UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES,	)	Case No. 0:08-cv-05348
	)	
Plaintiff,	)	Hon. Ann D. Montgomery
	)	
v.	)	
	)	
THOMAS J. PETTERS, ET AL.,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF SECOND EMERGENCY MOTION TO INTERVENE BY PETITIONERS RITCHIE CAPITAL MANAGEMENT, ET AL. AND TO VACATE THE RESTRAINING ORDER AS TO PETTERS GROUP WORLDWIDE, LLC

Petitioners, 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, L.L.C. (hereinafter "Ritchie" or "Petitioners") respectfully move to intervene as a matter of right in the above-captioned proceeding.[1] They further move to vacate the restraining orders and receivership as to Petters Group Worldwide, L.L.C. ("PGW"), removing it, its subsidiaries and assets from the receivership, on the grounds that the Government failed to satisfy the factual predicates of 18 U.S.C. § 1345,

[1] At the outset of these proceedings, Petitioners filed a motion to intervene for the purpose of objecting to the appointment of Douglas A. Kelley as receiver on conflict of interest grounds. The present motion is necessitated by changed circumstances which pose an imminent threat to Ritchie's ability to defend its interests in any future criminal forfeiture proceeding related to PGW. *See U.S. Envtl. Prot. Agency v. City of Green Forest, Ark.*, 921 F.2d 1394, 1401 (8th Cir. 1990) (finding changed circumstances made second motion to intervene appropriate); *Hodgson v. United Mine Workers*, 473 F.2d 118, 126-27 (D.C. Cir. 1972) (same).

which left the Court without statutory authority under § 1345 to enter the receivership orders as to PGW. As a result, Kelley's actions in placing PGW and its assets into bankruptcy proceedings are similarly beyond the scope of § 1345.

For these and other reasons described in more detail below, Ritchie respectfully asks the Court to vacate that portion of its prior orders authorizing pretrial restraints and receivership of the assets of PGW and its subsidiaries and to declare those aspects of its earlier orders void *ab initio*.

FACTS

The Court is very familiar with the procedural history of this case, and Petitioners will only recite the facts pertinent to this motion.

On October 2, 2008, the U.S. Attorney's Office filed this civil action, under seal, along with a Request for a Temporary Restraining Order,[2] seeking an injunction pursuant to 18 U.S.C. § 1345 against Thomas J. Petters ("Petters"), several alleged coconspirators, Petters Company Inc. ("PCI"), and several corporations not relevant to this motion. Conspicuously missing from that pleading was any mention of PGW.

On October 3, 2008, Petters and several codefendants were arrested prior to indictment.

[2] Complaint for Permanent Injunction and Other Equitable Relief (Doc. 1), *United States v. Petters et al.*, No: 08-cv-05348 (D. Minn. Oct. 2, 2008) [hereinafter "*Petters* Civil"].

On October 6, the Government filed both a First Amended Complaint and a Second Amended Complaint.[3] That same day it filed a stipulation and proposed order,[4] signed by AUSA Gregory G. Brooker and Jon M. Hopeman, attorney for Petters, asking the court to approve the Order for Entry of Preliminary Injunction. This Court signed the preliminary injunction order the same day.[5] The First and Second Amended Complaint and the stipulated Order – all filed on October 6, 2008 – for the first time included PGW as a defendant, and included PGW's assets among the assets to be restrained.

Both the First and Second Amended Complaints allege specific facts implicating "Petters and his associates" and the corporate entities PCI (and its affiliates), NIR and Enchanted Family Buying Company in the alleged fraud. The only mention of PGW anywhere in the two amended complaints is in the captions. Both Amended Complaints and the stipulated Order, however, repeatedly assert that "*certain* Defendants" or "*certain of the* Defendants" – clearly indicating not all of them – committed the enumerated acts.

The First Amended Complaint came the closest to including PGW in its allegations in any meaningful way, when it referenced entities owned by PGW[6] and conclusively stated at the end of paragraph 7:

> Defendant Petters used fraudulent funds to support his numerous enterprises, including but not limited to: Defendants Petters Aviation LLC,

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[3] First and Second Amended Complaints for Permanent Injunction and Other Equitable Relief (Docs. 7, 8), *Petters* Civil.

[4] Stipulation for Entry of Preliminary Injunction, Order Appointing Receiver and Other Equitable Relief (Doc. 11), *Petters* Civil.

[5] Order for Entry of Preliminary Injunction, Order Appointing Receiver and Other Equitable Relief (Doc. 12), *Petters* Civil [hereinafter "Order for Entry of Preliminary Injunction"].

[6] Polaroid Holding Company is wholly owned by PGW.

> MN Airline Holdings, Inc., Petters Aircraft Leasing LLC, MN Airlines Holdings, Inc., Petters Aircraft Leasing LLC, Southwest Aviation, Inc., Sun Country Airlines, Polaroid Holding Company and its subsidiaries, and Zink Imaging, Inc.[7]

In short, the Government claimed not that Petters defrauded people through these enterprises, but that instead he supported the enterprises using funds he had obtained by fraud. However, later that same day, the government superceded the First Amended Complaint by filing a Second Amended Complaint.

Significantly, the Second Amended Complaint deleted the above-quoted language and replaced it with "Defendant Petters used fraudulent funds to support his numerous enterprises."[8] This recantation suggests the Government *actually cannot* trace fraudulent funds into entities owned by PGW (including Polaroid Holding Company and its subsidiaries).

The First and Second Amended Complaints incorporate by reference an affidavit of FBI agent Eileen Rice filed in support of search warrants executed upon property owned by Petters and other defendants – but the Rice affidavit fails to implicate PGW in the alleged fraudulent scheme, or even mention PGW at all.[9] The only references to Polaroid in the affidavit are in paragraph 37, which states that banking records for PCI's bank accounts shows PCI paid: $500,000 to Thomas Beaudoin, former CEO of Polaroid,

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[7] First Amended Complaint (Doc. 7) at ¶ 7, *Petters* Civil.

[8] Second Amended Complaint (Doc. 8) at ¶ 7, *Petters* Civil.

[9] *See* Aff. of Jennifer Wilson at Ex. 1, *In re Petters Co., Inc.*, 08-bk-45257 (Bankr. Minn. Oct. 11, 2008) [hereinafter "*Petters* Bankruptcy"].

on December 11, 2007; $850,000 to Integrity Marketing and Sales[10] on December 7, 2007; and $1 million to Mary Jeffries on December 7, 2007.[11] Jeffries is the former President and COO of PGW and current CEO of Polaroid. These payments went to individuals and not to Polaroid itself, and the Government did not trace these assets into Polaroid.

