

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
09-680

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., ET AL.,

Appellants,

v.

UNITED STATES TRUSTEE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF MINNESOTA, BANKRUPTCY COURT FILE NO. 08-45257
HONORABLE GREGORY F. KISHEL

BRIEF OF APPELLEE UNITED STATES TRUSTEE

Of Counsel:

Habbo G. Fokkena
United States Trustee

Ramona D. Elliott
General Counsel

Michael E. Ridgway
Robert B. Raschke
Department of Justice
Office of the United States Trustee
300 South Fourth Street, Suite 1015
Minneapolis, MN 55415
(612) 664-5500

P. Matthew Sutko
Walter W. Theus, Jr.
United States Department of Justice
Executive Office for United States Trustees
20 Massachusetts Avenue, NW
Washington, D.C. 20530
(202) 307-1399

ATTORNEYS FOR APPELLEE
UNITED STATES TRUSTEE

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**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

IN THE MATTER OF:

Ritchie Special Investments, Ltd., et al.,

Civil No. 09-cv-680-ADM

v.

United States Trustee, et al.

Bky No. 08-45257

BRIEF OF APPELLEE UNITED STATES TRUSTEE

PRELIMINARY STATEMENT

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. (collectively “Ritchie”) have appealed the order of the bankruptcy court¹ overruling their objection to the appointment of Douglas A. Kelley (“Kelley”) as chapter 11 trustee, and approving his appointment in the jointly administered cases of Petters Company, Inc., et al. (Bankruptcy Court No. 08-45257) (“Trustee Order”). The United States Trustee² appointed

¹ The Honorable Gregory F. Kishel presiding. The decision can be found at 401 B.R. 391 (Bankr. D. Minn. 2009).

² United States Trustees are Department of Justice Officials appointed by the Attorney General to supervise the administration of chapter 11 bankruptcy cases. *See* 28 U.S.C. § 581-589(a). *See also* H.R. Rep. No. 95-595, at 88 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6049 (United States Trustees “serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena.”) Their express statutory powers include authorization to move for the appointment of a trustee, 11 U.S.C. § 1104(a), and the naming of a trustee if the court orders a trustee’s appointment, 11 U.S.C. § 1104(d).

Kelley pursuant to the bankruptcy court's Order for Appointment of Trustee(s) entered December 17, 2008. Kelley's appointment as trustee was supported by the Unsecured Creditors' Committee for the Petters cases ("the Petters Committee"), Ronald R. Peterson, Esq., Chicago, as trustee for the bankruptcy estates of Lancelot Investors Fund, L.P., et al. ("Lancelot trustee")³ and the Unsecured Creditors' Committee in *In re Polaroid Corporation, et al.*, Bky 08-46617 ("the Polaroid Committee").

BASIS FOR APPELLATE JURISDICTION

Jurisdiction for this appeal is premised upon 28 U.S.C. § 158(a)(1) which grants "district courts of the United States . . . jurisdiction to hear appeals from final judgments, orders, and decrees" of bankruptcy judges. Ritchie has appealed the order of the bankruptcy court overruling its objection to the appointment of Douglas A. Kelley as the chapter 11 trustee in these cases. Although the Eighth Circuit has not yet specifically ruled on this issue, other courts have held that such an order appointing (or denying) a trustee is a final order for appeal purposes. *In re Marvel Entertainment Group*, 140 F.3d 463, 470 (3d Cir. 1998) ("Using the liberal finality rules which apply in bankruptcy matters of this nature, we believe that jurisdiction is proper over the order appointing a trustee here."); *In re Cajun Elec. Power Coop. Inc.*, 69 F.3d 746, 748 (5th Cir. 1995) (appointment of bankruptcy trustee is an immediately appealable final order); *In re Plaza de Diego Shopping Ctr., Inc.*, 911 F.2d 820, 826 (1st Cir. 1990) (same); *Committee of Dalkon Shield Claimants v. A.H. Robins Co.*, 828 F.2d 239, 241 (4th Cir. 1987) (same). Applying the factors enunciated by the Eighth Circuit in *In re Koch*, 109 F.3d 1285,

³ Lancelot is a group of Chicago-based hedge funds which filed for chapter 7 relief. Lancelot claims a loss in excess of \$1.3 billion.

