

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

Court File 08-45257 (Joint Admin.)

In re:

Petters Company, Inc., et al.,

Debtors.

Chapter 11 Cases
Judge Gregory F. Kishel

**NOTICE OF HEARING AND EXPEDITED MOTION FOR DISCOVERY IN ADVANCE
OF HEARING ON OBJECTION TO APPOINTMENT OF DOUGLAS A. KELLEY AS
TRUSTEE FOR ALL DEBTORS AND/OR POSTPONEMENT OF THE HEARING
UNTIL DISCOVERY IS COMPLETED**

1. Ritchie Special Credit Investments, Ltd., Rhone Holdings II, Ltd., Yorkville Investment I, L.L.C., Ritchie Capital Structure Arbitrage Trading, Ltd., and Ritchie Capital Management, L.L.C. (together “**Ritchie**”), by and through his undersigned attorneys moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 2:00 o'clock p.m. on January 22, 2009, before the Honorable Gregory F. Kishel, in Courtroom 2A, U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota 55101, or as soon thereafter as counsel can be heard.

3. As this Motion is served on an expedited basis, any response to this Motion must be filed and delivered prior to the time of the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. The Court has jurisdiction over this motion pursuant to 28 U.S.C. §§157 and 1334, Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing the Petters Company, Inc. case was filed on October 11, 2008. This case is now pending in this Court.

5. This motion arises under 11 U.S.C. §§157 and 1334 and Fed. R. Bankr. P. 5005. This motion is filed under Fed. R. Bankr. P. 9014 and Local Rules 1070-1. Ritchie seeks expedited relief in order to allow discovery in advance of this Court's hearing on the objection to the appointment of Douglas A. Kelley ("Kelley") as trustee for all Debtors and/or the postponement of the hearing until discovery is completed.

6. On December 24, 2008, the United States Trustee appointed Kelley trustee for all of the debtors in these cases. This Court had earlier set a deadline of January 7, 2009 for filing oppositions to the trustee appointed by the United States Trustee, and a hearing date of January 27, 2009 for any oppositions so filed. On January 7, 2009, Ritchie filed its Objection to the appointment of Kelley as Trustee.

7. On January 9, 2009, Ritchie served document requests, interrogatories and a deposition notice on Jim Lodoen of Lindquist & Vennum, P.L.L.P., counsel for Kelley herein, by email and regular mail. True and correct copies of the discovery requests and correspondence accompanying same are attached hereto as Exhibit A.

8. In view of the impending January 27, 2009 hearing, Ritchie requested that Kelley agree as soon as possible to an expedited schedule under which responses to the document requests and interrogatories would be due by January 21, 2009, and the deposition held on January 23, 2009.

9. On the morning of January 16, 2009, counsel for Ritchie, James Jorissen, left a voice mail message for Mr. Lodoen in which he requested information as to whether Kelley intended to comply with Ritchie's discovery requests within the time frame Ritchie had requested. Later that day, Mr. Jorissen received a return call from Sandra Smalley-Fleming, Mr. Lodoen's partner.

10. During the January 16, 2009 call, Ms. Smalley-Fleming informed Mr. Jorissen that Mr. Lodoen had responded to Mr. Jorissen's email, but that the email had not gone through and, for some reason, had not been returned to Mr. Lodoen's email box as having been rejected. Mr. Lodoen had misspelled Mr. Jorissen's last name when he sent the email. Ms. Smalley-Fleming later forwarded the email to Mr. Jorissen. A true and correct copy of Ms. Smalley-Fleming's January 16, 2009 email attaching Mr. Lodoen's failed January 13, 2009 email is attached hereto as Exhibit B.

11. During the same call, Ms. Smalley-Fleming informed Mr. Jorissen that Kelley did not intend to respond to Ritchie's discovery requests within the shortened notice period or otherwise for a number of reasons, including Kelley's view that he is not obliged to participate in discovery in these proceedings by virtue of the Order entered by Judge Montgomery in the pending receivership action in U.S. District Court.

12. Mr. Jorissen asked Ms. Smalley-Fleming to send written confirmation of Kelley's positions related to Ritchie's discovery requests. Attached hereto as Exhibit C is a true and correct copy of a January 16, 2009 letter from Ms. Smalley-Fleming to Mr. Jorissen in response to his request.