On October 6, 2008, the Government and Petters agreed to a stipulated Order for Preliminary Injunction, appointing Douglas A. Kelley, Esq. ("Kelley" or "the Receiver"), Receiver. The stipulated Order gave Kelley sweeping powers to control the operations of the corporate entities, exclusive custody and control of all of the assets of each of the entities,[12] and other powers, including the power to place any of the entities into bankruptcy.[13]

[10] Integrity Marketing's only alleged connection to PGW or Polaroid is that its owner, Stephen Ratliff is a salesman for Polaroid.

[11] Aff. of Jennifer Wilson at Ex. 1, *Petters* Bankruptcy.

[12] Order for Entry of Preliminary Injunction (Doc. 12) at pp. 9-10, *Petters* Civil; Order for Entry of Preliminary Injunction (Doc. 43) at pp. 11-15, *Petters* Civil; Amended Order for Entry of Preliminary Injunction, Order Appointing Receiver and Other Equitable Relief (Doc. 70) at pp. 12-16, *Petters* Civil [hereinafter "Amended Order for Entry of Preliminary Injunction"]; Second Amended Order for Entry of Preliminary Injunction, Order Appointing Receiver and Other Equitable Relief (Doc. 127) at pp. 13-17, *Petters* Civil [hereinafter " Second Amended Order for Entry of Preliminary Injunction"].

[13] Order for Entry of Preliminary Injunction (Doc. 12) at p. 12, *Petters* Civil; Amended Order for Entry of Preliminary Injunction (Doc. 70) at p. 14, *Petters* Civil; Second Amended Order for Entry of Preliminary Injunction (Doc. 127) at p. 15, *Petters* Civil.

Between October 6, 2008 (the date of the first restraining order) and December 1, 2008 (the date of the indictment), several individual defendants pleaded guilty.[14]

On December 1, 2008, an indictment was issued in this district against Petters, his company PCI and PGW. The indictment contends that Petters used both PCI and PGW to execute an extensive fraud scheme "to induce investors to provide defendants PCI and PGW with billions of dollars."[15] The indictment sets forth twenty counts; the first nineteen counts all allege specific financial transactions on specific dates involving money from investors to PCI or its subsidiaries (Counts One through Twelve) *or* from PCI to Petters or other Petters companies (Counts Thirteen through Nineteen). Count Twenty, brought only against Petters himself, is the only alleged transaction involving PGW – a $3 million transfer from PGW to Petters personally on June 4, 2008 which was claimed to constitute money laundering.

The "asset freeze" section of each of the injunction/receivership orders mandated that *all* assets of the Defendants are deemed to be property of the Receivership and subject to the exclusive administration by the Receiver.[16] On December 18, 2008, Receiver Kelley used his authority from the receivership order filed October 6, 2008 (and

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[14] Robert White Plea Agreement (Doc. 7), *United States v. White*, 08-cr-299 (D. Minn. Sept. 30, 2008); Lawrence Reynolds Plea Agreement (Doc. 6), *United States v. Reynolds*, 08-cr-320 (D. Minn. Oct. 16, 2008); Michael Catain Plea Agreement (Doc. 6), *United States v. Catain*, 08-cr-302 (D. Minn. Oct. 3, 2008); Deanna Coleman Plea Agreement (Doc. 6), *United States v. Coleman*, 08-cr-304 (D. Minn. Oct. 6, 2008).

[15] Indictment at ¶ 5, *United States v. Petters et al.*, No. 08-cr-00364 (D. Minn, Dec. 1 2008) [hereinafter "*Petters* Criminal"].

[16] Order for Entry of Preliminary Injunction (Doc. 12) at p. 5, *Petters* Civil; Order for Entry of Preliminary Injunction (Doc. 43) at p. 6, *Petters* Civil; Amended Order for Entry of Preliminary Injunction (Doc. 70) at p. 7, *Petters* Civil; Second Amended Order for Entry of Preliminary Injunction (Doc. 127) at p. 8, *Petters* Civil.

reaffirmed in the above-cited amendments) to cause PGW's most valuable asset – Polaroid – to be placed into bankruptcy.

> I, Douglas A. Kelley, declare under penalty of perjury that I am the Court Appointed Receiver of . . . Petters Group Worldwide, LLC, and all affiliates, subsidiaries, divisions, successors or assigns owned 100% or controlled by the foregoing, which includes the entities listed below. As the Court Appointed Receiver, I herby [sic] declare as follows:
>
> It is in the best interest of the following entities:
>
> Polaroid Corporation;
> Polaroid Holding Company;
> Polaroid Consumer Electronics, LLC;
>
> (hereinafter the "Companies") to file voluntary petitions in the United States Bankruptcy Court pursuant to Chapter 11 of the United States Code.[17]

On February 12, 2009, Kelley's attorney started an adversary proceeding against Ritchie, asking the bankruptcy court to disallow Ritchie's liens on certain Polaroid assets.[18] In earlier filings, Kelley had acknowledged that Ritchie is a secured creditor of Polaroid.[19]

ARGUMENT

I. Petitioners Have Standing To Intervene And Raise These Challenges.

A. Petitioners are entitled to intervene in the action as a matter of right.

Ritchie is entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). First, Ritchie "claims an interest relating to the property . . . that is the subject

[17] Chapter 11 Voluntary Petition re Polaroid, *In re Polaroid Corporation, et al.*, No. 08-46617, (Bankr. D.Minn. Dec. 18, 2008) [hereinafter "*Polaroid* Bankruptcy"].

[18] Complaint, *Polaroid* Bankruptcy.

[19] Chapter 11 Completion filed by Petters Group Worldwide, LLC, Schedule D, *Petters* Bankruptcy.

matter of the action"[20] – the Polaroid assets against which Ritchie holds liens, are now restrained and in the process of being liquidated by the Receiver.

Secondly, Ritchie "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protects its interests."[21] Receiver Kelley, relying on the broad powers granted by the restraining and receivership orders, caused Polaroid to be placed into bankruptcy.