1287 (8th Cir. 1997),⁴ it

appears that jurisdiction in the district court is proper.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

THE BANKRUPTCY COURT DID NOT ERR IN APPOINTING KELLEY AS TRUSTEE FOR BOTH PGW & PCI

- A. **No disqualifying conflict of interest prevents Kelley from serving as a common trustee for these Debtors.**
- B. **Kelley’s pre-petition status as court-appointed Receiver for the Debtor entities did not disqualify him from serving as trustee for PGW.**
- C. **The bankruptcy court’s denial of Ritchie’s request for expedited discovery is not properly before this Court on appeal, because Ritchie did not appeal the bankruptcy court’s order of January 23, 2009.**

Standard of Review

The district court sits as a court of review in bankruptcy matters; accordingly, the bankruptcy court’s factual findings are reviewed for clear error and its conclusions of law *de novo*. *In re Loop Corp.*, 379 F.3d 511, 515 (8th Cir. 2004), *cert. denied* 543 U.S. 1055 (2005). However, in matters pertaining to the appointment or removal of a trustee, the bankruptcy court is given broad discretion. *In re Reagan*, ___ B.R. ___, 2009 WL 805144 (B.A.P. 8th Cir. March 30, 2009), *citing Contractors, Laborers, Teamsters & Eng’rs Health & Welfare Plan v. M & S Grading, Inc. (In re M & S Grading, Inc.)*, 541 F.3d 859, 867 (8th Cir. 2008). *See also, In re Farmland Indus., Inc.*, 397 F.3d 647, 651 (8th Cir. 2005) (“The bankruptcy court abuses its

⁴ The three factors are: “the extent to which (1) the order leaves the bankruptcy court nothing to do but execute the order; (2) the extent to which delay in obtaining review would prevent the aggrieved party from obtaining effective relief; (3) the extent to which a later reversal on that issue would require recommencement of the entire proceeding.” *Id.* citing *In re Olson*, 730 F.2d 1109 (8th Cir. 1984).

discretion when it fails to apply the proper legal standard or bases its order on findings of fact that are clearly erroneous.”); *Kim v. Cox*, 130 F.2d 721, 733 (8th Cir. 1942) (abuse of discretion standard applied in reviewing bankruptcy court’s appointment or removal of trustee) (decided under Bankruptcy Act of 1898).

As indicated in the Trustee Order, most of the findings of fact were based on various state and federal court proceedings involving many of the same parties, and so are not in dispute.

Trustee Order, 401 B.R. at 395, n. 6.

STATEMENT OF THE CASE

The petitions commencing the Chapter 11 cases of Petters Company, Inc. (“PCI”) and Petters Group Worldwide, LLC (“PGW”) were filed on October 11, 2008. Within one week following, the petitions commencing the Chapter 11 cases of PC Funding, LLC; Thousand Lakes, LLC; SPF Funding, LLC; PL Ltd., Inc.; Edge One, LLC and MGC Finance, Inc., PAC Funding, LLC and Palm Beach Finance Holdings were filed. All the cases were filed by Douglas A. Kelley in his capacity as the federal court-appointed receiver of these entities. An order for joint administration of the above-entitled cases was entered on October 22, 2008.

On December 2, 2008, the United States Trustee filed his motion under 11 U.S.C. § 1104(a) seeking an order directing the appointment of a chapter 11 trustee. UST App. 91-115. Ritchie filed its motion requesting the appointment of two trustees: one for PCI and one for PGW. The bankruptcy court held a hearing on the motion on December 16, 2008. The Court granted the United States Trustee’s motion and also “held that the issue of whether a trustee should be appointed for Debtor Petters Group Worldwide, LLC, with a different person or persons to be appointed as trustee(s) for the other Debtors, was not ripe until the United States

Trustee had first exercised his authority under 11 U.S.C. § 1104(a), as to all of the Debtors.” App. A-65, 66. On December 24, 2008, the United States Trustee, acting under the authority of 11 U.S.C. § 1104(d) and Fed. R. Bankr. P. 2009(c)(2), appointed Douglas A. Kelley (“Kelley”) as Chapter 11 Trustee of these jointly administered cases, and filed a motion under Fed. R. Bankr. P. 2007.1(c) seeking approval of his appointment with the bankruptcy court. UST App. 151-167.

On January 7, 2009, Ritchie timely filed its objections⁵ to the United States Trustee’s appointment of Kelley, alleging disqualifying conflicts of interest arising from Kelley’s status as pre-petition receiver for the Debtor entities as well as conflicts of interest arising from Kelley’s role as trustee for both PCI and PGW. Ritchie also sought to conduct expedited discovery into certain of Kelley’s actions in that regard. Kelley opposed the requests for discovery. A hearing was held on January 22, 2009 regarding Ritchie’s motion to compel discovery. The bankruptcy court denied the request and quashed all such discovery attempts. UST App. 149-150. Ritchie did not appeal this order.

The United States Trustee’s motion seeking approval of Kelley’s appointment was heard on January 27, 2009. The Petters Committee, the Polaroid Committee and the Lancelot trustee appeared in support of the United States Trustee’s appointment. Ritchie was the only creditor that opposed the motion.⁶ At the hearing, no evidence was taken; the parties presented oral

⁵ In its order entered December 17, 2008, the bankruptcy court set deadlines regarding the appointment process. App. A-65, 66.

