UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 09-680-ADM

Ritchie Special Credit Investments, Ltd. et al.,	Hon. Ann D. Montgomery
Appellants,	Appeal from Order Overruling Objection of Ritchie Special Credit Investments, Ltd., et al., to Appointment of Trustee in Chapter 11 Cases, and Approving Appointment
vs.	
United States Trustee, et al.,	United States Bankruptcy Court District of Minnesota Bky. No. 08-45257 (GFK)
Appellees.	

REPLY BRIEF OF APPELLANTS RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., ET AL.

Ritchie respectfully submits this Reply Brief in further support of its appeal of the Trustee Order.[1]

ARGUMENT

I. THE OVERRIDING CONFLICT PRESENT IN THESE CASES – PCI'S EFFORTS TO ACCESS THE ASSETS OF PGW – IS NOT DISPUTED; PGW NEEDS A TRUSTEE WITH NO TIES TO PCI TO PROTECT ITS INTERESTS.

Neither the Official Committee of Unsecured Creditors ("Committee") nor the United States Trustee ("U.S. Trustee") disputes the central fact at the heart of Kelley's conflict: PCI has no assets, and thus must seek to access PGW's substantial assets to benefit its creditors.

[1] "Ritchie," "Trustee Order" and other capitalized terms have the same meaning as defined in Appellants' Opening Brief.

Whether PCI will succeed is the defining issue of these bankruptcy proceedings. Accordingly, Kelley cannot faithfully serve as Trustee for both PCI and PGW, because that places him in the untenable position of fighting both sides of the battle.

In a vivid demonstration of the conflict, the Committee recently filed an objection to Ritchie's claims against PGW, asserting that "now that [PGW subsidiaries] Polaroid and PCE's assets have been sold, a *primary goal* of the PGW and PCI creditors is to *share equally* in the distribution of the Polaroid and PCE sale proceeds on a pro rata basis." (Objection by Creditors Committee, Case No. 08-46617, Docket No. 206, at p.7 (emphasis added).) Contrary to the statements of the Committee, which consists entirely of PCI creditors, only PCI creditors have the "primary goal" of a "pro rata" "sharing" in the Polaroid proceeds. PGW creditors want to preserve PGW's assets for themselves. Ritchie stands alone on this front because Ritchie is the only significant contract creditor of PGW, and thus is the only party that would materially benefit if PGW's assets are properly preserved for PGW creditors. PCI creditors stand to gain if PGW's assets are invaded, whether through a tort claim, substantive consolidation, or forfeiture, and thus remain silent on Kelley's conflicts because they benefit from them.

The Committee and the U.S. Trustee attempt to show that Kelley is not conflicted by concluding that PGW and PCI should not be treated as distinct entities and arguing that PGW engaged in Petters's fraud. In so doing, they leap over the critical question – Kelley's suitability to serve as Trustee. Leaving the merits of the Committee's and U.S. Trustee's arguments aside, the critical point is that the PGW Trustee must vigorously and unreservedly oppose those arguments given the dire consequences to PGW if they succeed. The arguments of the Committee and the U.S. Trustee thus underscore the need for a conflict-free PGW Trustee to protect PGW's interests.

Two arguments warrant brief rebuttals on the merits. *First*, the contention that Ritchie is not really a PGW creditor because the funds it provided were wired to a PCI bank account (U.S. Trustee Br. at 14; Committee Br. at 9) is incorrect. In *In re Luis Elec. Contracting Corp.*, 149 B.R. 751 (Bankr. E.D.N.Y. 1992), the Trustee argued that the debtor had no liability because a supplier, not the debtor, received the loan proceeds. The court rejected the argument, explaining that "[a] loan is no less a loan if it is remitted to a third party at the borrower's direction and on the borrower's behalf." *Id.* at 759. Ritchie wired the funds to the account specified by PGW. Thus, PGW, not PCI, remains obligated to repay those funds to Ritchie.

Second, the Committee and the U.S. Trustee repeatedly state that PGW was named a defendant, along with PCI and Petters, in the December 1, 2008 indictment, a fact they use to support their position that PCI creditors should recover from PGW assets. But a close review of the indictment – which contains allegations, not evidence – reveals that, although conclusory statements link PCI and PGW together in the fraud, only one of the specific transactions alleged involved PGW. That transaction, which did not involve PCI, supports a money laundering count that does not name PGW as a defendant. (Indictment, Doc. No. 75, Case No. 08-cr-00364.) And, no party has alleged that PGW was involved in the Ponzi scheme at the heart of Petters's fraud. These facts also highlight the importance of a non-conflicted Trustee to fight such efforts to tar PGW.