13. Expedited relief is required as, before the hearing on his appointment, serious questions must be investigated regarding several present and potential conflicts of interest arising from Kelley's current position as court-appointed receiver for the Debtors, his potential service as trustee for all Debtors, and his prior relationships and contacts with the Debtors and their owner, Thomas J. Petters. The items of discovery seek information which is important to the Court's determination of whether Kelley should serve as Trustee.

14. An expedited hearing on the relief requested by Ritchie herein is required because in the absence of an expedited hearing and expedited relief, Ritchie will be deprived of any opportunity to conduct discovery into the existing and potential conflicts of interest identified above.

WHEREFORE, Ritchie respectfully requests that the Court issue an Order granting Ritchie's request for expedited relief, approving expedited discovery that concludes prior to the January 27, 2009 hearing, or, in the alternative, moving the hearing to a date after discovery concludes, and for other and further relief as is just and necessary.

**LEONARD, O'BRIEN
SPENCER, GALE & SAYRE, LTD.**

/e/ James M. Jorissen

Dated: January 20, 2009

By _____
James M. Jorissen, #262833
100 South Fifth Street, Suite 2500
Minneapolis, Minnesota 55402-1234
(612) 332-1030

Bryan Krakauer
Thomas K. Cauley, Jr.
Brian A. McAleenan
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, Illinois 60603
(312) 853-7000

ATTORNEYS FOR RITCHIE CAPITAL
MANAGEMENT, LLC, RITCHIE SPECIAL
CREDIT INVESTMENTS, LTD., RHONE
HOLDINGS II, LTD., YORKVILLE
INVESTMENT I, LLC, RITCHIE CAPITAL
STRUCTURE ARBITRAGE TRADINGS, LTD.
AND RITCHIE CAPITAL MANAGEMENT, LTD.

VERIFICATION

I, James M. Jorissen, one of the attorneys for the moving party named in the foregoing Notice of Hearing and Motion, declare under penalty of perjury that I have personal knowledge of the factual averments set forth in the above Motion and that the foregoing is true and correct according to the best of my knowledge, information and belief.

**LEONARD, O'BRIEN
SPENCER, GALE & SAYRE, LTD.**

/e/ James M. Jorissen

Dated: January 20, 2009

By _____
James M. Jorissen, #262833
100 South Fifth Street, Suite 2500
Minneapolis, Minnesota 55402-1234
(612) 332-1030

394514

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Court File No. 08-45257 (Joint Admin.)

Petters Company, Inc., et al.,

Debtors.

Chapter 11 Case
Bankruptcy Judge Gregory F. Kishel

**MEMORANDUM IN SUPPORT OF
MOTION FOR EXPEDITED DISCOVERY IN ADVANCE OF HEARING ON
OBJECTION TO APPOINTMENT OF DOUGLAS A. KELLEY AS TRUSTEE
FOR ALL DEBTORS AND/OR POSTPONEMENT OF THE HEARING UNTIL
DISCOVERY IS COMPLETED**

Ritchie Special Credit Investments, Ltd., Rhone Holdings II, Ltd., Yorkville Investment I, L.L.C., Ritchie Capital Structure Arbitrage Trading, Ltd., and Ritchie Capital Management, Ltd. (together, "Ritchie") respectfully request that the Court order Trustee-designate Douglas A. Kelley ("Kelley") to submit to expedited discovery regarding his fitness to serve as Trustee prior to the January 27, 2008 hearing before this Court regarding confirmation of Kelley's appointment of Trustee, or, alternatively, to postpone the hearing on Kelley's appointment as Trustee until such discovery, either on an expedited basis or in the ordinary course, is completed.

Conducting discovery into Kelley's fitness as to serve as Trustee for all Debtors before the hearing on his appointment is necessary. Serious questions have been raised regarding several present and potential conflicts of interest arising from Kelley's current position as court-appointed Receiver for the Debtors, his potential service as Trustee for

all Debtors (and thus including Debtors with disputed claims against each other) and his prior relationships and contacts with the Debtors and their owner, Thomas J. Petters (“Petters”), who is now under indictment for orchestrating a massive Ponzi-scheme. Kelly simply cannot serve as Trustee in these proceedings and at the same time assert that all or some of his likely conflicting activities as Receiver should remain hidden from creditors of the Debtors and not subject to review. The Court must consider such facts to determine whether Kelley is truly “disinterested” and free of disabling conflicts, and thus suitable for service as a Trustee in these bankruptcy cases.

