**UNITED STATES BANKRUPTCY COURT**
**DISTRICT OF MINNESOTA**

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| In re | **Jointly Administered under Case No. 08-45257** |
| Petters Company, Inc., et al., | Court File No. 08-45257 |
| Debtors. | |
| | Court Files No.'s: |
| (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 |

**LINDQUIST & VENNUM P.L.L.P. AND TRUSTEE'S RESPONSE TO OBJECTION TO APPLICATION FOR AN ORDER AUTHORIZING THEM TO EMPLOY THE LAW FIRM OF LINDQUIST & VENNUM P.L.L.P.**

Lindquist & Vennum P.L.L.P. ("Lindquist & Vennum") and Douglas A. Kelley, as Chapter 11 Trustee (the "Trustee"), file this Response to the objection by Ritchie Special Credit Investments, Ltd., Rhone Holdings II, Ltd., Yorkville Investments I, L.L.C., Ritchie Capital Structure Arbitrage Trading, Ltd., and Ritchie Capital Management, Ltd. (collectively, "Ritchie") to the Trustee's Application for an Order Authorizing the Employment of the Law Firm of Lindquist & Vennum P.L.L.P. (the "Application"). Through the Application the Trustee seeks to employ and retain Lindquist & Vennum as his counsel in the above-captioned bankruptcy cases, *nunc pro tunc* to December 24, 2008.

## INTRODUCTION

On February 26, 2009, this Court entered its Order Overruling Objection of [Ritchie] to Appointment of Trustee in Chapter 11 Cases, and Approving Appointment (the "Appointment Order"). The Appointed Trustee's Response to Objection to Appointment of Douglas A. Kelley as Trustee for All of the Debtors in These Jointly Administered Proceedings filed in this case on January 21, 2009, Docket No. 132, in response to the objection is incorporated herein by reference as if fully set forth herein. Ritchie appealed the Appointment Order on March 9, 2009. The Appointment Order settled the status of the Trustee in these cases and leads to the need to determine the status of his selected bankruptcy counsel, Lindquist & Vennum. Ritchie filed the sole objection to the Application, and that objection puts forward the same arguments regarding the allegedly conflicted status of Lindquist & Vennum as were made by Ritchie with respect to the Trustee's appointment. While the legal requirements applicable to Lindquist & Vennum's eligibility for employment differ slightly from those applicable to the Trustee's appointment, that employment should be approved for substantially the same reasons the Trustee's appointment was approved. No actual conflicts have ripened. If and when they do, appropriate notice will be given and appropriate steps will be taken to ensure that neither the Trustee nor Lindquist & Vennum run afoul of Bankruptcy Code or Bankruptcy Rule proscriptions.

Ritchie, with respect to the Application, re-asserts the same "external conflict" and "internal conflict" objections that were overruled in the Appointment Order. The "external conflict" objection, hinged on the Trustee's role as Receiver, should be rejected for exactly the same reasons they were overruled in the Appointment Order. The "internal conflict" objection, hinged on potential inter-company claims between and among various debtors, should be overruled for the reasons given in the Appointment Order, even though a slightly different legal standard applies in the context of the Application.

## ARGUMENT

To be employed, Lindquist & Vennum must "not hold or represent an interest adverse to the estate" and must be "disinterested." 11 U.S.C. Section 327(a). To be disinterested, the firm must "not have an interest materially adverse to the interest of the estate or of any class of creditors … 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. Section 101(14)(C). Despite these strictures, Lindquist & Vennum is not disqualified from employment based upon its representation of both the Trustee and an affiliate creditor. *See In re BH & P Inc.*, 949 F.2d 1300, 1314 (3d Cir. 1991) (citing 11 U.S.C. § 327(c)). Under Section 327(c), in such situation, "if there is an actual conflict of interest" the firm cannot be employed. Many courts have held that it is not sufficient to merely identify a conflict of interest arising from prior representation but the moving party must demonstrate that the conflict must be materially adverse to the estate, its creditors or security holders. *See In re Quakertown Glass Co.*, 73 B.R. 468, 469 (Bankr.E.D.Pa, 1987) citing *Cle-Ware Industries, Inc. v. Sokolsky*, 493 F. 2d 863 (6th Cir. 1974); *In re Guy-Apple Masonry Contractor, Inc.*, 45 B.R. 160, 165 (Bankr.D.Ariz.).

The panel in *BH & P* affirmed the dismissal of Trustee's counsel in two of three jointly administered cases, on the basis of an actual conflict after the Trustee filed claims on behalf of one estate against the other two. 949 F.2d at 1314-17. Subsequently, the Third Circuit "clarified" its ruling in *BH & P* and reiterated its holding as follows:

> (1) Section 327(a), as well as § 327(c), imposes a per se disqualification as trustee's counsel of any attorney who has an actual conflict of interest; (2) the district court may within its discretion—pursuant to § 327(a) and consistent with § 327(c)—disqualify an attorney who has a potential conflict of interest and (3) the district court may not disqualify an attorney on the appearance of conflict alone.