II. THE TRUSTEE ORDER IS FINAL AND APPEALABLE.

The Committee asks the Court to dismiss Ritchie's appeal because the Trustee Order is not a "final order." The U.S. Trustee disagrees, stating that "it appears that jurisdiction in the district court is proper." (U.S. Trustee Br. at 2-3.) The U.S. Trustee is correct.

The Committee does not dispute that, in general, an order approving or rejecting a Trustee appointment is final and appealable. *In re Marvel Entertainment Group*, 140 F.3d 463, 470 (3d Cir. 1998); *Committee of Dalkon Shield Claimants v. A.H. Robins Co.*, 828 F.2d 239, 241 (4th Cir. 1987). The Committee instead grounds its argument on language in the Trustee Order stating that Ritchie "can renew [its] motion, after a cash-bearing estate has been assembled and at a time when investigation has made the alignments clearer and more concrete" or if "Kelley forgoes pursuing a particular claim or cause of action." (Committee Br. at 12-13.) The Committee contends that such language "contemplates further proceedings on Kelley's approval," and therefore "does not finally resolve" the Trustee issue. (*Id.* at 13.)

The Committee's argument fails because the Trustee Order contemplates not *definite, specified* future proceedings, but *possible* future proceedings *if new facts arise*. After appointing a Trustee, there is always a possibility that new facts will arise and expose a conflict of interest or other reason to disqualify the Trustee – no court would permanently preclude revisiting accusations of conflict if relevant new facts arise. Thus, the Trustee Order's specific mention of the inherent possibility of future proceedings based on new facts renders it no less "final" than an order that remained silent on that possibility. *A.H. Robins*, 828 F.2d at 241 (order declining to appoint Trustee deemed final, even though order stated that, subsequently, "should the debtor give the Court cause, the Court will not hesitate to appoint a Trustee").

The cases cited by the Committee are not to the contrary. Tellingly, none involves appointment of a Trustee. Several orders contemplated further review following specified, concrete events – a circumstance absent here. *Grilli v. Metropolitan Life Ins. Co., Inc.*, 78 F.3d 1533, 1538 (11th Cir. 1996) (special master asked to decide issue); *United States v. City of Milwaukee*, 144 F.3d 524, 530 (7th Cir. 1998) (court to consider issue once specified procedural

defect cured; noting also that denying a motion "without prejudice" has no "talismanic importance" to finality).[2] The decision in *In re Gilbertson Restaurants, LLC*, 315 B.R. 845 (8th Cir. BAP 2004), relied upon heavily by the Committee, is also inapposite because it concerned appointment of counsel. And, contrary to the general rule that orders appointing Trustees are final and appealable, the majority rule for counsel is that such orders are *per se* not appealable. *Id.* at 848. Both the holding and reasoning of *Gilbertson* must therefore be confined to appointments of counsel, removing any relevance to the Trustee issue at bar. As explained above, courts addressing the appealability of Trustee appointments have reached the opposite conclusion – such orders are final, including orders that, like the Trustee Order, expressly acknowledge the possibility of further consideration based upon new facts. *A.H. Robins*, 828 F.2d at 241.

Finally, as the U.S. Trustee contends, jurisdiction is proper under the Eighth Circuit's factors for determining appealability. *In re Koch*¸ 109 F.3d 1285, 1287 (8th Cir. 1997). The Court in *Marvel* explained: "[U]nless an appeal can be lodged now," no "meaningful review of the order appointing a trustee" will occur because a court will never undo years of proceedings "solely for the purpose of reversing the appointment of a trustee and have the proceedings begin again from scratch." 140 F.3d at 470.

III. THE BANKRUPTCY COURT'S DENIAL OF DISCOVERY IS PROPERLY CONSIDERED ON APPEAL.

The Committee and the U.S. Trustee contend that the Bankruptcy Court's refusal to permit Ritchie to take discovery of Kelley prior to the hearing is not properly on appeal,

[2] The court in *Beasley v. Union Pac. R. Co.*, 652 F.2d 749, 750 (8th Cir. 1981), denied summary judgment, an issue and procedural posture wholly different from Ritchie's appeal. Further, the appellant did not even argue that the order was final, but instead that the order came within the injunctive relief exception to review of non-final orders under §1292.

because it is either interlocutory (Committee Br. at 27-28) or not specifically appealed (U.S. Trustee Br. at 19-20). However, the Bankruptcy Court's discovery ruling is a "related order" that is automatically subsumed in the final Trustee Order on appeal. *E.g., Donohue v. Hoey*, 129 Fed. Appx. 304, 2004 WL 2095661, *8 (10th Cir. Sept. 21, 2004) (interlocutory order denying request for depositions properly considered on appeal although not expressly listed in notice of appeal). Thus, the discovery issue is properly before the Court.

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