IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Plaintiff, v. THOMAS J. PETTERS, ET AL, Defendant.	Case No.: 08-5348 (ADM/JSM) Hon. Ann D. Montgomery **JOINT MEMORANDUM OF LAW OF RECEIVER DOUGLAS A. KELLEY AND PLAINTIFF UNITED STATES IN OPPOSITION TO ACORN CAPITAL GROUP'S EXPEDITED MOTION TO INTERVENE**

Douglas A. Kelley ("Receiver" or "Kelley") and the United States ("Plaintiff"), respectfully submit this joint memorandum of law in opposition to Acorn Capital Group, LLC's ("Acorn") expedited motion to intervene in this action.

PRELIMINARY STATEMENT

On August 24, 2008, Acorn filed a complaint in the U.S District Court, Southern District of New York against Thomas Petters ("Petters") for two counts of breach of contract. *Acorn Capital Group, LLC v. Thomas J. Petters*, File No. 08-cv-7236 (S.D.N.Y.; filed Aug. 14, 2008) ("New York Litigation"). (Complaint, Smalley-Fleming Decl., Ex. 1.)[1] The complaint alleges that on November 1, 2004, Acorn entered into a credit agreement with PAC Funding, LLC, which was amended on May 12, 2008, whereby Acorn agreed to loan up to $300 million to PAC Funding to purchase electronic equipment ("Credit Agreement"). Under the Credit Agreement, Acorn purportedly made a series of loans to PAC Funding totaling more than $273 million. (Ex. 1, ¶ 1.) Acorn

[1] Reference to the "Smalley-Fleming Decl." shall refer to the declaration of Sandra S. Smalley-Fleming, and attached exhibits, submitted herewith.

alleges that Petters executed a guarantee agreement, whereby he guaranteed up to $50 million of the loans ("Petters Guaranty"). (*Id.* at ¶ 1.) Acorn further alleges that through the Credit Agreement and the Guaranty, Petters misrepresented that PAC Funding's collateral for the Credit Agreement included more than $289,000 in accounts receivable, and that Petters has since admitted that the collateral is valued at much less than $289,000, and further that some of the collateral is inventory, not accounts receivable. (Complaint, Ex. 1 at ¶¶ 30-32.) Acorn seeks monetary damages of $50 million plus fees and costs in the New York Litigation. (*Id.* at p. 11.) Polaroid Corporation and Polaroid Consumer Electronics (collectively "Polaroid") were not named as defendants in the New York Litigation, nor were they referenced in the complaint.

The Receiver filed a Notice of this Court's Amended Preliminary Injunction and Stay Order ("Stay Order") in the New York Litigation. Acorn was given until November 24, 2008 to respond to the Notice of Stay Order. Since that time, Acorn has requested an additional 60 days to evaluate its course of action, and to respond to the Notice of Stay Order.

Acorn filed the present motion to intervene on Wednesday, November 26, 2008, just nine (9) days before the hearing. Like it alleged in the New York Litigation, Acorn alleges that under the Credit Agreement, it agreed to loan $300 million to PAC Funding. Acorn further alleges that at least $25 million was loaned by PAC Funding to Polaroid. Acorn claims that Polaroid executed a security agreement which secures payment of all amounts advanced by Acorn to PAC Funding, which currently exceeds $276 million. Acorn does not provide a copy of any agreements between Acorn and Polaroid, any

evidence that monies it provided to PAC Funding were received by Polaroid, and provides no evidence that Acorn is a secured creditor of Polaroid, or to demonstrate the existence and validity of the claimed lien.[2] Moreover, Acorn provides no justification for the need for an emergency hearing. Instead, Acorn summarily concludes that if it is not permitted to intervene in this matter for the purpose of lifting the stay, "Acorn stands to suffer substantial economic and financial injury, because it will be unable to realize on or protect its interest in its collateral, which consists of Polaroid's inventory, accounts receivable, [various] trademarks, and all proceeds (including cash proceeds) thereof." (Acorn's Memorandum in Support of Expedited Motion to Intervene ("Acorn Memo"), pp. 7-8.) Acorn cannot distinguish itself from the countless other creditors, secured and unsecured, across the country that are also impacted by the Stay Order.