As set forth in Ritchie’s Opposition, the conflicts stemming from Kelley’s position as Receiver and as Trustee for Debtors with directly opposing interests, arising from the differing fiduciary duties and legal obligations inherent in those positions, alone preclude Kelley from properly serving as Trustee. But there is more. Kelley’s Verified Statement in support of his appointment, and other publicly-available filings and statements made by Kelley, suggest additional conflicts exist – such as substantial contact with the United States Attorney’s office regarding protection of “victims” of the Petters fraud and his representation of the Petters-related entities prior to his appointment as Receiver – the details of which must be flushed out in discovery. Furthermore, only discovery will reveal the full extent of Kelly’s activities to date as Receiver and the extent to which such activities create additional direct, apparent, or potential conflicts and adversity to the role he continues to seek as a Trustee fiduciary in these bankruptcy cases. Discovery alone, for example, could reveal actions or formed positions Kelly has already undertaken that favor one group of creditors over another.

Ritchie is entitled to such discovery in this contested matter pursuant to Bankruptcy Rule 9014(c), and expediting such discovery is necessary for the Court timely to determine of the issues regarding Kelley's fitness as Trustee. Further, given the short four-month time period of Kelly's apparent affiliation with Petters' entities that is relevant for discovery purposes, the burden is minimal. It is important to the efficiency and fairness of these bankruptcy proceedings that such discovery be had promptly and the hearing on Kelly's fitness to serve as Trustee be heard as quickly as possible to minimize the potential for harm flowing from Kelley's conflicts of interest.

BACKGROUND

On December 24, 2008, the United States Trustee appointed Douglas A. Kelley Trustee for all Debtors in these proceedings, and sought this Court's approval of that appointment. The Court set a deadline of January 7, 2009 for filing Oppositions to Kelley's appointment, and set a hearing date of January 27, 2009. In its Opposition filed on January 7, 2009, Ritchie explained, among other things, that Kelley could not properly serve as Trustee for all Debtors due to clear, immutable conflicts of interest. For example, in his position as Receiver, Kelley acts solely as agent of the District Court and is obligated to work with the government to ensure the assets of all the entities are available for forfeiture or restitution to benefit all victims of Petters's fraud. Those obligations conflict with the fiduciary duties of a Trustee, who must serve the interests of *all* creditors (not just victims). Moreover, separate Trustees are required for Petters Group Worldwide, L.L.C. ("PGW") and Petters Company, Inc. ("PCI"). PGW and PCI have separate and distinct creditor constituencies and, consequently, conflicting interests.

For instance, creditors of PCI, which has little or no assets, will seek access to the assets of PGW to satisfy their claims, which plainly would harm PGW's creditors.¹ The same person cannot both advance that claim on behalf of PCI and oppose the claim on behalf of PGW.

On January 9, 2009, Ritchie served document requests, interrogatories and a deposition notice on attorneys for Kelley. (*See* Exhibit A) In light of the impending January 27, 2009 hearing, Ritchie requested that Kelley agree to an expedited schedule, under which responses to the document requests and interrogatories would be due by January 21, 2009, and the deposition held on January 23, 2009.

Ritchie received no response from Kelley until January 16, 2009, after Ritchie's counsel placed a follow-up phone call to Kelley's counsel.² Kelley's counsel told Ritchie's counsel that Kelley would not agree to the expedited schedule for several reasons, including: (1) the stay imposed by the Receivership Order³ prevents any discovery against Kelley. Counsel for Kelley confirmed these positions in writing following the conversation (*see* Exhibits B and C), again emphasizing the view that the Receivership Order "precludes the discovery you seek of Douglas Kelley to the extent it is beyond the publicly available information Mr. Kelley has submitted as to his activities

¹ Ritchie notes that, in addition to being a creditor of PGW, it is also a victim of Petters's fraud entitled to share in any sums collected by the Receiver for the benefit of victims.

² Counsel for Kelley stated that they had attempted to send an e-mail response to Ritchie's counsel on January 13, 2009, but that e-mail did not reach Ritchie's counsel due to a typo in the e-mail address and, apparently, Kelley's counsel received no indication of the problem.

