IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Plaintiff, v. THOMAS J. PETTERS, ET AL, Defendant.	Case No.: 08-5348 (ADM/JSM) Hon. Ann D. Montgomery **JOINT MEMORANDUM OF LAW OF RECEIVER DOUGLAS A. KELLEY AND PLAINTIFF UNITED STATES IN OPPOSITION TO LG ELECTRONIC'S EXPEDITED MOTION TO INTERVENE**

Douglas A. Kelley ("Receiver" or "Kelley") and the United States ("Plaintiff"), respectfully submit this joint memorandum of law in opposition to LG Electronics, Inc.'s ("LGE") expedited motion to intervene in this action.

PRELIMINARY STATEMENT

On September 19, 2008, LGE filed a complaint in the U.S District Court, Eastern District of Texas against Petters Group Worldwide ("PGW"), Polaroid Corp. ("Polaroid") and five (5) other defendants alleging patent infringement. LG Electronics, Inc. v. Petters Group Worldwide, LLC, et al, File No. 5:08-cv-00163 (E.D. Tex.; filed Sept. 19, 2008) ("Texas Litigation"). The complaint alleges that each of the defendants have infringed, and continue to infringe, on a number of LGE's patents. LGE seeks monetary damages for alleged past and ongoing infringement, and further seeks a permanent injunction against the Texas Litigation defendants. (Amended Complaint, Smalley-Fleming Decl., Ex. 1.)[1]

[1] Reference to the "Smalley-Fleming Decl." shall refer to the declaration of Sandra S. Smalley-Fleming, and attached exhibits, submitted herewith.

Although LGE has not sought emergency relief in the Texas Litigation through a motion for temporary restraining order, and despite the fact that LGE has repeatedly agreed to extend the deadlines for various defendants to file their respective answers (Adkisson Decl., Ex. A.)[2], LGE urges the Court to grant expedited relief. LGE claims it is entitled to an expedited hearing on its motion to intervene due to "exigent" circumstances: "the Receiver's Notice purports to relieve a defendant from serving its Answer, which would otherwise be due December 11, 2008. Absent prompt action from this Court, the Receiver's Notice will derail the orderly case management of the co-pending case in the Eastern District of Texas." (LGE's Motion to Intervene, pp. 1-2.) LGE cannot distinguish itself from the countless other parties in litigation across the country that are also impacted by the Stay Order.

LGE asserts that it is entitled to intervene in this action under Federal Rule of Civil Procedure 24(a) as a matter of right, and alternatively under Rule 24(b) by permission of the Court. It seeks to intervene to clarify, modify and/or lift the Court's Amended Preliminary Injunction and Stay Order ("Stay Order"), to allow LGE to immediately pursue the Texas Litigation against Polaroid. LGE does not have a recognized interest in the subject matter of this litigation, nor can it demonstrate that any such interest may be impaired by the disposition of this case. Further, LGE's interest in this litigation, if any, is an economic interest, which the Eighth Circuit has held does not justify intervention as a matter of right. Moreover, because the remedy LGE seeks will frustrate the fundamental purpose of an equity receivership, and will cause undue delay

[2] Reference to "Adkisson Decl." shall refer to the declaration of John C. Adkisson and attached exhibits, submitted in support of LGE's motion to intervene.

in this litigation, the Court should deny LGE's request for permissive intervention.

Finally, even if the Court permits LGE to intervene in this action, LGE cannot demonstrate that it is entitled to a modification and/or lift of the Stay Order permitting LGE to proceed against Polaroid. Indeed, because the Receiver was appointed less than two (2) months ago, LGE's motion is premature. The Receiver should be given sufficient time to assume control over the estate, organize and analyze the entities under his control, and to resolve the factual and legal issues which must be resolved to determine ownership of the receivership assets. LGE's motion to intervene and to lift the stay should be denied in its entirety.

BACKGROUND

On October 6, 2008, the Court placed defendants Petters Company, Inc. ("PCI"), Petters Group Worldwide ("PGW"), and various affiliated entities into receivership and appointed Kelley to serve as their Receiver. By Order dated October 14, 2008, the Court amended its preliminary injunction and appointed a receiver for the individual defendants Thomas Petters, Deanna Coleman, Robert White, James Wehmhoff, Larry Reynolds and Michael Catain.[3] On October 22, 2008, the Court heard Kelley's motion to amend preliminary injunction and stay civil litigation. The Court granted the motion and stayed all pending and future civil litigation against the named defendants and their affiliated entities. Under these Orders, Kelley was granted "the full power of an equity Receiver," directed to take possession and control of the operations and assets of the receivership entities, and charged with performing all acts necessary or advisable to preserve the value

[3]On October 16, 2008, the Court appointed Gary Hansen receiver over defendant Frank Vennes and his related entities.

of the assets of the receivership estate for the benefit of the defendants' creditors. LGE now seeks to intervene for the sole purpose of lifting the Stay Order to permit LGE to proceed in the Texas Litigation against Polaroid.