Acorn asserts that it is entitled to intervene in this action under Federal Rule of Civil Procedure 24(a) as a matter of right, and alternatively under Rule 24(b) by permission of the Court. It seeks to intervene to clarify, modify and/or lift the Court's Amended Preliminary Injunction and Stay Order ("Stay Order"), to allow Acorn to immediately notify account debtors to make payments of amounts owed to Polaroid directly to Acorn. Acorn does not have a recognized interest in the subject matter of this litigation, nor can it demonstrate that any such interest may be impaired by the disposition of this case. Further, Acorn's interest in this litigation, if any, is an economic interest, which the Eighth Circuit has held does not justify intervention as a matter of right. Acorn's assertion that its economic interest is a property interest protected by the

[2] The Receiver has received some documents relating to the Credit Agreement from Acorn, which are the subject of an ongoing investigation. Even without concerns regarding the lien, its existence would not provide grounds for the argument that this Court's injunction and civil stay would violate Acorn's Fifth Amendment rights.

Fifth Amendment is of no consequence. Moreover, because the remedy Acorn seeks will frustrate the fundamental purpose of an equity receivership, and will cause undue delay in this litigation, the Court should deny Acorn's request for permissive intervention.

Finally, even if the Court permits Acorn to intervene in this action, Acorn cannot demonstrate that it is entitled to a modification and/or lift of the Stay Order permitting Acorn to proceed against Polaroid and/or to direct Polaroid's account debtors to make payments to Acorn. Indeed, because the Receiver was appointed less than two (2) months ago, Acorn's motion is premature. The Receiver should be given sufficient time to assume control over the estate, organize and analyze the entities under his control, and to resolve the factual and legal issues which must be resolved to determine ownership of the receivership assets. The receivership assets include those assets owned by entities that are not named defendants in this matter, but who are "affiliates, subsidiaries, divisions, successors, or assigns owned 100% or controlled by [the named defendants]," including Polaroid, which is owned 100% by Polaroid Holding Company, which is owned 100% by Petters Group Worldwide, LLC. (Stay Order, at p. 3.) Acorn's motion to intervene and to lift the stay should be denied in its entirety.

BACKGROUND

On October 6, 2008, the Court placed defendants Petters Company, Inc. ("PCI"), Petters Group Worldwide ("PGW"), and various affiliated entities into receivership and appointed Kelley to serve as their Receiver. By Order dated October 14, 2008, the Court amended its preliminary injunction and appointed Douglas Kelley as Receiver for the individual defendants Thomas Petters, Deanna Coleman, Robert White, James

Wehmhoff, Larry Reynolds and Michael Catain.[3] On October 22, 2008, the Court heard Kelley's motion to amend preliminary injunction and stay civil litigation. The Court granted the motion and stayed all pending and future civil litigation against the named defendants and their affiliated entities. Under these Orders, Kelley was granted "the full power of an equity Receiver," directed to take possession and control of the operations and assets of the receivership entities, and charged with performing all acts necessary or advisable to preserve the value of the assets of the receivership estate for the benefit of the defendants' creditors. Acorn now seeks to intervene for the sole purpose of lifting the Stay Order to permit Acorn to proceed in the Texas Litigation against Polaroid.

ARGUMENT

The receivership in this litigation was established pursuant to 18 U.S.C. § 1345 and Fed. R. Civ. P. 65. Section 1345 authorizes broad injunctive relief to protect those affected by ongoing mail fraud, wire fraud or banking fraud schemes. Besides enjoining receivership defendants, § 1345(b) empowers district courts to "take such other action as is warranted to prevent a continuing or substantial injury to the United States or any other person . . . for whose protection [an anti-fraud] action is brought." 18 U.S.C. § 1345 (b). Victim restitution is a primary focus of §1345. *United States v. Payment Processing Ctr., LLC*, 439 F.Supp.2d 435, 438 (E.D. Pa. 2006). To that end, receivership actions under §1345 are often brought to preserve the status quo and protect innocent people while

[3]On October 16, 2008, the Court appointed Gary Hansen receiver over defendant Frank Vennes and his related entities.

parallel criminal investigations proceed. *United States v. Payment Processing Ctr., LLC*, 435 F.Supp.2d 462, 464 (E.D. Pa. 2006) (citations omitted).