⁶ In a colloquy with the bankruptcy court, Ritchie appears to have “backed off” its initial request to disqualify Kelley as trustee for all the Debtor entities, stating its “primary objective is to have a separate trustee appointed for PGW” and leaving Kelley in place for the other nine Debtor entities. Trustee Order, 401 B.R. at 403; UST App. 42. This position is consistent with

argument regarding their respective positions.

On February 26, 2009, the bankruptcy court issued its order approving the appointment of Kelley as common trustee for all of the Debtor entities. App. 344-378. Pursuant to the court's order, Kelley, on March 5, 2009, filed his acceptance of appointment as Chapter 11 Trustee and in the same pleading attached his turnover of assets. UST App. 168-172.

Ritchie timely filed its Notice of Appeal from the bankruptcy court's order on March 9, 2009. Docket Entry # 1.

STATEMENT OF THE FACTS

PCI and PGW⁷ are both privately held limited liability companies owned 100% by Thomas J. Petters ("Petters"). PCI is the sole member and owns 100% of the membership interests of PC Funding, Thousand Lakes, SPF Funding, PL Ltd., Edge One, MGC Finance, PAC Funding and Palm Beach Holdings. PCI was utilized as the venture capital arm of the Petters enterprises. It utilized single purpose entities to obtain billions of dollars of funding, purportedly to acquire merchandise for sale to wholesalers and retailers nationwide. PGW has investments in companies across the globe; however, its principal asset was 100% ownership of the stock of Polaroid Corporation. UST App. 117-118.

As a result of a federal criminal investigation, Petters, PCI and PGW were indicted on charges

Ritchie's prayer for relief "that the Court reverse the Trustee Order and direct the Bankruptcy Court to order the United States Trustee to appoint a separate trustee for PGW, and that the Trustee not be Kelley." Ritchie Brief at 24.

⁷ PCI was formed in Minnesota and PGW was formed in Delaware, although both companies operate from the same location in Minnetonka, Minnesota.

of mail fraud, wire fraud, money laundering and conspiracy to commit those offenses.⁸ Other Petters executives implicated in this Ponzi scheme had also been arrested and have since pled guilty to certain crimes. According to the government, more than 20 lenders and investors had been defrauded out of more than \$3.45 billion as a result of this alleged scheme.

On October 6, 2008, pursuant to 18 U.S.C. § 1345(a)(2), the United States District Court for the District Court of Minnesota appointed Douglas A. Kelley, Esq., as a Receiver for PCI, PGW and all of their affiliates and subsidiaries except for MN Airlines, LLC dba Sun Country Airlines (the “Receiver”).⁹ From October 11, 2008 to October 19, 2008, the Receiver filed bankruptcy petitions for the various Debtors. By its order of October 22, 2008, the bankruptcy court ordered these cases to be jointly administered. UST App. 173-174.

Pursuant to the authority granted to him as Receiver, Kelley sought relief under Chapter 11 “to reorganize and/or preserve their operations, sell assets and preserve potential avoidance [actions] and claims.” UST App. at 83. At the time of filing the petitions in bankruptcy, the Receiver was: (i) operating the Debtors’ businesses, (ii) preserving the Debtors’ assets, and (iii) based on the district court’s order appointing him as a receiver, purporting to act as a debtor-in-possession under §§ 1107 and 1108 of the Bankruptcy Code. In point of fact, the only entities conducting any business operations at the time of filing were PCI and PGW.¹⁰ UST App. at 80-90.

⁸ See *United States of America v. Thomas Joseph Petters, et al.*, United States District Court, District of Minnesota, Criminal No. 08-364. Indictment, A - 293 - 305.

⁹ See *United States of America v. Thomas Joseph Petters, et al.*, United States District Court, District of Minnesota, Civil No. 08-5348.

¹⁰ PCI and PGW had a combined 28 employees, while the remaining Debtors’ estates had no direct operations, no employees and no direct payroll costs. UST App. at 84-85.

The United States Trustee filed his motion under 11 U.S.C. § 1104(a) seeking the appointment of a chapter 11 trustee. The United States Trustee's motion was premised on two considerations – 1) the Bankruptcy Code did not recognize the authority of a “receiver” continuing on as a debtor in possession and 2) the Debtor entities had no management structure in place to operate the businesses since those individuals had either been indicted and/or plead guilty to certain federal crimes. UST App. 91-111. The bankruptcy court granted the motion and directed the United States Trustee to appoint a trustee or trustees for the debtors' estates. *See* 11 U.S.C. § 1104(d). The United States Trustee appointed Kelley to serve as trustee for the jointly administered estates, Fed. R. Bankr. P. 2009(c)(2), and filed an Application for Order Approving the Appointment of Trustee. Fed. R. Bankr. 2007.1(c).