Receiver Kelley's law firm, Lindquist and Vennum, filed for bankruptcy on behalf of Polaroid and has filed an adversary proceeding in bankruptcy court trying to invalidate Petitioners' liens against specific Polaroid assets.[22] If Polaroid succeeds in invalidating the liens, Petitioners are in danger of losing their standing to participate in post-conviction third-party ancillary hearings regarding the forfeiture of PGW's assets, since unsecured creditors lack standing to participate in third-party ancillary proceedings. *See United States v. Ribadeneira*, 105 F.3d 833, 834-37 (2d Cir. 1997) (finding unsecured creditors have no legal interest in proceeding); *United States v. Campos*, 859 F.2d 1233, 1238-39 (6th Cir. 1988); *United States v. Reckmeyer*, 836 F.2d 200, 205 (4th Cir. 1987); *United States v. Fuchs*, 2005 WL 440429, *1-2 (N.D. Tex. Feb. 23, 2005); *United States v. McCorkle*, 143 F. Supp. 2d 1311, 1319 (M.D. Fla. 2001); *United States v. BCCI Holdings* 69 F. Supp. 2d 36 (D.C. Cir. 1999).[23]

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[20] Fed. R. Civ. Proc. Rule 24(a)(2).

[21] *Id.*

[22] Complaint, *Polaroid* Bankruptcy.

[23] The standards for invalidating liens in the bankruptcy court differ from the standards for determining whether a lien is a valid secured interest which would give a third party creditor standing to participate in the ancillary hearings in a criminal forfeiture

Polaroid's recent actions, to which Receiver Kelley obviously will not object (and likely cannot, given his relationship to Polaroid), clearly demonstrate that Ritchie's interests are not adequately represented by existing parties – the third element of Rule 24(a) intervention. Although this Court has stated that the Receiver is the fiduciary to all victims of fraud by Petters, clearly he is acting adversely to Ritchie's interests in having counsel who represent him try to invalidate Ritchie's liens – as well as in forcing a sale of Polaroid's assets at the bottom of the market.

This Court has already permitted several non-party secured creditors of Polaroid to intervene, including Zenith Electronics, LLC, LG Electronics, Inc., and Acorn Capital Group, LLC.[24] As noted by the Court in its Order permitting those parties to intervene, "In practice . . . the inquiry required under Rule 24 'is a flexible one, and a practical analysis of the facts and circumstances of each case is appropriate.'"[25] The Court cited to a Ninth Circuit case discussing intervention, indicating that "in determining whether intervention is appropriate, courts are 'guided primarily by practical and equitable considerations,' and 'generally interpret the requirements broadly in favor of intervention.'"[26]

Petitioners seek to remove PGW and its assets from the receivership. Such action

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case. The collateral estoppel effect of a bankruptcy court ruling regarding the liens would create a myriad of questions in the forfeiture proceeding. Ritchie's interests are large, given the high dollar value of the loans secured by these liens, and those interests should not be ignored at this stage of the proceedings, forcing Ritchie to take its chances that it would retain standing in the forfeiture proceedings.

[24] Memorandum Opinion and Order Granting in Part and Denying in Part Motions to Intervene (Doc. 143), *Petters* Civil.

[25] *Id.* at p. 4.

[26] *Id.* at p. 5 (quoting *Donnelly v. Glickman* 159 F.3d 405, 409 (9th Cir. 1998)).

– much like litigation against the entities of named defendants – is prohibited by the October 22, 2008 stay on litigation. But, as the Court noted when granting the other non-party secured creditors' motions to intervene:

> Therefore, if, as the movants, Receiver Kelley, and the United States apparently have assumed, the granting of a motion to intervene for the limited purpose of requesting relief from the stay is a threshold event that must occur before a nonparty can actually request that the stay be lifted, it would betray the stated intent of the order staying litigation to now deny, under the guise of Rule 24, such nonparties the ability to move the Court for relief from the stay.[27]

To remain consistent, Petitioners' motion to intervene should be granted.

B. Petitioners have standing to challenge the scope of the injunction and receivership.

Pursuant to § 1345(b), the court is authorized to enter "a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to . . . any person or class of persons for whose protection the action is brought."

As persons for whose protection this action was purportedly brought, Petitioners have standing to request modification of the injunction/receivership to preserve the status quo of their assets pursuant to 18 U.S.C. § 1345(b).

A third-party who owns an interest in assets restrained pursuant to §1345 has standing to challenge the factual basis for the restraint – even though the findings of fact supporting the restraining order were stipulated to by a criminal defendant and the Government. In *United States v. Payment Processing Ctr., LLC*, 435 F. Supp. 2d 462

[27] *Id.* at p. 6.

(E.D. Pa. 2006), the court was presented with a situation similar to the situation here. There, after entering a temporary restraining order under § 1345 and restraining approximately $10 million, the Government and the defendant entered a stipulated preliminary injunction, restraining a bank account at Wachovia Bank, N.A. Wachovia, as a third-party, asserted an ownership interest in some of the funds in the bank account.[28] The court held that the fact that the criminal defendant and the Government had stipulated that there were grounds under § 1345 for the restraint did not bar third-party Wachovia from challenging the basis for the restraint. After an evidentiary hearing on the issue, the court concluded that ownership of some of the money had vested in Payment Processing Center by the time of the restraint, but part belonged to Wachovia; the court released that portion to Wachovia. *Payment Processing*, 461 F. Supp. at 469-70.

Ritchie is a third-party here who owns liens against certain assets of Polaroid (which was not a named defendant) and certain assets of PGW (which, though named as a defendant, was not implicated in the fraud, at least in the facts so far alleged in the record). Although the cases differ factually, in both *Payment Processing* and this case, an innocent third party who owns interests in the restrained property seeks to challenge the restraint because certain property was not lawfully restrained under the facts

[28] Wachovia claimed that, under the Uniform Commercial Code's law on provisional credits, the money in the bank account belonged to Wachovia rather than PPC. "Because Wachovia provisionally credited PPC's account in the amount of deposited drafts from third-party telemarketing transactions" and the credits "never became final because the payor banks refused to honor many of the drafts," the funds in the account still belonged to Wachovia, it argued. *Payment Processing*, 435 F. Supp. 2d at 464.

stipulated to by the criminal defendants and the Government.[29]

Therefore, Petitioners, as secured creditors of PGW and Polaroid, have standing to object to challenge the receivership order's reach to assets of those corporations. *See, e.g., Sec. & Exch. Comm'n v. Forex Asset Mgmt. LLC,* 242 F.3d 325 (5th Cir. 2001) ("[A] non-party creditor who objected to a proposed receivership distribution plan had standing because he had a legitimate interest in the proceedings, and had participated adequately in the proceedings by timely filing his claim, filing objections, and attending the hearing on the claim."); *Commodity Futures Trading Cmm'n v. Topworth Int'l,* 205 F.3d 1107, 1113 (9th Cir. 1999).

C. Receiver Kelley has acted (and apparently will continue to act) adversely to the rights to Ritchie in regard to the improperly restrained assets.