The fundamental purpose of an equity receivership is to protect property for ultimate return to the proper parties. The receiver's role is to safeguard assets, preserve their value, and help facilitate an equitable property distribution. *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006). Stays directed to nonparties may be entered where necessary to protect a federal receivership. *See SEC v. Wenke*, 622 F.2d 1363 (9th Cir. 1980); *SEC v. An-Car Oil Co.*, 604 F.2d 114, 117 (1st Cir. 1979); *Lankenau v. Coggeshall & Hicks*, 350 F.2d 61, 62 (2nd Cir. 1965); *see also Jordan v. Independent Energy Corp.*, 446 F. Supp. 516 (N.D. Tex. 1978).

Here, the receivership is the product of the Court's equity jurisdiction. Courts presiding over equity receiverships possess extremely broad power to supervise and protect receivership assets. *See*, e.g., *SEC v. Black*, 163 F.3d 188, 199 (3rd Cir. 1998) (noting that in dealing with receivers vested with equitable powers, a "district court has wide discretion as to how to proceed"); *FDIC v. Bernstein*, 786 F. Supp. 170, 177 (E.D.N.Y. 1992) ("one common thread keeps emerging out of cases involving equity receivership—that is, a district court has extremely broad discretion in supervising an equity receivership"). "The power of the district court to issue a stay, effective against all persons, of all proceedings against the receivership entities rests as much on its control over the property placed in receivership as on its jurisdiction over the parties." *SEC v. Wenke*, 622 F.2d 1469. The Court's power to enter a blanket stay is broader than its authority to grant or deny injunctive relief under Fed. R. Civ. P. 65. *Id.* at 1371; *see also*

SEC v. Universal Financial, 760 F.2d 1024, 1037 (9th Cir.1985) (recognizing that the traditional preliminary injunction test is not applied in ruling on motions to except applicants from a blanket receivership stay).

I. ACORN IS NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Federal Rule of Civil Procedure 24(a)(2) entitles a party to intervene as a matter of right if the party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect is interests, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Under Eighth Circuit law, a party may intervene as a matter of right if "(1) it has a recognized interest in the subject matter of the litigation; (2) the interest may be impaired by the disposition of the case; and (3) the interest will not be adequately protected by the existing parties." *Chiglo v. City of Preston*, 104 F.3d 185, 187 (8th Cir. 1997). Where the interest for the claimed right to intervene is not relevant to the main action, or if the movant's claim is separate from or independent of the main action, or if it promotes a different purpose in the lawsuit than that asserted in the original complaint, intervention should be denied. Finally, although not conclusive, "the opposition of all the original parties to the main action to intervention is an element for the Court's consideration." *Commonwealth Edison Co. v. Allis-Chalmers Mfg Co.*, 207 F. Supp. 252, 257 N.D. Ill. 1962).

A. Acorn Does Not Have A Cognizable Interest in the Subject Matter of The Litigation.

Under Rule 24(a)(2), an interest is cognizable only where it is "direct, substantial, and legally protectable." *United States v. Union Elec. Co.*, 64 F.3d 1152, 1171 (8th Cir. 1995). If a party seeking to intervene cannot demonstrate that it has an interest relating to the property or transaction which is the subject of the underlying suit, intervention is not proper. *See Medical Liability Mutal Ins. Co. v. Alan Curtis*, LLC, 485 F.2d 1006 (8th Cir. 2007) (holding interest to ensure that defendants in a parallel state case had sufficient resources to satisfy a potential judgment was too remote and indirect to qualify as a cognizable interest under Rule 24 (a)(2)); *Arkansas Power & Light Co. v. Arkansas Public Service Com'n*, 107 F.R.D. 335 (E.D. Ark. 1985) (holding parties do not have a right to intervene in litigation simply because it indirectly affects their financial position); *Morgan v. Sears, Roebuck and Co.*, 124 F.R.D. 231 (N.D. GA. 1988) (denying manufacturer's motion to intervene where action was brought against retailer to recover damages sustained when nightgown burned while being worn, where the issues were whether the plaintiff was wearing the gown and whether it was defective, and thus movant's argument that it had not manufactured the gown did not involve a common question of law or fact with the main action). The Eighth Circuit has made clear that "[a]n economic interest in the outcome of the litigation is not itself sufficient to warrant mandatory intervention." *Medical Liability Mutual Ins. Co.*, 485 F.2d at 1008 (citation omitted).