³ *See Second Amended Order for Entry of Preliminary Injunction, Appointment of Receiver, and Other Equitable Relief*, dated December 8, 2008 and entered as Docket Entry No. 127 in *United State of America v. Thomas J. Petters, et al.*, Case No. Civ. 08-5348 (ADM/JSM) (the "Receivership Order").

as Receiver”; (2) that this is not a contested proceeding because this Court did not expressly state that it would hear evidence at the January 27, 2009 hearing; and (3) Kelley’s actions as Receiver are fully laid out in the publicly-available Receivership Report (*id.*).⁴ Its request for expedited discovery rebuffed, Ritchie seeks the aid of the Court with the instant motion.

ARGUMENT

Ritchie is entitled to discovery in this proceeding pursuant to Bankruptcy Rule 9014(c). Courts in this Circuit grant expedited discovery for “good cause.” Good cause is shown where the need for the requested discovery “in the administration of justice [outweighs any] prejudice to the responding party, and considering the entirety of the record to date and the reasonableness of the request in light of all of the surrounding circumstances.” *Wachovia Securities, L.L.C. v. Stanton*, 571 F. Supp. 2d 1014, 1050 (N.D. Iowa 2008) (citing *Monsanto Co. v. Woods*, 250 F.R.D. 411, 413 (E.D. Mo. 2008)).

There is Good cause for the expedited discovery Ritchie seeks. The hearing on Kelley’s appointment as Trustee is set for January 27, 2009. Accordingly, Ritchie will not have the requested information absent an order of expedited discovery.

⁴ Moreover, in the letter, counsel for Kelley stated that “we will not be responding on an expedited basis *or otherwise* to your discovery.” (Exhibit C (emphasis added).) The discovery requests, however, concern Kelley’s actions not only with regard to his role as Receiver, but also in his personal capacity and in his role as Trustee. Thus, the letter reflects a view that the Receivership Order takes precedence over, and thus interferes with, the bankruptcy scheme and the powers of this Court over Kelley in his role as Trustee.

And the requested information is important to the Court's determination of whether Kelley should serve as Trustee. The law demands that a Trustee be free from all conflicts of interest, and even prohibits service where a mere appearance of a conflict exists. *See, e.g., In re AFI Holding Co., Inc.*, 530 F.3d 832, 850 (9th Cir. 2008); *see also id.* at 845 (noting the importance of specific record facts when analyzing Trustee qualifications). Accordingly, close scrutiny of all relevant facts is warranted. Indeed, it is astonishing for Kelly to argue, as he has, that he can serve as Trustee in these proceedings while shielding his actions from discovery, even where his actions as Receiver conflict with the interests of these Debtors' estates.

In resisting the requested discovery, Kelley has asserted that the Court envisioned consideration of the conflicts on the present record only. Ritchie agrees that Kelley has several disabling conflicts of interest that can be determined purely as a "legal" matter, such as the conflicts inherent in the multiple roles of Receiver and Trustee, and as Trustee for Debtors with different creditor constituencies with conflicting interests. However, this is not the full story, and proceeding on that basis alone ignores other probable sources of conflict.

One such conflict, for example, is that Kelley's law firm, Kelley & Wolter, represented PGW and PCI prior to Kelley's appointment as Receiver, and such representation included the grant of an irrevocable proxy concerning Petters's ownership interests in PGW and PCI to Mr. Kelley's law partner, Steven E. Wolter. Kelley disclosed this representation and the irrevocable proxy in the Verified Statement he submitted in support of his appointment as Trustee, but he provided none of the crucial

details, such as how the representation of PCI and PGW came about, what compensation or other consideration was received or precisely what powers and benefits are afforded to Mr. Wolter under the irrevocable proxy. These issues bear significantly upon Kelley's fitness to serve as Trustee. More broadly, and even more fundamentally, Kelly has not disclosed the full range of his activities as Receiver, and this further indicates the extent to which those activities on behalf of victims of the Petters's fraud put him at cross purposes with other bankruptcy estate interests.