In recent litigation, the Receiver has indicated that his plan is to liquidate all of Petters' assets and apportion them (obviously after the Government gets its share under the forfeiture laws) "equally" among all of the creditors and victims.[30] In the words of the Receiver: "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."[31]

The Receiver has further stated in his pleadings that "victim restitution is a

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[29] Ritchie is not challenging the truth of any of the facts stipulated to in the Orders. This challenge is to the facial validity of the Orders, even if the facts were all true.

[30] Memorandum in Opposition to LG Electronic's Motion to Intervene (Doc. 100) at p. 12, *Petters* Civil.

[31] *Id.* at 13.

primary focus of § 1345" and of his efforts.[32]

On December 12, 2008, this Court issued an Order declining to lift the litigation stay against Polaroid, a PGW subsidiary, sought by several of its secured creditors. The Court described Receiver Kelley's performance of his duties under the orders: "Since Receiver Kelley was appointed on October 6, 2008, he has dutifully identified, managed and preserved the assets for the *best interest of all* (creditors, claimants and victims alike)."[33]

An equal distribution among secured and unsecured creditors and victims of all of the "receivership estate's" corporate assets alike would violate property rights of Petitioners, the largest secured creditor of PGW – as well as other secured creditors of the solvent Petters corporations. The victims and creditors of the various corporations named in the receivership are not legally "all in the same boat," as the Receiver would have it.

At stake here are the property interests of many different classes of unsecured creditors and lienholders of several different corporate entities – as well as the Government and indicted criminal defendants, and the criminal defendants' alleged victims. The separate corporate entities and assets that have now been gathered into the "receivership estate" have widely diverging degrees of alleged culpability – from 100% (PCI) to 0% (Polaroid). The extent to which each subject corporation's assets are forfeitable clearly affects the rights of creditors of that corporation. Furthermore, the

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[32] Memorandum in Opposition to Acorn Capital Group's Motion to Intervene (Doc. 109) at p. 12, *Petters* Civil.

[33] Memorandum Opinion and Order Granting in Part and Denying in Part Motions to Intervene (Doc. 143) at p. 8, *Petters* Civil (emphasis in original).

solvency of each corporation and defendant affects the lienholders' and creditors' rights.

Third-parties with interests in the properties placed into receivership continue to suffer "a continuing and substantial injury," as long as their assets remain frozen – as well as irreparable injury if the Receiver liquidates the assets at present low market value, or causes their liens to be destroyed. Cf. *In re Schwen's, Inc.*, 19 B.R. 681, 702 (Bankr. D. Minn. 1981) (examining extent of damages to estate by receiver's acts alleged by secured creditor). Therefore, Petitioners, as secured creditors of PGW and Polaroid, have standing to object to the receivership order as it affects those corporations.

II. The Receivership Orders Are Void To The Extent They Exceed The Powers Authorized Under § 1345.

Because the initial restraining order and all of its subsequent expansions were done by stipulation between the U.S. Attorney's Office and Petters/the Receiver (with Petters' lawyer signing the original stipulation to appoint the receiver, and the Receiver signing the others) this Court has never made an independent determination of fact as to whether particular assets – such as PGW and its subsidiaries – were restrainable at all under § 1345, or the statutory procedures normally employed for restraining assets in criminal forfeiture cases. Had the Court been asked to scrutinize the factual basis for the § 1345 orders, it would have found that the findings of fact in those stipulated orders were legally insufficient to sustain a § 1345 injunction and the receivership against PGW and its subsidiaries.

A. The Government has not made the requisite factual showing to restrain the assets of PGW and its subsidiaries.

The Government has (at least) three hurdles to clear before an injunction and

receivership can issue under § 1345: (1) the Government must show that a person is violating or about to violate a federal fraud statute; (2) the Government must show the person is alienating or disposing of property; and (3) the Government must show that the property subject to the Government's requested injunction and/or receivership was obtained as a result of or traceable to the fraudulent activities. *See* § 1345.

The stipulated findings of fact here supporting the receivership orders are insufficient, *as a matter of law*, to authorize the restraining order and receivership as to PGW and its subsidiaries. There is no evidence in the record that PGW or its subsidiaries were: involved in the fraudulent conduct of PCI; nor that they were alienating or disposing of property; nor that any of PGW or its subsidiaries' property was traceable proceeds of the fraudulent activities. The stipulated facts entered into between the criminal defendant and the Government fail to establish elements (2) and (3), above. Also, by using the generic term "some defendants" or "some of the defendants," the findings of fact fail to identify which defendants allegedly violated the first prong. This is not a sufficient basis to restrain all the assets of PGW.

1. The Government has not shown that PGW was violating or about to violate a fraud statute contained in 18 U.S.C. § 1341 et. seq.

a. Burden of proof.

A growing number of courts have held that such a finding must be made by the preponderance of the evidence, not a mere probable cause.

> 18 U.S.C. § 1345, the so-called "fraud injunction statute," requires application of the traditional burdens of proof for the issuance of a civil injunction. In light of . . . *prevailing Eighth Circuit Court of Appeals*

> *precedent on civil injunctions pursuant to Fed. R. Civ. P. 65*, an injunction pursuant to the statute may only issue upon the [G]overnment's proof by the preponderance of the evidence that a violation of one of the specified fraud statutes is occurring or is about to occur.

United States v. Barnes, 912 F. Supp. 1187, 1198-1199 (N.D. Iowa 1996) (emphasis added).

The vast majority of case law requires findings by a preponderance of the evidence before issuance of a preliminary injunction or receivership. "The first factor under the statute is proof of a violation of a predicate offense statute by the preponderance of the evidence." *Id*. *See also United States v. Brown*, 988 F.2d 658, 663 (6th Cir. 1993); *United States v. Cacho-Bonilla*, 206 F. Supp. 2d 204, 208-09 (D. P.R. 2002); *United States v. Quadro Corp*., 916 F. Supp. 613, 619 (E.D. Tex. 1996); *United States v. Jones*, 652 F. Supp. 1559, 1560 (S.D.N.Y 1986). The fact that the defendant has been indicted does not dispense with this requirement. *Brown*, 988 F.2d at 663.

b. Specific findings of fact.

Section 1345 requires specific findings of fact, set forth with particularity in accordance with Fed. R. Civ. P. Rule 65. In *United States v. Cohen*, a § 1345 case, the Fourth Circuit admonished the district court for not making factual findings to support its order:

> [W]e are unable to discern with sufficient degree of precision the factual basis underlying the district court's order. For example, it found that "Cohen has engaged in a pattern of fraudulent behavior highlighted by false statements, self-dealing, and willingness and ability to secretly manipulate financial transactions for unlawful purposes."
>
> But that statement finds conclusions only, damning as they may be, and no statement which is false has been found as a fact by the district court, nor

> has any incident of self-dealing, nor has any incident of secret manipulation of a financial transaction for an unlawful purpose.