Here, although Acorn did not previously initiate a lawsuit against Polaroid, and has not provided the Court with any documentary evidence of its purported interest in

Polaroid's assets, Acorn claims it has a security interest in the inventory, accounts receivable, and trademarks of Polaroid, which "constitutes a property right, which is protected by the Fifth Amendment." (Acorn Memo, p. 8.) Acorn further asserts it is entitled to notify Polaroid's account debtors to make payments directly to Acorn; to take possession and liquidate Polaroid's inventory; and to foreclose, liquidate and realize the proceeds from the liquidation of Polaroid's trademarks. (*Id.* at p. 9.) Finally, Acorn alleges that it has a right to intervene in this matter, because it has "monetary and property interests as it relates to the Court's imposition" of the Stay Order. (Acorn Memo, p. 8.) Under Acorn's theory, every person that claims an interest in any asset owned by the named defendants and their "affiliates, subsidiaries, divisions, successors, or assigns owned 100% or controlled by [them]," can intervene in this action as a matter of right. Acorn provides no support for this expansive interpretation of Rule 24(a)(2). Moreover, Acorn's interest in seeking to collect on its purported security interest is not relevant to this litigation, involves claims that are separate and distinct from the allegations and claims in this litigation, and promotes a wholly different purpose. Acorn's asserted interest in this litigation does not satisfy the Eighth Circuit's test for intervention as a matter of right.

B. Acorn's Alleged Interest in the Subject Matter of the Litigation Will Not Be Impaired or Impeded if Intervention is Denied.

Even if Acorn had a cognizable interest in this litigation, which it does not, any such interest would not be impaired or impeded if this litigation proceeds without Acorn's intervention. Acorn has sought to protect its interest under the Credit Agreement in the New York Litigation. Rule 24 states that a prospective intervener must be "so

situated that the disposition of the action may as a practical matter impair or impede [his]...ability to protect that interest." Fed. R. Civ. P. 24(a)(2). Acorn does not meet this requirement.

Acorn asserts that if the Stay Order applies to Polaroid's assets, "Acorn will be unable to pursue its Article 9 rights." (Acorn Memo, p. 9.) Of course, Acorn has requested in the New York Litigation that the court enter an order requiring Petters to pay $50 million relating to the Credit Agreement. Although Acorn is barred from maintaining a suit against Polaroid at present, Acorn is not precluded from proceeding against Polaroid, and may seek any and all available relief, after this litigation is resolved. Moreover, under the Stay Order, the Receiver is charged with the responsibility of managing, administering, and conducting the operations of the ongoing legitimate business operations of the named defendants, including Polaroid, and with taking incidental steps to protect and preserve the assets of any of the entities. (Stay Order, p. 14.) The role of a receiver is to safeguard assets, preserve their value, and help facilitate an equitable property distribution.

Because Acorn does not have a cognizable interest in the subject matter of this litigation, and because any such alleged interest will not be impaired or impeded if it is prevented from intervening in this litigation, the Court should deny Acorn's motion to intervene as a matter of right.