Even as to the largely "legal" conflicts, such as the conflict between Kelley's roles as Receiver and Trustee, discovery could highlight the extent, severity and immediacy of the conflicts by uncovering specific instances in which Kelley's conflicts of interest have impacted his decisions. For instance, Kelley's duties as Trustee include determining the value of both the assets of, and claims against, PGW and PCI, and his duties as Receiver include analyzing, along with the United States government, the merits of a veil-piercing or forfeiture action against PGW. Those activities, even if in their early stages, would reveal not only that Kelley is expending considerable effort working against the interests of PGW creditors in helping to bring claims against PGW, but could also indicate the severity of the harm PGW creditors will suffer if a such a claim against PGW proves successful. Such facts would thus underscore the importance of having a non-conflicted Trustee oppose all efforts to claim the assets of PGW for victims of the fraud who are not also contract creditors of PGW.

Ritchie drafted its discovery requests to encompass the issues discussed above and other potential areas of conflict. However, because Ritchie has received little insight into

Kelley's actions as Receiver and Trustee to date, the requests had to be worded somewhat expansively in order to ensure that all relevant materials were captured. However, given that the relevant time period spans less than four months, the total volume of relevant material cannot be extensive, and Ritchie seeks only a single deposition. Thus, any burden imposed by expedited discovery is likely to be minimal. And, in order to ensure that any burden on Kelley is minimal, Ritchie stands ready to discuss with the Court and Kelley the best means of focusing its requests to ensure that Kelley produces only the information material to the issues at hand.

Federal Rule of Bankruptcy Procedure 9006(c) and Local Rule 9006-1 authorize expedited relief for cause and on appropriate notice to parties. Additionally, expedited discovery is needed to promote judicial efficiency and fairness. Without discovery, the January 27, 2009 hearing will focus on the conflicts that arise largely as legal issues and those that are apparent from public sources. If Kelley is approved as Trustee following such a hearing, and discovery later reveals additional conflicts, another hearing will be required. Meanwhile, Ritchie and other creditors would be subject to harm from having a conflicted Trustee serve. Resolving all issues regarding Kelley's conflicts of interest promptly and at the outset of these cases will obviate any such concerns.

Courts approve requests for expedited discovery where, as here, the information sought bears on key issues to be decided at a hearing that will occur before discovery could be obtained in the ordinary course. *See Wachovia*, 571 F. Supp. 2d at 1050; *Edudata Corp. v. Scientific Computers, Inc.*, 599 F. Supp. 1084, 1088 (D. Minn. 1984);

Onan Corp. v. United States, 476 F. Supp. 428, 434 (D. Minn. 1979).⁵ Ritchie therefore requests an order that imposes an expedited discovery schedule that concludes prior to the January 27, 2009 hearing. If the Court decides that expedited discovery is not appropriate, or that the time period before the hearing is too short to avoid unduly burdening Kelley, Ritchie requests, in the alternative, that the Court move the hearing to a date that reasonably follows the completion of discovery on whatever schedule the Court approves.

CONCLUSION

For the foregoing reasons, Ritchie respectfully requests that the Court enter an order approving expedited discovery that concludes prior to the January 27, 2009 hearing or, in the alternative, moving the hearing to a date after discovery concludes in the ordinary course or as the Court otherwise directs.

⁵ Those decisions also make clear that the extent of the discovery sought can be limited to minimize the burden of expedited discovery, either pursuant to an agreement of the parties or with the aid of the Court.

LEONARD, O'BRIEN
SPENCER, GALE & SAYRE, LTD.

/e/ James M. Jorissen

Dated: January 20, 2009

By _____
James M. Jorissen, #262833
100 South Fifth Street, Suite 2500
Minneapolis, Minnesota 55402-1234
(612) 332-1030

Bryan Krakauer
Thomas K. Cauley, Jr.
Brian A. McAleenan
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, Illinois 60603
(312) 853-7000

COUNSEL FOR RITCHIE CAPITAL
MANAGEMENT, LTD., RITCHIE SPECIAL
CREDIT INVESTMENTS, LTD., RHONE
HOLDINGS II, LTD., YORKVILLE
INVESTMENT I, LLC, AND RITCHIE
CAPITAL STRUCTURE ARBITRAGE
TRADING, LTD.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Petters Company, Inc., et al.,

Debtors.

(includes:

Petters Group Worldwide, LLC;
PC Funding, LLC;
Thousand Lakes, LLC;
SPF Funding, LLC;
PL Ltd., Inc.;
Edge One LLC;
MGC Finance, Inc.;
PAC Funding, LLC;
Palm Beach Finance Holdings, Inc.)