152 F.3d 321, 326 (4th Cir. 1998).

c. The insufficiency of findings of fact here are insufficient to support the restraints against PGW and its subsidiaries.

On their face, the stipulated findings of fact in the various orders are insufficient to form a basis for the § 1345 order. First, they rely on a probable cause standard – most courts now require preponderance of the evidence. More importantly, the language in the stipulated findings of fact – which was apparently carefully worded as a compromise between what the Government wanted and what Petters and his cohorts were willing to admit at that point – fails to establish a factual basis for the restraint as to PGW or its assets.

There are many reasons why a criminal defendant would be willing to sign off on such a stipulation. Perhaps he was hoping to curry favor with the Government, in order to get released on bail, or to advance his cause in settlement discussions. As Justice Stevens stated in his dissent in *Libretti v. United States*, 516 U.S. 29, 55 (1996) "it is not unthinkable that a wealthy defendant might bargain for a light sentence by voluntarily 'forfeiting' property to which the [G]overnment had no statutory entitlement." Such a temptation would be even more enticing if the property is partially owned by someone else. For that reason, third-parties with interests in the restrained property should not be forced to take the criminal defendant's word that a factual basis exists for the pretrial restraint and liquidation by the Receiver of potentially forfeitable assets.

The findings of fact sections of each of the orders in the present matter[34] merely recite that there is probable cause to believe that (1) "certain Defendants" have committed and were continuing to commit fraud prior to being enjoined; (2) Defendants' fraudulent activities generated $3 billion; (3) immediate, irreparable harm would result if the fraud by "certain of the defendants" were not enjoined; (4) the U.S. is likely to succeed on the merits of its Amended Complaint; and (5) weighing the equities, the injunction is in the public interest.[35]

PGW's assets were included in the receivership despite the fact that there has never been any specific factual finding that PGW (as opposed to PCI or Petters himself) was "violating or about to violate 18 U.S.C. § 1341. . . ."

In a comparable case, the Government in *Cacho-Bonilla* "did not allege, much less prove, that [the criminal defendants] had committed or was about to commit the predicate acts." 206 F. Supp. 2d at 208. Because of this deficiency, the court was without authority under § 1345, and it terminated the receivership.

> As an initial showing, the [G]overnment had to establish that [the criminal defendants] had committed or was about to commit any of the predicate acts outlined in the statute. In other words, the [G]overnment had to establish that the fraud injunction statute authorized the Court to enjoin the conduct being charged.

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[34] Order for Entry of Preliminary Injunction (Doc. 12), *Petters* Civil; Order for Entry of Preliminary Injunction (Doc. 43), *Petters* Civil; Amended Order for Entry of Preliminary Injunction (Doc. 70), *Petters* Civil; Second Amended Order for Entry of Preliminary Injunction (Doc. 127), *Petters* Civil.

[35] Order for Entry of Preliminary Injunction (Doc. 12) at ¶¶ 4-8, *Petters* Civil; Order for Entry of Preliminary Injunction (Doc. 43) at ¶¶ 4-8, *Petters* Civil; Amended Order for Entry of Preliminary Injunction (Doc. 70) at ¶¶ 4-8, *Petters* Civil; Second Amended Order for Entry of Preliminary Injunction (Doc. 127) at ¶¶ 4-8, *Petters* Civil

Cacho-Bonilla, 206 F. Supp. 2d at 208.

Just as in *Cacho-Bonillo*, the Government has presented insufficient facts to support the Court's authority, and the receivership should be terminated as to PGW.

Moreover, several defendants pleaded guilty prior to Petter's indictment.[36] It is fair to assume that they cooperated and provided all the information they could to the Government.[37] Thus the information in the indictment may very well be the best case the Government can make against PGW and its subsidiaries.

2. The Government has not shown that PGW was alienating or disposing of property, or intended to do so.

Furthermore, before the Court can enter a preliminary injunction placing a person's assets into receivership under § 1345, the Court must find that the "person" to be enjoined was "alienating or disposing of property, or intend[ed] to alienate or dispose of property . . . obtained as a result of a banking law violation" or other triggering fraud. § 1345(b)(2).

No such finding was made in any of the orders. PGW was placed into the receivership, not only without any factual basis for a claim that it was violating or about to violate the fraud statute, but also without any factual finding that PGW was "alienating

[36] Robert White Plea Agreement (Doc. 7), *United States v. White*, 08-cr-299 (D. Minn. Sept. 30, 2008); Lawrence Reynolds Plea Agreement (Doc. 6), *United States v. Reynolds*, 08-cr-320 (D. Minn. Oct. 16, 2008); Michael Catain Plea Agreement (Doc. 6), *United States v. Catain*, 08-cr-302 (D. Minn. Oct. 3, 2008); Deanna Coleman Plea Agreement (Doc. 6), *United States v. Coleman*, 08-cr-304 (D. Minn. Oct. 6, 2008).

[37] *See, e.g.*, Defendant's Memorandum of Law in Support of Motion for Revocation of Detention Order (Doc. 67) at p. 4, *Petters* Criminal.

or disposing of property, or intend[ed] to alienate or dispose of property."[38] § 1345(b)(2). To the contrary, the factual support in the Government's pleadings (e.g. Agent Rice's affidavit), makes a detailed showing of wrongdoing as to Petters himself and PCI but is exculpatory as to PGW. As to Petters himself, he has been incarcerated for months with his communications subject to direct suppression by the Government.

3. The Government has not shown that the restrained assets of PGW were obtained as a result of or traceable to the alleged fraud.

The Government also never attempted to meet its burden under § 1345(a)(2) of proving that PGW's assets which were placed into receivership were "property . . . obtained as a result of a banking law violation . . . or a Federal health care offense [or other triggering fraud] . . . or property which is traceable to such violation." § 1345(a)(2). The wording in the stipulated facts was different as to this prong – "Defendants' fraudulent activities generated $3 billion." By using the term "defendants" collectively rather than the qualified term "certain of the defendants" or "certain defendants," the wording creates a suggestion that all of the defendants and corporate entities contributed equally to the $3 billion in fraud profits. However, the sentence would still be literally true even if PGW was not involved in the fraudulent activities and therefore contributed $0 to the $3 billion in fraudulent activities of the rest of the defendants. This wording fails to trace any proceeds of fraudulent activities into PGW.

[38] Additionally, Polaroid, a separate corporation which was not indicted or even implicated in the alleged fraud, was also brought into the receivership without any showing required under § 1345(a)(1) or (2).