The bankruptcy court held a hearing on the United States Trustee's Application for Order Approving the Appointment of Trustee. The Petters Committee, the Polaroid Committee¹¹ and the Lancelot Trustee supported the appointment of Kelley, while Ritchie continued its opposition. UST App. at 33-58.

The bankruptcy court issued its order on February 26, 2009. The court ruled that Kelley could serve as trustee for both the PCI estate and the PGW estate, overruling Ritchie's argument that he could not serve as trustee for both. The bankruptcy court cited Fed. R. Bankr. P. 2009(d), stating that “Ritchie (has) not made a prima facie showing that, at present their interests, or the interests of the creditors of any particular debtor, are actually prejudiced at present by the

¹¹ Polaroid Corporation and nine affiliated companies (“Polaroid entities”) filed petitions under Chapter 11 of the Bankruptcy Code on December 18, 2008. By order of the bankruptcy court dated December 23, 2008, the Polaroid cases were ordered to be jointly administered bearing Case No. 08-4661, Docket Entry # 21. The United States Trustee appointed the Official Unsecured Creditors' Committee on January 8, 2009, Docket Entry # 44.

existence of conflicts of interest that arise out of the configuration of the Debtors' rights against each other, pre- or post-petition. At this time, there is no 'internal conflict' that prevents Kelley from serving as trustee for all of the Debtors, pursuant to the U.S. Trustee's appointment." Trustee Order, 401 B.R. at 414.

The court also held that Kelley's pre-petition status as the court-appointed receiver for Tom Petters and several of his business entities (including all the Debtors) did not prevent Kelley from serving as a common trustee in these cases. "In sum, Kelley's past status as trustee (sic) does not make him not disinterested so as to bar his appointment as trustee for these cases. Any such status he may technically retain after a full effectuation of his appointment as trustee will not do so either. The 'external conflict' urged by the Ritchie Parties is not a ground for disapproving the United States Trustee's appointment." Trustee Order, 401 B.R. at 410.

SUMMARY OF ARGUMENT

A trustee for multiple estates with claims against one another need not be automatically removed. Removal must be based on some evidence of an actual conflict which prejudices the creditors of one of the estates. Ritchie has failed to meet its burden of establishing that it will suffer actual prejudice if Kelley is allowed to serve as a common trustee.

The selection of a common trustee in these jointly administered cases would be economical, would avoid unnecessary duplication of actions and would provide for an orderly administration of the cases. As the trustee, he acts in a fiduciary capacity and must act in conformity with the mandates of the Bankruptcy Code. His duties are to identify potential assets, prosecute avoidance claims and to monetize the same. Contrary to the assertions of Ritchie, Kelley does not have the power to pursue forfeiture actions, nor is he an "agent" of the

federal government in its criminal action against Petters, PCI and PGW.

Ritchie did not appeal from the bankruptcy court's order denying its discovery requests. Accordingly, this Court lacks jurisdiction to consider this argument. Even if the issue was properly preserved, Ritchie still is unable to show that the bankruptcy court abused its discretion in denying its request.

ARGUMENT

THE BANKRUPTCY COURT DID NOT ERR BY APPROVING KELLEY'S APPOINTMENT AS TRUSTEE FOR BOTH PGW & PCI

A. No disqualifying conflict of interest prevents Kelley from serving as a common trustee for these Debtors.

1. Ritchie has not met its burden under Fed. R. Bankr. P. 2009(d).

Ritchie argues that an appointment of a separate trustee for PGW is mandated because of a conflict of interest between PGW and PCI. As the party challenging the appointment of a common trustee in these cases, the burden rests upon Ritchie to establish actual prejudice to them arising from any conflict of interest the common trustee may have *vis a vis* the other jointly administered entities. Fed. R. Bankr. P. 2009 (d) states: “[o]n a showing that creditors . . . of the different estates will be prejudiced by conflicts of interest of a common trustee **who has been . . . appointed**, the court shall order the selection of separate trustees for estates being jointly administered.” (emphasis added). Fed. R. Bankr. P. 2009(d). If the appointment is that of a single trustee, a party in interest may challenge such appointment upon a showing of prejudice to creditors arising from conflicts of interest of a common trustee. *Id.* For the following reasons, Ritchie's assertion that Kelley cannot serve as a common trustee for all Debtors falls short of the mark.

Ritchie's sole basis for arguing that prejudice will result if Kelley serves as trustee for both PGW and PCI and its subsidiaries is that claims are likely to exist among those entities.¹² The existence of interdebtor claims is not, however, automatic grounds for removal of a trustee for multiple estates and accordingly does not constitute grounds to mandate the appointment of separate trustees. Removal must be based on evidence of an actual conflict which prejudices the creditors of one of the estates. The court in *In re BH&P, Inc.*, 949 F.2d 1300 (3d Cir. 1991), rejected the notion that a trustee who, in a jointly administered case, asserts a claim on behalf of one estate against another, becomes a "creditor" as defined under 11 U.S.C. § 101(14)(A). The court held that section 101(14) should not be read to disqualify a trustee because of actions taken by the trustee in his representative capacity. Any trustee appointed under 11 U.S.C. § 1104 must be disinterested as defined under section 101(14). The appointment of a separate trustee requires a showing that creditors will suffer actual prejudice by conflicts held by a common trustee. "Before a trustee may be removed, some actual injury must be shown." *Id.* at 1311.