Jointly Administered under
Case No. 08-45257

Court File No. 08-45257

Court File Nos.:

08-45258 (GFK)
08-45326 (GFK)
08-45327 (GFK)
08-45328 (GFK)
08-45329 (GFK)
08-45330 (GFK)
08-45331 (GFK)
08-45371 (GFK)
08-45392 (GFK)

Chapter 11 Cases
Judge Gregory F. Kishel

UNSWORN CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2009, I caused the following documents:

Notice of Hearing and Expedited Motion for Discovery in Advance of Hearing on Objection to Appointment of Douglas A. Kelley as Trustee for All Debtors and/or Postponement of the Hearing Until Discovery is Completed and Memorandum in Support of Motion for Expedited Discovery in Advance of Hearing on Objection to Appointment of Douglas A. Kelley as Trustee for All Debtors and/or Postponement of the Hearing Until Discovery is Completed

to be filed electronically with the Clerk of Court through ECF, and that ECF will send an e-notice of the electronic filing to the following:

- Marc A AL maal@stoel.com, jlhanon@stoel.com, cjbishman@stoel.com
- Carolyn G. Anderson cga@zimmreed.com,
kmc@zimmreed.com, mbk@zimmreed.com
- Richard D Anderson randerson@briggs.com
- Daniel C. Beck dbeck@winthrop.com, tcooke@winthrop.com
- Johnathan C Bolton jbolton@fulbright.com, arodriguez@fulbright.com

- Cynthia A. Bremer cbremer@fulbright.com, pjackson@fulbright.com
- Roylene A Champeaux Roylene.Champeaux@usdoj.gov,
karen.malikowski@usdoj.gov;usamn.ecfbankruptcy@usdoj.gov;Muriel.Holland@usdoj.gov
- Zack A Clement zcclement@fulbright.com, arodriguez@fulbright.com
- Barbara Jean D'Aquila bdaquila@fulbright.com, pjackson@fulbright.com
- Michael S. Dove mdove@gislason.com,
KGleisner@gislason.com;JBurgau@gislason.com
- Michael Fadlovich michael.fadlovich@usdoj.gov
- William Fisher william.fisher@gpmlaw.com
- Timothy A. Fusco fusco@millercanfield.com, skoczylas@millercanfield.com
- Michael D Gordon mgordon@briggs.com
- Wesley T. Graham wgraham@hensonefron.com, cfisher@hensonefron.com
- Brian C Gudmundson bcg@zimmreed.com
- J Jackson jackson.j@dorsey.com
- Mark J. Kalla kalla.mark@dorsey.com, jorgensen.karen@dorsey.com
- Douglas W. Kassebaum dkassebaum@fredlaw.com, scharter@fredlaw.com
- Lorie A. Klein klein@moss-barnett.com, montpetitm@moss-barnett.com
- Ronn B Kreps rkreps@fulbright.com, pjackson@fulbright.com
- Connie Lahn connie.lahn@fmjlaw.com, Aong.Moua@fmjlaw.com
- Thomas Lallier tlallier@foleymansfield.com
- Chris T Lenhart lenhart.chris@dorsey.com
- David B. Levant dblevant@stoel.com, sljaggers@stoel.com;sea_docket@stoel.com
- James A. Lodoen jlodoen@lindquist.com, gluessenheide@lindquist.com
- ANDREW S NICOLL anicoll@jenner.com
- David Bradley Olsen dolsen@hensonefron.com, cfisher@hensonefron.com
- RONALD R PETERSON rpeterson@jenner.com
- Robert Raschke robert.raschke@usdoj.gov

- Michael E. Ridgway mike.ridgway@usdoj.gov
- David E. Runck david.runck@fmjlaw.com
- BRANDY A SARGENT basargent@stoel.com
- Olufemi O Solade osolade@fulbright.com, sbechtel@fulbright.com
- John R. Stoebner jstoebner@lapplibra.com, rtri@lapplibra.com;lfrey@lapplibra.com
- MICHAEL S TERRIEN mterrien@jenner.com
- US Trustee ustpregion12.mn.ecf@usdoj.gov

I further certify that I caused a copy of the foregoing documents to be mailed by first class mail, postage paid, to the following non-ECF participants:

N/A

/e/ Valerie Rittenbach

Dated: January 20, 2009

Valerie Rittenbach
100 South Fifth Street, Suite 2500
Minneapolis, MN 55402
(612) 332-1030

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