First and foremost, money laundering is not an offense that justifies a § 1345 restraint. By its own terms, § 1345 only authorizes injunctions against violators of Chapter 63, which includes §§ 1341-1349, or §§ 287, 371 or 1001 of title 18. Money laundering is codified at 18 U.S.C. § 1956 et. seq. and 31 U.S.C. § 5340 et. seq. ***Section 1345 does not provide for a restraint of assets believed to be tied to a money-laundering offense, and money laundering under 18 U.S.C. § 1956(h) is the only offense alleged against PGW.***[39]

The case law is well developed that a pretrial restraint of untainted assets is beyond the scope of § 1345. The statute itself makes clear that the court may freeze only those assets "related to the alleged fraud," *Brown*, 988 F.2d at 664, or traced to the fraud. This requirement dovetails with the principle that only tainted assets – and not "substitute assets" – may be restrained pretrial in a criminal forfeiture case.[40] *See also Cacho-Bonilla*, 206 F. Supp. 2d at 209 ("the plain language of the statute limits the receivers' reach to the property obtained as a result of the violation or traceable thereto") (citing *United States v. DBB, Inc.*, 180 F.3d 1277, 1280-81 (11th Cir. 1999); *U.S. v. Fang*, 937 F. Supp. 1186, 1194 (D. Md. 1996) ("All courts which have addressed the issue suggest that any assets to be frozen must in some way be traceable to the allegedly illicit activity"); *Quadro Corp*., 916 F. Supp. at 619 (the district court may only freeze assets which the Government has proven to be related to the alleged fraud); *Barnes*, 912 F. Supp. at 1198).

In *Quadro Corp*.,"the [G]overnment ha[d] not shown by a preponderance of the

[39] *See* Indictment at ¶ 20, *Petters* Criminal.
[40] *See* section III, *infra*.

evidence any specific assets which [were] traceable proceeds from the fraudulent scheme." 916 F. Supp. at 619. The same problem was presented in *Brown*:

> [T]he district court failed to distinguish between the proceeds from the alleged Medicare fraud and untainted funds from the seventy-five percent of the Browns' business that is unrelated to Medicare claims. As a result, we remand the case so that the district court can reevaluate the nature of the assets that it froze. The court may freeze only those assets related to the alleged fraud.

988 F.2d at 664.

Much of the case law regarding the scope of § 1345 consists of district courts quoting *Brown*,[41] for example: *United States v. Hoffman*, 560 F. Supp. 2d 772, 777 (D. Minn. 2008) (Government must prove by a preponderance of the evidence that assets were traceable proceeds of an ongoing violation of the predicate offense statue); *United States v. Williams*, 476 F. Supp. 2d 1368, 1374 (M.D. Fla. 2007) (U.S. must prove equitable factors – likelihood of success on the merits, irreparable injury, the balance of hardship on the parties, and the public interest – weigh in favor of injunctive relief, and also must establish that fraud has been committed and demonstrate the extent of such fraud); *United States v. Sriram*, 147 F. Supp. 2d 914 (N.D. Ill. 2001) ("the cases do

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[41] The Sixth Circuit held in *Brown*, 988 F.2d at 663:

> Our reading of the amendment of 1990 does not limit the effect of the old language [in § 1345(b)]. A district court had the authority to freeze assets which were the "fruits of the fraud" under the pre-1990 version of section 1345. *See United States v. Jones*, 652 F. Supp. 1559, 1560 (S.D.N.Y. 1986). Congress did not alter the district court's authority when it added language regarding banking-law violations. Consequently, asset freezes in cases not involving banking-law violations continue to be within the scope of 18 U.S.C. § 1345 after the statute was amended in 1990.

uniformly state that the assets frozen must be 'traceable to the allegedly illicit activity,'" therefore the court released untainted assets to defendant); *Barnes*, 912 F. Supp. at 1198 (to obtain § 1345 injunction Government must prove by the preponderance of the evidence that a violation of one of the specified fraud statutes is occurring or is about to occur); *Quadro Corp.*, 916 F. Supp. at 619 (district court may freeze only those assets which the Government has proven by a preponderance of the evidence to be related to the alleged fraud); *Cacho-Bonilla*, 206 F. Supp. 2d at 208-209 ("the plain language of the statute limits the receivers' reach to the property obtained as a result of the violation or traceable thereto"); *Jones*, 652 F. Supp. at 1560 (denying Government's request pursuant to § 1345 to freeze defendant's untainted assets in order to make them available for restitution).

There is no evidence that the assets of PGW which the Government seeks to reach pursuant to 18 U.S.C. § 1345 were "obtained as a result of a [criminal] violation," or "traceable to such violation" as the statute plainly requires in order for them to be restrained or placed in receivership under § 1345(a)(2). Moreover, tracing any payments from PCI to individuals who currently or formerly worked for PGW or Polaroid does not implicate the corporations in any wrongdoing, including money laundering. Unless those payments can then be traced into the corporation's bank accounts, the assets are not traceable proceeds allowing forfeiture against the corporations. In addition to their failure to establish a factual basis for any of the three prongs above, neither the complaints nor the orders recite the necessary element that the court "shall proceed as soon as practicable to the hearing and determination of such an action." § 1345(b).

The "asset freeze" section of each of the injunction/receivership orders mandated that *all* assets of the Defendants are deemed to be property of the Receivership and subject to the exclusive administration by the Receiver.[42] No grounds have been shown to make the logical leap between implicating "certain of the defendants" in the ongoing fraud, and gathering all of the assets of all of the defendants into the freeze of assets beyond PCI and its subsidiaries.

III. A Restraining Order/Receivership Under 21 U.S.C. § 853 Would Also Be Invalid Against PGW.

Section 1345 is not the only statutory process the Government could have used to restrain assets prior to the criminal trial of Petters and his codefendants. The customary statutory process for restraining assets pending the outcome of criminal forfeiture is set out in 21 U.S.C. § 853(e), made applicable to all criminal forfeiture cases by 18 U.S.C. § 982(b)(1). The case law under this section, however, is illustrative of the error made by the Government here as to PGW and its subsidiaries.

Under § 853, the mere fact that PGW was indicted in the criminal case would not authorize a pretrial restraint against all of its property. An indicted defendant's property may only be restrained prior to trial to the extent authorized by § 853(e)(1), which limits the restraints to "tainted property." By the terms of § 853(e) itself, substitute assets[43]

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[42] Order for Entry of Preliminary Injunction (Doc. 12) at pp. 4-5, *Petters* Civil; Order for Entry of Preliminary Injunction (Doc. 43) at pp. 4-6, *Petters* Civil; Amended Order for Entry of Preliminary Injunction (Doc. 70) at p. 7, *Petters* Civil; Second Amended Order for Entry of Preliminary Injunction (Doc. 127) at p. 8, *Petters* Civil.