The cases cited by Ritchie contain facts which established an identifiable conflict between two or more entities. Such is not the case here. The interrelatedness of these Debtor entities and affiliates of other Petters entities is obviously complex. "Upon reviewing the

¹² This position is inconsistent with the one Ritchie took when it sought the appointment of a single receiver for both PGW and PCI in the Circuit Court of Cook County, Illinois. In that proceeding, Ritchie sought the appointment of a "William Procida as Receiver for the Collateral, including PGW and PCI and all its operations, with all of the usual powers of a receiver, . . ." See *Appointed Trustee's Response to Objection to Appointment of Douglas A. Kelley as Trustee for All of the Debtors in these Jointly Administered Proceedings*, UST App. 116-132. The state court granted Ritchie's request and appointed William Procida "Receiver of the Petters Entities," which was defined to include PGW and PCI. *Id.* at 119-120. Ultimately, however, the Illinois state court deferred to this Court's Receivership Order and suspended further proceedings. Trustee Order, 401 B.R. at 398.

schedules, it becomes immediately obvious that the Debtor Entities, along with the dozens of other subsidiary entities of these Debtor Entities, and affiliates of other entities owned by Thomas J. Petters, have accrued inter-company obligations, engaged in extensive transferring of funds between PCI, PGW and subsidiary entities of each, and incurred inter-company obligations on behalf of other entities at hundreds of million dollar levels.” *Appointed Trustee’s Response to Objection to Appointment of Douglas A. Kelley as Trustee for all of the Debtors in these Jointly Administered Proceedings*, UST App. 125. The response of Kelley outlined his proposed “plan of action” — to recover and liquidate assets, pursue avoidance claims and fraudulent transfers, and then to distribute the proceeds in accordance with the statutory priorities envisioned by the Bankruptcy Code.¹³ *Id.* at 127.

The selection of a common trustee in these jointly administered cases will be economical, will avoid unnecessary duplication of actions and will provide for an orderly administration of the cases. “[I]t has long been recognized that joint administration, and the appointment of a common trustee, are favored means to save expense.” *In re Ben Franklin Retail Stores, Inc.*, 214 B.R. 852, 858 (Bankr. N.D. Ill. 1997). Appointing a single trustee to investigate and locate all available assets is in the collective best interest of the creditors, and it does not present a conflict of interest. *See In re International Oil Co.*, 427 F.2d 186, 187 (2d Cir. 1970); *In re H&S Transp. Co.*, 55 B.R. 786, 791-92 (Bankr. M.D. Tenn. 1982).

The bankruptcy court recognized these considerations of economy and efficiency in declining to accept Ritchie’s argument regarding this so-called “internal conflict.” The additional expenditure of time and professional expense weighs heavily against appointing

¹³ All of these functions are contemplated by 11 U.S.C. § 1106(a).

another trustee for PGW. “The Ritchie Parties have not even made a squawk about economy or efficiency supporting or ultimately vindicating the appointment of a second trustee, and there is no credible way they can.” Trustee Order, 401 B.R. at 413.

Based on the foregoing, the bankruptcy court correctly held that Ritchie has not met its burden under Fed. R. Bankr. P. 2009(d). “The structure of Rule 2009(d) imposes a burden of proof on the party that asserts a disqualifying prejudice - both a burden of production of evidence if the existence of the prejudice is fact-dependent, and burden of persuasion if the arguments pro and con are in equipoise. The Ritchie Parties have not carried that burden(.)” Trustee Order at 414.

2. No inherent difference between Ritchie and other creditors, or between PGW and PCI, mandates the appointment of a separate trustee for PGW.

In an effort to support its contention that PGW is “different” and therefore must have a separate trustee, Ritchie seeks to differentiate between “regular creditors” and victims of Petters’ fraud. Ritchie claims “regular creditor” status for itself. Furthermore, it seeks to draw a line between PGW and the remaining Debtor entities, claiming that PGW was a legitimate business enterprise and that PCI and its subsidiaries were engaged in unrelated fraudulent activities. These are distinctions without a difference. Victims of fraud and commercial creditors are treated the same in bankruptcy cases, and whatever relationships existed between PGW and the remaining Debtors, including PCI, will be sorted out during the administration of the bankruptcy cases. In any event, the record does not support Ritchie’s attempted distinctions.