II. ACORN IS NOT ENTITLED TO PERMISSIVE INTERVENTION.

Acorn asserts that it also qualifies for intervention under Rule 24(b). Rule 24(b) provides the Court with discretion to allow intervention to any person who "has a claim

or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In deciding whether to exercise discretion, the Court should consider whether intervention will "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Here, Acorn does not have a claim or defense involving a question of law or fact that is common to this litigation. Acorn does not assert otherwise. Instead, Acorn makes the conclusory allegation that intervention will not prejudice the parties or delay adjudication, and thus permissive intervention is justified. (Acorn Memo at p. 9.) Acorn does not meet the requirements of permissive intervention.

Permitting Acorn to intervene for the purpose of seeking a lift of the Stay Order as to Polaroid will unduly delay and prejudice the parties' rights in this litigation, as it will indefinitely lead to a flood of motions by similarly-situated persons across the country that are affected by the receivership stay, and who claim to have an interest in the assets of the Petters' related entities. The burden and expense of responding to these motions, and proceeding with the litigation if such motions are granted, would defeat the purpose of the Stay Order.

III. THE COURT PROPERLY INCLUDED POLAROID IN THE INJUNCTION AND STAY ORDER.

A. Polaroid is Appropriately Included in the Injunction.

The Court's first preliminary injunction, dated October 6, 2008, froze the assets of PGW, Petters Company, Inc. and any affiliates, subsidiaries, divisions, successors or assigns owned 100% or controlled by Petters Company, Inc. or PGW, including the assets of Polaroid Corporation, which is owned 100% by Polaroid Holding Company,

which is owed 100% by PGW. On October 14, 2008 the Court issued an amended preliminary injunction, which froze the assets of the individual defendants. On October 22, 2008, the Court entered the Stay Order, which identified both the October 6, 2008 and October 12, 2008 Orders, and expressly states that "the October 14, 2008 Order of Entry of Preliminary Injunction, Appointment of Receiver, and Other Equitable Relief...is hereby amended." (October 22, 2008 Order).

Acorn asserts that because the Government's documentation in support of the request for the Receiver does not assert that Polaroid was a party to the fraud or the alienation or disposition of property by violating banking laws, that the injunction should not apply to Polaroid. Acorn provides no case law or other support for this assertion, and ignores the broad injunctive power provided by 18 U.S.C. § 1345. Besides enjoining receivership defendants, § 1345(b) empowers district courts to take any such action that "is warranted to prevent a continuing or substantial injury to the United States or any other person . . . for whose protection the action is sought." 18 U.S.C. § 13245(b). Victim restitution is a primary focus of §1345. *United States v. Payment Processing Ctr., LLC*, 439 F.Supp.2d 435, 438 (E.D. Pa. 2006). Here, the assets of affiliates and subsidiaries that are owned 100% or controlled by the named defendants, including Polaroid are subject to the injunction and litigation stay while the government proceeds with the criminal matter and deals with the question of restitution of any victims of the vast fraud scheme at issue in this litigation.

B. Acorn's Request To Lift The Stay is Premature.

The Court should deny Acorn's motion to amend and/or lift the Stay Order to permit Acorn to "enforce its Article 9" rights against Polaroid. A stay order helps to insure that all creditors of the receivership estate are treated alike. By preserving the status quo, a blanket stay will avoid preferential treatment of some creditors of the receivership defendants to the detriment of others. *See SEC v. Universal Financial*, 760 F.2d 1034, 1038 (9th Cir. 1985) (refusing to lift receivership stay where the stay was necessary to maintain the status quo, and because a lift of the stay would result in excessive litigation costs related to a multiplicity of actions in different forums, thereby diminishing the size of the receivership estate); and *SEC v. Pittsford Capital Income Partners, LLC*, No. 06-civ-6353, 2007 WL 61096, at *2 (W.D.N.Y. Jan. 5, 2007) (rejecting judgment creditors' motion to lift stay to enforce judgment so as to receive full compensation rather than pro rata recovery available to hundreds of other fraud victims). As discussed above, the power of the Court to supervise and protect receivership assets is extremely broad, and is controlled by 18 U.S.C. §1345. The Court did not make a mistake in including Polaroid in the Stay Order, and there is nothing "inequitable" about continuing to apply the Stay Order at this time.

