepetition liquidator of the debtor's property, . . .or administrator of the debtor's property. *The definition of custodian to include a receiver or*

trustee is descriptive, and not meant to be limited to court officers with those titles.") (emphasis added). If the debtor cannot administer the estate as debtor- in- possession, then a disinterested trustee (not a receiver) is to perform that function.

E. The Receivership Order does not Override The Scheme Contemplated By The Bankruptcy Code nor does it Supplant The Authority Of The U.S. Trustee In Chapter 11 Cases.

The appointment of a receiver cannot circumvent the bankruptcy scheme established by Congress. The district court had the authority to appoint a receiver with management powers to run the affairs of the PCI entities prior to bankruptcy. But under the Bankruptcy Code, that authority did not supplant the right of the United States Trustee to appoint a trustee in Chapter 11 cases and does not affect the status of receivers as custodians. *See 11 U.S.C. §§ 101 (11)(A) & ©; 105(b); 543.*

An important policy underlying the Bankruptcy Code is the need to ensure that there are disinterested trustees, overseen by the United States Trustee, to manage bankrupt companies. *See 11 U.S.C. § 1104* (requiring that a trustee appointed by the court at the request of the U.S. Trustee must be a "disinterested person"). [2] In defining the obligation of "disinterestedness," the Code

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[2] The Code defines "disinterested person" as a person that"

> (A) is not a creditor, an equity security holder, or an insider;
>
> (B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and
>
> © does not have an interest materially adverse to the interest of the estate or of any class creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.

11 U.S.C. § 101 (14).

says that examiners and trustees may "not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason." 11 U.S.C. § 101(14)(C)(emphasis added). "By prohibiting any 'materially adverse' 'interest' to any party to the bankruptcy 'for any . . . reason,' Congress plainly invited - indeed compelled-federal courts to construe 'disinterestedness' against the backdrop of the equitable duties that apply to positions of trust." *In re Big Rivers Elec. Corp.*, 355 F.3d 415, 431 (6th Cir.2004).

The relevant case law supports the United States Trustee's view. For example, in *Matter of Plantation Inn Partners*, 142 B.R. 561 (Bankr. S.D. Ga. 1992), the debtor sought turnover of property from a custodian (who had previously been a receiver), and the custodian sought to excuse turnover under the exception contained in 11 U.S.C. 543(d). But, as explained, the bankruptcy court held that the custodian could not continue to administer the estate, despite the statutory exception. To do so would "vest [the custodian] permanently with all the duties and powers of a debtor-in-possession" and thus far exceed the limited relief envisioned in Section 543. *Id*. at 564. As the court noted, the Bankruptcy Code clearly "contemplates that the long-term administration of a Chapter 11 case will be managed by a trustee or debtor-in-possession, not a hybrid created by judicial fiat." *Id.* *But see Adams v. Marwil (In re Bayou Group, LLC)*, 363 B.R. 674 (S.D.N.Y. 2007).

Similarly, in *In re Stratesec, Inc.*, 324 B.R. 156 (Bankr. D.D.C. 2004), the court held that allowing a receiver "to continue to manage the affairs of the debtor while that debtor utilizes chapter 11of the Bankruptcy Code" would be "inconsistent with the Bankruptcy code"; "[i]f a fiduciary is necessary, it should be a trustee appointed by the United States Trustee." *Id.* At 157-

158. *See also In re 400 Madison Ave. Ltd. P'ship*, 213 B.R. 888, 894 (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 obligations and duties of a Chapter 11 trustee nor the somewhat different ones of a debtor-in-possession set forth in Code § 1107."). Other than *Bayou*, there appears to be scant contrary authority for the proposition that a district court has the authority to appoint a person to fulfill the duties of a receivership and also administer the estate after the filing of a bankruptcy petition.

It also is important to note that Kelley's service as a custodian, standing alone, does not automatically disqualify him from being appointed or elected as a Chapter 11 trustee. Whomever is selected to serve in such a capacity must meet the definition of "disinterestedness" set forth under 11 U.S.C. § 101(14).

Conclusion

Based on the foregoing, the United States Trustee respectfully requests that this Court enter an order directing the appointment of a Chapter 11 Trustee, and for such other relief as may be just and equitable.

DATED: December 2, 2008

Respectfully submitted,

HABBO G. FOKKENA
UNITED STATES TRUSTEE
Region 12

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	**Jointly Administered under Case No. 08-45257**
Petters Company, Inc., et al.,	**Court File No. 08-45257**
Debtors.	
	Court File Nos.:
(includes:	
Petters Group Worldwide, LLC;	**08-45258 (GFK)**
PC Funding, LLC;	**08-45326 (GFK)**
Thousand Lakes, LLC;	**08-45327 (GFK)**
SPF Funding, LLC;	**08-45328 (GFK)**
PL Ltd., Inc.;	**08-45329 (GFK)**
Edge One, LLC;	**08-45330 (GFK)**
MGC Finance, Inc.;	**08-45331 (GFK)**
PAC Funding, LLC;	**08-45371 (GFK)**
Palm Beach Finance Holdings, Inc.)	**08-45392 (GFK)**
	Chapter 11 Cases
	Judge Gregory F. Kishel

ORDER GRANTING UNITED STATES TRUSTEE'S MOTION TO APPOINT A CHAPTER 11 TRUSTEE

The above-entitled matter having come on for hearing before the undersigned on the Motion of the United States Trustee seeking an expedited hearing and seeking an order directing the United States Trustee to appoint a Chapter 11 trustee pursuant to 11 U.S.C. § 1104(a). Michael E. Ridgway appearing on behalf of the United States Trustee. Other appearances were noted in the record.

Based upon the motion of the United States Trustee, the arguments of counsel and all of the files, records and proceedings herein, it is hereby **ORDERED**:

1. Cause exists for hearing this matter on an expedited basis;

2. Cause exists for the appointment of a Chapter 11 trustee under 11 U.S.C. § 1104(a)(1);

3. The appointment of a Chapter 11 trustee is in the interests of creditors and the estates under 11 U.S.C. § 1104(a)(2); and

4. The United States Trustee is hereby ordered to appoint a Chapter 11 trustee, with all of the rights, powers and duties authorized under 11 U.S.C. §§ 1104 and 1106.

DATED: December ___, 2008

_____
HONORABLE GREGORY F. KISHEL
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:	**Jointly Administered under Case No. 08-45257**
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Palm Beach Finance Holdings, Inc.)	**08-45392 (GFK)**
	Chapter 11 Cases
	Judge Gregory F. Kishel

UNSWORN CERTIFICATE OF SERVICE

I, Audrey Williams, declare under penalty of perjury that on December 2, 2008, I served copies of the U.S. Trustee's Notice of Expedited Hearing and Motion to Chapter 11 Trustee, Memorandum in Support thereof, and proposed Order electronically by Notice of Electronic Filing, and upon all parties who have requested service in these cases by filing the same via ECF with the Bankruptcy Court in the District of Minnesota, and upon the following by first class mail postage pre-paid:

James A. Lodoen
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Taunton Ventures LP
c/o Paul Taunton
990 Deerbrook Drive
Chanhassen, MN 55317

Executed on: December 2, 2008

/e/Audrey Williams
Audrey Williams
Office of the United States Trustee