[43] Substitute assets, by definition are untainted assets, forfeitable as a post-conviction remedy if forfeited tainted assets can no longer be located, etc. 21 U.S.C. § 853(p).

may not be restrained or placed into receivership prior to trial in a criminal forfeiture case.[44] *United States v. Field*, 62 F.3d 246, 248-9 (8th Cir. 1995). Moreover, a receivership order is invalid to the extent that it "exceed[s] the statutory authority for preconviction restraints." *United States v. Riley*, 78 F.3d 367, 371 (8th Cir. 1996).

The conclusory allegation which appears in the stipulated orders – that Petters' alleged Ponzi scheme generated $3 billion in "traceable" proceeds – does not suffice. In order to be *traceable* proceeds, the Government must *trace* them into a specific asset. The Government has not done that or tried to do that, even in the allegations of fact. The allegation in the First Amended Complaint that "Defendant Petters used fraudulent funds to support his numerous enterprises, including but not limited to . . . Polaroid Holding Company and its subsidiaries. . . ." was quickly recanted when the Government filed the Second Amended Complaint *later the same day*.

The Court has no authority, moreover, to restrain untainted assets from PGW as "substitute assets" forfeitable for Petters' alleged offenses nor to ensure there are adequate assets to provide criminal restitution to PCI's victims. A receivership order is overbroad and invalid to the extent it encompasses substitute assets – that is, assets that are not tainted under a "*traceable* proceeds" or "facilitation" theory. *Riley*, 78 F.3d 367.[45] The Government has not established a legal basis for including PGW and its

[44] A pretrial restraint under § 853(e)(1), by its terms, applies only to property forfeitable as "tainted" – i.e. "traceable assets" or "facilitating property" ("subsection (a)") property. Substitute assets are "subsection (p) property."

[45] Similarly, under § 1345, the receivership order is overbroad if it purports to encompass assets unrelated to the alleged fraud. *Brown*, 988 F.2d at 664. See also *United States v. O'Brien*, 1999 WL 357755, *3 (6th Cir. May 11, 1999) (unpublished) ("*United*

subsidiaries in the receivership estate. Without a factual showing that PGW's assets are forfeitable as tainted assets under *Riley*, the restraining order violates the due process protections Ritchie is entitled to under § 853(e).[46]

IV. A Court Cannot Use Its General Equity Jurisdiction To Give A Receiver Powers Over Assets Beyond Those Authorized By § 1345.

The Government alludes to this Court's "equity jurisdiction" in support of its proposition that "Courts presiding over equity receiverships possess extremely broad power to supervise and protect receivership assets."[47] However, this Court's general equitable powers do not permit the Government to obtain a receivership order that allows the pretrial restraint of untainted assets.

Since the Government lacks any interest in the property at this stage, it can only obtain a receivership pursuant to the procedures authorized by specific legislation, such as § 1345. 12 CHARLES ALAN ET AL., FEDERAL PRACTICE AND PROCEDURE § 2983 (2d ed. 1995) ("Receivers, under proper circumstances, also may be appointed at the request of government officials acting pursuant to specific legislation."). When the specific legislation authorizes a receivership sought by government officials, the court may not

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States v. Brown . . . involved civil forfeiture which does not have a provision for the seizure of substitute assets." (citations omitted)).

[46] Third parties whose interests in property are restrained pending trial by a forfeiture count in a criminal indictment may obtain equitable relief from the criminal court prior to trial in order to protect their interests. *See*, *e.g.*, *Riley*, 78 F.3d at 369; *United States v. Real Prop. in Waterboro,* 64 F.3d 752, 757 (1st Cir. 1995); *United States v. Regan,* 858 F.2d 115, 121-22 (2d Cir. 1988); *United States v. Crozier*, 777 F.2d 1376, 1382-84 n.2 (9th Cir. 1985); *United States v. Siegal,* 974 F.Supp. 55, 57-8 (D. Mass. 1997); *United States v. Wu,* 814 F. Supp. 491, 494 (E.D. Va. 1993*)*; *United States v. Scardino,* 956 F. Supp. 774, 780 n.5 (N.D. Ill. 1997).

[47] Memorandum in Opposition to LG Electronic's Motion to Intervene (Doc. 100) at p. 5, *Petters* Civil.

expand beyond the reach of the statute by relying on general equitable powers.

> [T]he Supreme Court held in *Grupo Mexicano* [*de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999)] that Rule 65 does not authorize an injunction to freeze assets merely because a plaintiff fears that by the time a judgment is obtained the assets will have been dissipated.
>
> *Grupo Mexicano* does not bar the Government's effort to freeze assets here because the Government moves for the preliminary injunction under a specific statutory authorization. . . . But the analysis in *Grupo Mexicano* counsels caution in expanding the sweep of that authority to freeze assets beyond the specific grant of authority made by Congress.

Sriram, 147 F. Supp. 2d at 948 (In reaching its conclusion that Rule 65 does not authorize a court to issue a preliminary injunction preventing the disposition of assets pending a contract claim for money damages, the Supreme Court found that "such a remedy was historically unavailable from a court of equity," citing *Grupo Mexicano*, 527 U.S. at 333).

In *Cohen*, the United States filed a complaint against a defendant individual, seeking monetary penalties for banking law violations. The district court asserted that it had the power to enter the preliminary injunction on several grounds: inherit equitable authority, ancillary jurisdiction, Fed. R. Civ. P. 65, 28 U.S.C. § 1651(a), and 18 U.S.C. § 1345(a)(2)(A). The Fourth Circuit examined various theories set forth by the Government as a basis for the court's equitable authority to enter a preliminary injunction freezing a defendant's assets. It held that Fed. R. Civ. P. 65 did not provide authority for the injunction, as it regulated only the issuance of injunctions otherwise authorized. Similarly, the All Writs Act, 28 U.S.C. § 1651(a), was inapplicable as a source of authority, as it was not relevant to an order that froze assets. *Cohen*, 152 F.3d at 324. The Fourth Circuit noted that 18 U.S.C. § 1345(a)(2)(A) may have applied to United

States' claim, but only if the Government proved that a defendant has disposed of or intends to dispose of property that was obtained as a result of or traceable to past violations of banking laws. *Id.* at 325.