To determine whether to lift a stay of litigation, a district court should consider: "(1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim." *SEC v. Wenke*, 742 F.2d 1230 (9th Cir.

1984); *see also U.S.A. v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 443 (3rd Cir. 2005). A district court should give substantial weight to the receiver's need to proceed unhindered by litigation, and the risk that litigation expenses will diminish the receivership assets. *Acorn*, 429 F.3d at 443. The Court should also consider how early in the receivership a party seeks to lift the stay: "very early in a receivership even the most meritorious claims might fail to justify lifting a stay given the possible disruption of the receiver's duties." *Id.* (refusing to lift stay where receivership had been in effect for just 30-36 months); *Wenke*, 622 F.2d at 1374 (refusing to lift stay where receivership had been in effect for just two years); *SEC v. Universal Financial*, 760 F.2d 1034, 1039 (9th Cir. 1985) (denying lift of four-year old stay where new facts continued to come to light); compare *SEC v. Wenke*, 742 F.2d 1230 (9th Cir. 1984) (holding district court abused its discretion by refusing to lift the stay seven (7) years after creation of the receivership, where no new facts had come to light for six (6) years, and where the receiver was ready to distribute the assets).

Here, refusing to lift the stay as to Polaroid will preserve the status quo, and will not cause substantial injury to Acorn. *See e.g., SEC v. Pittsford Capital Income Partners, LLC*, No. 06-Civ-6353, 2007 WL 61096, at *1 (W. D. N.Y. Jan. 5, 2007). Because the receivership is in its infancy, Acorn's motion is premature. The Court should deny Acorn's motion to amend and/or lift the stay of litigation as to Polaroid, which will not prevent Acorn from having its day in court, will not cause irreparable harm to Acorn, and will promote the goals of the receivership.

C. Acorn's Assertion of a Constitutionally Protected Property Interest is of No Effect.

Acorn asserts that the Stay Order violates its Fifth Amendment rights, because it deprives Acorn of its "constitutionally protected property rights with no means of protecting its interests." The Stay Order delays Acorn's ability to possess or control its alleged property, but it does not deprive Acorn of any just lien it may have against that property. As such, the temporary stay provided by the Stay Order is not a deprivation of Acorn's property rights.

The Fifth Amendment protects property rights in two ways. It provides that no person shall be "deprived of ... property, without due process of law," and it provides that private property shall not "be taken for public use, without just compensation." U.S.C.A. Const. Amend. V. Due process requires that an individual be given sufficient notice and an opportunity to be heard before being deprived of a property interest. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). What notice is suitable, and what opportunity to be heard is adequate, depends on the circumstances of the particular case. *Id.* To the extent a party has a claim against a receiver or the entities in receivership, due process demands that the claimant be heard, but the district court has significant control over the time and manner of the proceedings. *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 552 (6th Cir. 2006).

Due compensation requires that an individual be compensated for a governmental "taking," however, not all injuries to property caused by a governmental action are constitutional takings that require due compensation. *In re Peaches Records And Tapes, Inc.*, 51 B.R. 583, 588 (Bank. 9th Cir. 1985) (*citing Armstrong v. United States*, 364 U.S. 40, 48, 80 S. Ct. 1563, 168 (1960).) A significant distinction has traditionally been made between government action that deprives a property owner of his entire interest and a regulation that "affect[s] some but not all of the 'bundle of rights' which constitute the 'property' in question." *In re Peaches Records And*

Tapes, Inc., 51 B.R. at 588 (*citing United States v. Security Industrial Bank*, 459 U.S. 70, 76 (1982).