Ritchie’s characterization of its relationship with PGW as being that of a “true creditor” is

belied by the underlying documentation (as reflected in Exhibit A to *Debtor's Response to United States Trustee's Motion to Appoint a Chapter 11 Trustee and Motion of the Ritchie Group for Appointment of a Chapter 11 Trustee in the Bankruptcy Case of Petters Worldwide, LLC*). A - 324-326. According to the financial history of the money “loaned” to PGW, the entire \$146 million was wired directly by Ritchie into the bank account of PCI at M&I Bank. “This demonstrates how loosely funds were distributed around the various Petters companies, although notably no funds appear to have gone to PGW. Virtually all of these funds went immediately to pay other investors.” A - 316. In this sense, Ritchie is most likely not a true creditor as it suggests, but instead another victim of Petters’ vast Ponzi scheme. In such cases, appellate courts have consistently determined that innocent victims should share equally in any recovered funds because equity demands equal treatment.¹⁴ *See generally United States Securities and Exchange Commission v. The Infinity Group Company*, 226 Fed. Appx. 217 (3d Cir. 2007) (*per curiam*) (*unpublished*) (collecting cases).

Ritchie also contends that “PCI was the vehicle for the fraud — not PGW.”

However, the indictment returned by the grand jury charges both entities with a variety of federal offenses. “From at least in or about 1995 and continuing through in or about September 2008, in the State of Minnesota and elsewhere, the defendants, THOMAS JOSEPH PETTERS, PETTERS COMPANY, INC., AND PETTERS GROUP WORLDWIDE, LLC, aided and abetted by persons and affiliated business entities, . . . did knowingly and unlawfully devise and participate in a scheme and artifice to defraud and to obtain billions of dollars in money and

¹⁴ Ritchie is attempting to bootstrap itself into a better position *vis a vis* other similarly situated parties. Such manipulation to Ritchie’s benefit at this early stage of these cases would result in an inequitable and inefficient administration of these bankruptcy estates.

property by means of materially false and fraudulent pretenses, representations, and promises.” *Indictment*, ¶ 4, A - 293-394. In fact, counts 1 through 7 of the indictment charge both PCI and PGW with aiding and abetting mail fraud in violation of 18 U.S.C. Sections 1341 and 2. *Id.* at ¶ 10, A - 297-298. Counts 8 through 10 of the indictment charge both PCI and PGW with aiding and abetting wire fraud in violation of 18 U.S.C. Sections 1343 and 2. *Id.* at ¶ 13, A - 298-299. Count 11 alleges that Thomas Joseph Petters, PCI and PGW “**did knowingly and willfully combine, conspire, and agree with each other and with . . . others known and unknown to the Grand Jury**, to commit offenses against the United States, that is, mail fraud and wire fraud as described in Counts 1 through 10 above, in violation of Title 18, United States Code, Sections 1341 and 1343.” (emphasis added) *Id.* at ¶ 15, A - 300. Count 12 of the Indictment alleges that Petters individually, along with both PCI and PGW, were involved in a money laundering conspiracy in violation of 18 U.S.C. § 1956(h). *Id.* at ¶20, A - 301-302.

Ritchie’s attempt to minimize the role of PGW in the fraudulent scheme stands in stark contrast to the allegations in the indictment. According to the indictment, the actions of PGW and PCI were intertwined in this complex criminal scheme to defraud victims. The Grand Jury found probable cause to believe that both entities were instrumentalities in Petters’ criminal enterprise.

B. Kelley’s pre-petition status as court-appointed Receiver for the Debtor entities did not disqualify him from serving as trustee for PGW.

As the trustee for these bankruptcy cases, Kelley is obligated to follow the mandates of Title 11 of the United States Code. The district court who appointed him receiver recognized this requirement when it amended the Receivership Order to require “(a)ny bankruptcy cases . . . shall during their pendency be governed by and administered pursuant to the requirements of the

United States Bankruptcy Code, 11 U.S.C. section 101 *et seq.*, and the applicable Federal Rules of Bankruptcy Procedure.” *Second Amended Order for Entry of Preliminary Injunction, Appointment of Receiver, and other Equitable Relief*,¹⁵ , Section IV, ¶ B. 2. c, UST App. 73. The bankruptcy court’s order also recognizes this obligation: “. . . Kelley has committed to proceeding with the administration of the estates in these cases in accordance with the values and priorities of bankruptcy law. Kelley acknowledges that this will entail maximizing the value of all assets collected, and then distributing them to the holders of all allowed claims against the Debtors, pursuant to statutory priorities and *pro rata* if necessary, all as the Bankruptcy Code envisions.” Trustee Order, 401 B.R. at 409. (footnote omitted). In no event, however, would Kelley’s obligations as trustee of these bankruptcy estates be materially adverse to his obligations as receiver in the district court.