V. The Legal Effect Of Appointing A Receiver Without Statutory Or Equitable Authority.

This Court is faced with a matter of first impression. The law is not yet developed as to whether an appointment of a receiver – and more importantly, the actions taken by the receiver post-appointment – should be deemed void or voidable when the court later determines that the order was overly broad and encompassed property that § 1345 does not allow to be restrained.

Petitioners urge the Court to follow the rationale of the Eighth Circuit in *Finneran v. Burton*, 291 F. 37 (8th Cir. 1923) and hold that when the court appoints a receiver without proper authority, the receivership is void. In *Finneran*, a Missouri state court appointed a receiver after creditors of an insolvent company brought suit. Applications were then initiated seeking to prohibit the state court judge from proceeding with the receivership. The Eighth Circuit agreed with the Missouri Court of Appeals that because certain steps required by law prior to the appointment of a receiver were not followed, the receivership was ruled "void ab initio." *Finneran*, 291 F. at 38-9.

This is the proper decision for this Court to make, especially in light of policy. If improperly appointed receiverships were deemed merely to be voidable, there would be no recourse for parties who were adversely affected by the poorly made decisions of receivers. Receivers could bootstrap their improperly exercised powers by arguing that

their conduct cannot be undone; and the Government would be incentivized to obtain overly broad § 1345 orders if all the court could do is simply terminate the authority to act further, instead of rescinding the orders. Additionally, parties seeking the appointment of a receiver, for whatever reason, would be tempted to distort the facts to comport with requisite preconditions as to the appointment of a receiver because the injured person would have no effective remedy for harm caused during the improper receivership.

VI. Practical Effect.

Petitioners acknowledge that Petters stipulated to the receivership orders. Nevertheless, his stipulation alone cannot grant the Court authority that it lacks under the statute. As was shown above, the Government and the criminal defendant cannot by collusion confer authority to appoint a receiver where the stipulated factual basis fails to supply the elements required by the statute.

Ritchie also agrees that, with Petters incarcerated, there are equitable reasons for the appointment of a receiver to manage PGW's affairs, in the absence of a board of directors or other appointee qualified to run the corporation's affairs in Petters' absence. Indeed, Ritchie itself sought and obtained a receivership order in state court before this § 1345 case was filed – as it had standing to do on general equitable principles, since it owns substantial secured interests in certain assets belonging to PGW and subsidiary Polaroid.

Petitioners would consent to the appointment of a receiver qualified to run the business if (i) the Government supplied the required nexus under § 1345, and (ii) the

Court appointed an independent receiver for PGW, i.e., not Kelley. However petitioners do not consent to the continuation of the current receiver's control over PGW's untainted assets (whether that control is by virtue of Kelley's receivership power or his new trustee power). Petitioners are entitled to representation of its interests by a receiver who is conflict-free, which Receiver Kelley cannot supply.

Unless the Government can show valid grounds under § 1345 for subjecting PGW's assets to the receivership, this Court should declare the current receivership orders void as to PGW and its subsidiaries. (Petitioners are not challenging the pretrial restraint or receivership orders to the extent they apply to other defendants or other Petters assets.)

For the untainted corporate assets at least, Petitioners are entitled to a conflict-free receiver who is not beholden to the Government, nor trying to assist the Government in maximizing future forfeitures, or creating one big pot of liquidated assets from which it proposes to dole out pro rata portions to the criminals' alleged victims, and third party corporate lienholders and unsecured creditors alike. Further, given the current economic crisis – which marks the worst time in decades to be liquidating any business – Petitioners seek appointment of a receiver for the untainted assets who has the business acumen and experience to try to turn around troubled companies if commercially feasible. Only a businessman experienced in salvaging troubled companies would have the experience to determine whether such a thing would be feasible, or whether the companies should continue to pursue bankruptcy reorganization as the most commercially sound solution.

VII. Fee Issue.

When a receivership exceeds the scope of § 1345 as to specific assets, the receiver's expenses and salary, and those of his agents and employees, may not be paid from those improperly restrained assets. *United States v. Guess*, 2005 WL 1819382 (S.D. Cal. June 28, 2005), citing *Bowersock Mills & Power Co. v. Joyce*, 101 F.2d 1000, 1002 (8th Cir. 1939). In *Bowersock*, when determining which party must bear the receiver's expenses, the Eighth Circuit distinguished between receivers appointed properly and those without authority:

> The general rules are that where a receiver is regularly and lawfully appointed, his expenses and compensation are to be charged only against the receivership funds and not against the party who procured his appointment; but that where the appointment of the receiver was irregular or inequitable or the court which appointed him was without authority so to do, the party who procured the appointment, and not the receivership fund, is liable for the expenses of the receivership.

101 F.2d at 1002 (footnotes omitted).

Under this reasoning, although the Receiver is entitled to be paid for his work, someone other than PGW and Polaroid should pay him.

> "[A] district court has discretion to award receivership costs against the United States." *Frankwell Bullion*, 99 F.3d at 306 ((holding the Government should pay the majority of the expenses billed by a receiver appointed pursuant to the [G]overnment's *ex parte* TRO obtained against a foreign corporation based on alleged statutory violations after it was determined at the later preliminary injunction hearing that an injunction was unwarranted). "[T]hose costs of the receivership that would not have arisen but for the appointment should be charged against the party invoking the receivership. . . ."

Guess, 2005 WL at *4.

"An appropriate allocation decision considers the 'extent that each defendant

would otherwise have had to incur those expenses, and the extent that each defendant benefitted from the receiver's work.'" *Id.* at *4 (citing *Commodity Future Trading*, 99 F.3d at 306). In *Guess* the court granted the receiver's application for payment of fees. Though the benefit to other parties of the receiver's appointment was hotly disputed, the court imposed the entire liability of the receivership costs on the United States.

As explained in 1923 by the Eighth Circuit in *Finneran v. Burton*, where the proceedings appointing the receiver are void, the receiver "has no legal right to take possession of the property. He was nothing more at law than a volunteer or a trespasser." *Finneran*, 291 F. at 37. In *Cacho-Bonilla*, where the Government's actions in seeking the receivership of a private company were not substantially justified, the company was entitled to attorneys' fees under the Equal Access to Justice Act. 206 F. Supp. 2d at 20. Under the facts here that means Kelley and his agents may not pay themselves from PGW or Polaroid assets.

CONCLUSION

Ritchie does not view the over breadth of the asset freeze/receiver orders here as a problem created by the Court. This is a problem created by the Government and Petters, magnified by the way Receiver Kelley has exceeded his powers. This Court, however, has a duty now to correct the over breadth of its orders. To accomplish this correction, the Court must vacate those parts of the order that restrain PGW itself and PGW assets and declare those aspects of the orders void *ab initio*.

Dated: March 23, 2009.

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