Here, Acorn asserts that if it is not permitted to take immediate possession of its property, its Fifth Amendment Rights will be violated. But Acorn provides no support for its theory that the appointment of a receiver or the imposition of a stay order deprives a secured creditor of due process or is a taking without compensation. The case law cited by Acorn in support of this argument is inapposite, as such cases merely stand for the general proposition that a secured creditor's right in its collateral is protected under the Fifth Amendment, and that the bankruptcy laws are subject to the protections of the Fifth Amendment. Indeed, under *In re Briggs Transp. Co*, 780 F.2d 1339 (8th Cir. 1985), cited by Acorn, the court held that the temporary stay provided by the bankruptcy laws is not a taking of a secured creditors' substantive rights in property. *Id.* at 1342. "In a constitutional sense, this temporary suspension of lien enforcement breaches no essential property interest of the creditor and is not an unlawful taking under the Fifth Amendment." *Id.*

Being deprived of the right of immediate possession of property does not violate a person's Fifth Amendment rights. In *Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, VA*, 300 U.S. 440, 457, (1937), the United States Supreme Court held that a bankruptcy law that prevented a secured creditor from retaining possession of property did not deny them due process guaranteed by the Fifth Amendment. The court held that although the law prevented the mortgagee from retaining possession of the property, it did not dissolve its lien. *Id.* at 559-560. The court explained that the creditor's interests are protected because the possession is at all times subject to the supervision and control of the court. *Id.* at 466-67 and 564.

Even outside the bankruptcy context, district courts have broad equitable power to appoint a receiver over assets in dispute, and to issue blanket injunctions that temporarily deprive

a secured creditor of control over its assets. *Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006); *see also SEC v. Wencke*, 622 F.2d 1363, 1369-71 (9th Cir. 1980) (holding federal courts have inherent equitable authority to issue a variety of 'ancillary relief' measures to enforce federal law including imposing a receivership or issuing a stay). This authority to issue a stay does not depend on a statutory grant, but rather "derives from the inherent power of a court of equity to fashion effective relief." *Wencke*, 622 F.3d at 1369.

Appointment of a receiver and imposition of a stay does not deprive parties or non-parties of due process if they receive adequate notice and an opportunity to be heard. See *SEC v. TLC Investments and Trade Co.*, 147 F. Supp. 2d 1031, 1034 (C.D. Cal. 2001) (holding summary proceedings that included adequate notice and an opportunity to be heard satisfied due process, and explaining that the primary purpose of equity receiverships is to promote the orderly and efficient administration of the estate by the court for the benefit of creditors); *SEC v. American Capital Investments, Inc.*, 98 F.3d 1133, 146-47 (9th Cir. 1996) (overruled on other grounds) (holding that in action brought by SEC, sale by receiver of property did not deprive non-party investors of due process as long as they were provided adequate notice and an opportunity to be heard.); *Commodity Futures Trading Commission v. Topworth International, Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 1999) (holding that in action brought by the Commodities Futures Trading Commission, due process rights of non-party investor who disapproved of the receiver's distribution plan were not violated as long as the investor received adequate notice and an opportunity to be heard.); *Foxfire Enterprises, Inc. v. Enterprise Holding Corp.*, 837 F.2d 597, 598 (2nd Cir. 1988) (holding ex-parte appointment of a receiver in a mortgage foreclosure proceeding to collect rents did not deprive defendant of property without due process of law, where defendant received other protections under New York law and received an opportunity to present his arguments in court); *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9th

Cir. 1984) (holding that after the United States obtained a monetary judgment against defendant, and where receiver was appointed to oversee collection and redistribution of the debt, the appointment of the receiver was not a denial of a creditor's right to due process because creditor received ample notice and an opportunity to contest the Receiver's actions).

The Stay Order delays Acorn's ability to possess or control its alleged property, but it does not deprive Acorn of any just lien it may have against that property. As such, the temporary stay provided by the Stay Order is not a deprivation of Acorn's property rights. The receivership is in its infancy, and at the appropriate time, the Court can permit Acorn and similarly-situated creditors with an opportunity to be heard. In the meantime, the Receiver should be given sufficient time to assume control over the estate, organize and analyze the entities under his control, and to resolve the factual and legal issues which must be resolved to determine ownership of the receivership assets. During this time, the Stay Order maintains the status quo.

CONCLUSION

Based on the foregoing, the Receiver and Plaintiff respectfully request that the Court deny Acorn's motion to intervene and further deny Acorn's motion to modify and/or lift the Stay Order as to Polaroid.

DATED: December 3, 2008

LINDQUIST & VENNUM P.L.L.P.

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