In short, Kelley as trustee is duty-bound to administer these estates according to the dictates of the Bankruptcy Code. He is no longer a “receiver” and, contrary to the assertion of Ritchie, is not placed “in the untenable position of having to advance the interests of two distinct groups seeking recovery from the same assets.”¹⁶ Kelley is not a “receiver” over these

¹⁵ Docket Entry # 127, Civ. No. 08-5348, *United States of America v. Thomas Joseph Petters, et al.*, United States District Court, District of Minnesota (“Receivership Order”). UST App. 59-79.

¹⁶ Ritchie’s objection also misapprehends Kelley’s role as receiver in the district court action, suggesting that he owes a fiduciary duty to the victims of Petters’ fraud and serving as “an agent for the Government.” In this regard, it is incorrect — “a receiver is the agent only of the court appointing him; he represents the court rather than the parties. He is the custodian of property which is under the control of the court.” *Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147, 150 (4th Cir. 1944). *Greenleaf Apartments, Ltd. v. Soltesz (In re Greenleaf Apartments, Ltd.)*, 158 B.R. 456, 459 (Bankr. S.D. Ohio 1993) (“[A] receiver is a court appointed officer who is controlled exclusively by the court . . . [H]e is not to be regarded as an agent or representative of either party to an action.”) (citations omitted).

bankruptcy cases or their respective estates.

Ritchie’s objection to the appointment of Kelley as trustee for all of these Debtor entities totally misstates his role. The entire premise for the United States Trustee’s motion for the appointment of a chapter 11 trustee in these cases centered on the inherent tension between the traditional duties of a court-appointed equity receiver and a trustee (or debtor-in-possession) in bankruptcy. As was explained in his motion seeking the appointment of a trustee, a bankruptcy court cannot order the appointment of a receiver under the Bankruptcy Code. “A court may not appoint a receiver under . . . title [11].” *11 U.S.C. § 105(b)*. Although it may be conceded that Kelley, as receiver under the District Court’s order, had the authority to file the petitions initiating these bankruptcy cases, once they were filed, the United States Trustee contends that his authority as receiver terminated by operation of law. Although the bankruptcy court did not wholly adopt the United States Trustee’s position that Kelley’s role as receiver terminated by *operation of law*, it recognized the effect of the District Court’s receivership order “that these Chapter 11 cases will go ahead fully governed by the substantive law of bankruptcy.” Trustee Order, 401 B.R. at 408. The bankruptcy court, citing the mandates of 11 U.S.C. § 543(b)(2),¹⁷ ordered the turnover of all property Kelley had as receiver to himself as chapter 11 trustee. Trustee Order, 401 B.R. at 408-409.

The mandate of the Receivership Order¹⁸ that Kelley “(c)ordinate with representatives

¹⁷ 11 U.S.C. § 543(b)(1) provides: “A custodian shall — deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents or profits of such property that is in such custodian’s possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case(.)”

¹⁸ *Section IV, ¶ 6*, UST App. 74-75.

of the United States Attorney's office and Court personnel as needed to ensure that any assets subject to the terms of this Order are available for criminal restitution, forfeiture, or other legal remedies . . ." does not create any materially adverse conflicts *vis a vis* Kelley's obligations to these bankruptcy estates. The mere allegation of forfeiture in the indictment against Petters, PCI and PGW does not mandate the appointment of a separate trustee for PGW. Kelley, in his role as Receiver, is not empowered to pursue restitution or forfeiture. The power to prosecute any forfeiture against any asset rests exclusively with the United States Attorney.¹⁹ Contrary to the assertion of Ritchie, Kelley is not "an agent for the Government." "The notion of having the assets in Kelley's hands 'available for criminal restitution, forfeiture,' and the like signifies a duty to fully disclose their form and whereabouts and to maintain transparency that our legal system makes incumbent on any entrusted officer of a court, in the performance of obligations **to the appointing court**. It reflects no more than that." Trustee Order, 401 B.R. at 407. (emphasis in original).

Kelley's status as Receiver of any Petters entities does not conflict with his status as trustee of these Debtor entities. His fiduciary duties are mandated by Title 11 of the United States Code. In this regard, Kelley must collect and preserve all available assets, and make them available for distribution to the creditors of these estates according to the priorities set forth under the Bankruptcy Code. Kelley is powerless to determine what assets, if any, may be subject to forfeiture and/or restitution. Those decisions are left to the discretion of the United States Attorney and the district court. Accordingly, his current or former status as a receiver does not

¹⁹ The statutory authority of the United States Attorney to seek forfeiture of assets does not *ipso facto* make the United States a creditor in these bankruptcy cases.

disqualify him from serving as trustee in these cases.

C. The bankruptcy court's denial of Ritchie's request for expedited discovery is not properly before this Court on appeal, because Ritchie did not appeal the bankruptcy court's order of January 23, 2009.