*In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 476 (3d Cir. 1998) (lower court abused its discretion in disqualifying law firm in absence of potential or actual conflict; firm terminated representation of creditor when retained by the trustee).

In its disclosures in connection with the Application and its filings on behalf of the Trustee with respect to his disputed appointment, Lindquist & Vennum has been completely candid regarding the debtors' tangled affairs, inter-company obligations, inter-company transfers, transfers to third parties for the sole apparent benefit of affiliates, questionable business practices, and the large sums of money involved. Further, the Trustee and the firm have represented to this Court that they expect to focus for an extended period of time on untangling the debtors' messy financial dealings, liquidating assets, recovering assets, and pursuing avoidance actions against non-affiliated entities. They intend to defer resolution of inter-company claims until such time, if ever, that such resolution ripens (for example, if it is determined after the initial focus that it is in the estates' best interests not to seek substantive consolidation) and makes sense for the complete administration of these cases. And if, at that future date and endowed with better knowledge and a handle on assets available for distribution to creditors, it appears that there exist direct conflicts between debtor entities or affiliates, steps will be take with the input of parties in interest, including the creditors' committees and United States Trustee, to determine an appropriate manner to deal with these issues and seek the approval of this Court for the steps chosen.

The Appointment Order fully acknowledged the possibility of inter-debtor conflicts down the road ("[a]t this early stage of the cases at bar, one cannot deny any of these possibilities out of hand") but also determined that in these complex cases that the Trustee's plan of action, "administrative in nature or legally-oriented" throughout the first phase would not present him

"with cross-running allegiances." The issue of potential conflicts will not ripen to actuality until, at the earliest, the recovery and asset assemblage stage of these cases is over. Appointment Order at 31, 32. With respect to the appointment of the Trustee in this context, this Court held that at present there is no disqualifying prejudice to the interests of creditors arising out of potential inter-debtor conflicts. Id., at 33-34. The question now is whether in such context multiple representation rises to the level of "actual conflict" that would disqualify Lindquist & Vennum under Section 327.

Because possible or alleged conflicts are at this stage of the cases merely potential, and will not ripen until at the earliest the completion of the Trustee's recovery and assemblage phase of administration, the Trustee should be allowed to employ Lindquist & Vennum to assist him in carrying out these duties. Until and unless an actual conflict manifests itself, this Court has complete discretion to allow that employment under Section 327, despite the potential that such manifestation could possibly occur. *Marvel Entertainment*, 140 F.3d at 476, *quoting BH & P*, 949 F.2d at 1316-1317. These Petters bankruptcy cases, at least at this stage and for the foreseeable future, are thus distinguishable from the manifest conflicts in *BH & P*, where claims were on file and litigation had commenced between the estates, and those in *In re Big Mac Marine, Inc.*, 326 B.R. 150, 152-153 (8th Cir. B.A.P. 2005) where counsel who represented shareholders in their personal bankruptcies was disqualified as counsel in the bankruptcy of their

company due to the shareholders' substantial claims asserted against the company and claims by a bank against all the debtors that put them in conflicting positions.[1]

Nevertheless, the Ritchie objection divines two alleged actual conflicts arising from Lindquist & Vennum's representation of the Trustee in these cases. The first, the same "external conflict" asserted with respect to the Trustee's appointment, supposedly flows from the Trustee's status and duties as court-appointed receiver. But the Appointment Order found that purported "external conflict" to have been "vitiated or extinguished" via the Trustee's appointment, his formal turnover of receivership assets to the Debtors in the above-captioned cases, and the commitments he made to the Court with respect to the bankruptcy process, its values, and its priorities. Appointment Order at 25-26. Since the firm's client holds no adverse interest due to the purported "external conflict", it follows ineluctably that Lindquist & Vennum in representing the Trustee does not represent an adverse interest and is disinterested. Moreover, because the issue has been "vitiated or extinguished" there can be no actual conflict.

Next, the objection asserts an actual "internal conflict" with respect to the representation of the Trustee in the several bankruptcy cases in which he has been appointed, and in the related Polaroid bankruptcy cases. Ritchie interposed the selfsame objection to the Trustee's appointment. But the Appointment Order, overruling that objection, found at this stage of these cases that there is no prejudice by conflicts of interest of Mr. Kelley in being appointed as

[1] The other authorities cited in Ritchie's Objection likewise involved adversity or representations that had crystallized into actual conflicts through pending or prior litigation, the filing and assertion of claims, or both. *See Southern Kitchens, Inc. v. TransAmerica Investment Corp. (In re Southern Kitchens, Inc.)*, 216 B.R. 819, 829 (Bankr. D. Minn. 1998) (Kishel, J.) (former client possibly liable for damage that trustee's § 327(e) counsel attributed to others in his complaint), and *In re J & M Development of Cass County*, Bky. No. 04-41065, 2004 WL 1146451 (Bankr. W.D. Mo. May 19, 2004) (concurrent representation of debtor's owners in state court litigation with one of debtor's creditors, and owners asserting claims against debtor).

Trustee in these multiple related cases. Fed.R.Bankr.P. 2009(d). The reason that there is no prejudice is that no actual conflicts yet exist.

The Trustee's plan of administration, as conducted thus far and as to be conducted as represented to the Court, "does not entail any action or process that would pit the distribution rights of PGW's creditors directly against those of the creditors of any of the other Debtors, until most or all recoverable assets have been garnered in." Appointment Order at 32. Furthermore, that plan of administration leads to a focal point, well down the road, where any inter-debtor claims cross-running between the estates, and the advisability of substantive consolidation, will be addressed. *Id*. That point will focus the attention of all interested parties on the need, if any at that juncture, of prophylactic action to protect the rights of all constituents and continue the administration of the estates in accordance with Bankruptcy Code requirements including Section 327 and Rule 2009.[2] For now, and well into the future, in assisting the Trustee in carrying out his duties in these cases and completing the recovery and assemblage phase of his plan of administration, Lindquist & Vennum is and will remain disinterested, does not and will not hold or represent an interest adverse to an estate, and will not be involved in any actual conflict of interest. Its representation of the Trustee "does not involve the assertion of a claim by one client against another client represented by [it] in the same litigation or other proceeding before a tribunal." Minn. R. Prof. Cond. 1.7(b)(3).

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[2] In numerous large cases a commonly used procedure to address conflicts issues is the employment of Conflicts Counsel with appropriate safeguard procedures and ethical walls that place limitations upon the representation by professionals employed by the estate. *See, e.g., In re Enron Corp.*, 2002 WL 32034346 at pg.15 (Bankr. S.D.N.Y. 2002); *In re Rockway Bedding, Inc.*, 2007 WL 1461319 at pg. 2 (Bankr. D.N.J. 2007).

Such a finding is completely consistent with the Appointment Order and the "flexible approach" adopted in *BH & P* to guide a bankruptcy court's discretion in reviewing an application to employ a professional.

> This flexible approach will require the bankruptcy courts to analyze the factors present in any given case in order to determine whether the efficiency and economy which may favor multiple representation must yield to competing concerns affecting fairness to all parties involved and the protection of the integrity of the bankruptcy process. Factors to be considered include, but are not limited to, the nature of disclosure of the conflict made at the time of the appointment, whether the interests of the related estates are parallel or conflicting, and the nature of the interdebtor claims made.

*BH & P*, 949 F.2d at 1316. The efficiency and economy favoring multiple representation of these estates has been well-chronicled. Separate Unsecured Creditors' Committees are active in these cases and in the Polaroid cases, and each has retained counsel. Disclosure has been full and candid. At least through the recovery and assemblage phase of administration, the interests of the related estates are parallel rather than conflicting. No inter-debtor claims have yet been made, and the forensic process to even properly and soberly assess those issues remains months from completion. Accordingly, the Application should be approved.

Respectfully submitted this 16th day of March 2009.

**LINDQUIST & VENNUM P.L.L.P.**

By: e/ James A. Lodoen
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**FOR ITSELF AND AS ATTORNEYS FOR DOUGLAS A. KELLEY, TRUSTEE**

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## CERTIFICATE OF SERVICE

Gretchen Luessenheide of the City of New Hope, County of Hennepin, State of Minnesota, being first duly sworn on oath, states that on March 16, 2009 she served the following document:

Lindquist & Vennum P.L.L.P. and Trustee's Response to Objection to Application for an Order Authorizing Them to Employ the Law Firm of Lindquist & Vennum P.L.L.P.

upon

| | |
|---|---|
| Arrowhead Capital Management LLC<br>c/o James N. Fry<br>601 Carlson Parkway, Suite 1250<br>Minnetonka, MN 55305 | Mark R. Jacobs<br>Pryor Cashman LLP<br>410 Park Avenue<br>New York, NY 10022 |
| Ronald R. Peterson<br>Jenner & Block, LLP<br>330 North Wabash Avenue<br>Chicago, IL 60611-7603 | Taunton Ventures LP<br>c/o Paul Taunton<br>990 Deerbrook Drive<br>Chanhassen, MN 55317 |
| Petters Aviation LLC<br>4400 Baker Rd<br>Minnetonka, MN 55343 | Huron Consulting Group, Inc.<br>4795 Paysphere Circle<br>Chicago, IL 60674-4795 |

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| Elite Landings, LLC<br>2005 Cargo Road<br>Minneapolis, MN 55450 | Connie Lahn<br>David Runck<br>Fafinski Mark & Johnson, P.A.<br>Flagship Corporate Center<br>775 Prairie Center Drive, Suite 400<br>Eden Prairie, MN 55344 |

via U.S. Mail to the addresses listed above, and electronically by Notice of Electronic Filing 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.

/e/ Gretchen Luessenheide
Gretchen Luessenheide