Prior to the hearing on the United States Trustee's appointment of Kelley as trustee, Ritchie sought to compel discovery from him. The bankruptcy court conducted a hearing on Ritchie's requests on January 22, 2009. Kelley and the United States Trustee resisted such efforts. The bankruptcy court concluded that "there (wasn't) any basis for the discovery in the first instance here. So I'm certainly not going to either order the expediting of the responses nor am I going to delay the hearing. I'm going to address the issues as have been framed . . . next Tuesday for the formal hearing addressing these questions as matters of law." UST App. 30. The court entered its order denying Ritchie's request and further quashed all such discovery requests. UST App. 149-150.

Ritchie has not appealed the bankruptcy court's order denying its discovery requests. The only order Ritchie has appealed is the bankruptcy court's order entered February 26, 2009. Docket Entry # 1. As such, this Court does not have jurisdiction to entertain Ritchie's claim of error. *Powers v. Mesaba Aviation, Inc., d/b/a Mesaba Airlines*, ___ F.Supp.2d ___, 2007 WL 2261690 (D. Minn. Aug. 3, 2007) ("Under Rule 8002(a), a notice of appeal must be filed 'within 10 days of the date of the entry of the judgment, order, or decree appealed from.'") (citation omitted); *Accord, Veltman v. Whetzal*, 93 F.3d 517, 520 (8th Cir. 1996) (failure to timely file a notice of appeal "deprives the district court of jurisdiction to review that [appealed-from] order"), *affirming Veltman v. Whetzal*, 192 B.R. 201 (D.S.D. 1996) .

Even if Ritchie argues that the discovery issue is part and parcel of the bankruptcy

court's order approving Kelley's appointment as trustee, Ritchie must show an abuse of discretion. Such matters are soundly left to the discretion of the court. *Pleasants v. Am Express Co.*, 541 F.3d 853, 859 (8th Cir. 2008) ("We review the district court's order for an abuse of discretion, allowing the court 'great latitude' in discovery matters") (citing *Executive Air Taxi Corp. v. City of Bismarck*, 518 F.3d 562, 570 (8th Cir. 2008)). *See also, Miscellaneous Docket Matter #1 v. Miscellaneous Docket Matter #2*, 197 F.3d 922, 925 (8th Cir. 1999) (abuse of discretion standard applies in discovery matters in proceeding ancillary to principal action). The bankruptcy court correctly concluded that disposition of the matter of approving Kelley's appointment as common trustee could be determined as a matter of law. Accordingly, Ritchie's claim of error concerning its discovery requests falls short.

[End of Document]

CONCLUSION

For these reasons, the United States Trustee hereby respectfully requests this Court affirm the bankruptcy court's order overruling Ritchie's objection to Kelley's appointment as trustee for these jointly administered chapter 11 cases and approving his appointment.

Respectfully submitted,

Dated: May 20, 2009

HABBO G. FOKKENA
United States Trustee
Region 12

Of Counsel:

RAMONA D. ELLIOTT
General Counsel
P. MATTHEW SUTKO
Associate General Counsel
WALTER W. THEUS, JR.
Executive Office for
United States Trustees
Department of Justice
20 Massachusetts Ave., N.W.
Washington, DC 20530
TELE: (202) 307-1399

By: /e/ Michael E. Ridgway
Michael E. Ridgway
Trial Attorney, SD Atty. No. 1456
Robert B. Raschke
Assistant U.S. Trustee, MN 161081
Department of Justice
Office of the U.S. Trustee
U.S. Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, MN 55415
TELE: (612) 664-5500
FACS: (612) 664-551

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
09-680**

RITCHIE SPECIAL INVESTMENTS, LTD., ET AL.,

Appellants,
v.

UNITED STATES TRUSTEE, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF MINNESOTA, BANKRUPTCY COURT FILE NO. 08-45257
HONORABLE GREGORY F. KISHEL

UNSWORN CERTIFICATE OF SERVICE

I, Audrey Williams, declare under penalty of perjury that on May 20, 2009, I served copies of the Brief of Appellee United States Trustee, United States Trustee's Appendix and Certificate of Compliance with Local Rule 7.1, electronically by Notice of Electronic Filing, and upon all parties who have requested service in these cases by filing the same via ECF with the United States District Court, District of Minnesota, and/or upon the following by first class mail postage pre-paid:

Ronald R. Peterson, Esq.
Jenner & Blek, LLP
330 North Wabash Avenue
Chicago, IL 60611-4603

David E. Runck
Fafinski, Mark & Johnson, PA
Eden Prairie, MN 55344

Richard A. Chesley
Paul, Hastings, Janofsky & Walker LLP
191 North Wacker Drive, 30th Floor
Chicago, IL 60606

Executed on: May 20, 2009

/e/Audrey Williams
Audrey Williams
Office of the United States Trustee