ARGUMENT

The receivership in this litigation was established pursuant to 18 U.S.C. §1345 and Fed. R. Civ. P. 65. Section 1345 authorizes broad injunctive relief to protect those affected by ongoing mail fraud, wire fraud or banking fraud schemes. Besides enjoining receivership defendants, 18 U.S.C. §1345(b) empowers district courts to "take such other action as is warranted to prevent a continuing or substantial injury to the United States or any other person . . . for whose protection [an anti-fraud] action is brought." Victim restitution is a primary focus of §1345. United States v. Payment Processing Ctr., LLC, 439 F.Supp.2d 435, 438 (E.D. Pa. 2006). To that end, receivership actions under §1345 are often brought to preserve the status quo and protect innocent people while parallel criminal investigations proceed. United States v. Payment Processing Ctr., LLC, 435 F.Supp.2d 462, 464 (E.D. Pa. 2006) (citations omitted).

The fundamental purpose of an equity receivership is to protect property for ultimate return to the proper parties. The receiver's role is to safeguard assets, preserve their value, and help facilitate an equitable property distribution. Liberte Capital Group, LLC v. Capwill, 462 F.3d 543, 551 (6th Cir. 2006). Stays directed to nonparties may be entered where necessary to protect a federal receivership. See SEC v. Wenke, 622 F.2d 1363 (9th Cir. 1980); SEC v. An-Car Oil Co., 604 F.2d 114, 117 (1st Cir. 1979); Lankenau

v. Coggeshall & Hicks, 350 F.2d 61, 62 (2nd Cir. 1965); see also Jordan v. Independent Energy Corp., 446 F. Supp. 516 (N.D. Tex. 1978).

Here, the receivership is the product of the Court's equity jurisdiction. Courts presiding over equity receiverships possess extremely broad power to supervise and protect receivership assets. See, e.g., SEC v. Black, 163 F.3d 188, 199 (3rd Cir. 1998) (noting that in dealing with receivers vested with equitable powers, a "district court has wide discretion as to how to proceed"); FDIC v. Bernstein, 786 F. Supp. 170, 177 (E.D.N.Y. 1992) ("one common thread keeps emerging out of cases involving equity receivership—that is, a district court has extremely broad discretion in supervising an equity receivership"). "The power of the district court to issue a stay, effective against all persons, of all proceedings against the receivership entities rests as much on its control over the property placed in receivership as on its jurisdiction over the parties." SEC v. Wenke, 622 F.2d 1469. The Court's power to enter a blanket stay is broader than its authority to grant or deny injunctive relief under Fed. R. Civ. P. 65. Id. at 1371; see also SEC v. Universal Financial, 760 F.2d 1024, 1037 (9th Cir.1985) (recognizing that the traditional preliminary injunction test is not applied in ruling on motions to except applicants from a blanket receivership stay).

I. LGE IS NOT ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Federal Rule of Civil Procedure 24(a)(2) entitles a party to intervene as a matter of right if the party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect is interests, unless existing parties

adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Under Eighth Circuit law, a party may intervene as a matter of right if "(1) it has a recognized interest in the subject matter of the litigation; (2) the interest may be impaired by the disposition of the case; and (3) the interest will not be adequately protected by the existing parties." Chiglo v. City of Preston, 104 F.3d 185, 187 (8th Cir. 1997). Where the interest for the claimed right to intervene is not relevant to the main action, or if the movant's claim is separate from or independent of the main action, or if it promotes a different purpose in the lawsuit than that asserted in the original complaint, intervention should be denied. Finally, although not conclusive, "the opposition of all the original parties to the main action to intervention is an element for the Court's consideration." Commonwealth Edison Co. v. Allis-Chalmers Mfg Co., 207 F. Supp. 252, 257 N.D. Ill. 1962).

A. LGE Does Not Have A Cognizable Interest in the Subject Matter of The Litigation.

Under Rule 24(a)(2), an interest is cognizable only where it is "direct, substantial, and legally protectable." United States v. Union Elec. Co., 64 F.3d 1152, 1171 (8th Cir. 1995). If a party seeking to intervene cannot demonstrate that it has an interest relating to the property or transaction which is the subject of the underlying suit, intervention is not proper. See Medical Liability Mutal Ins. Co. v. Alan Curtis, LLC, 485 F.2d 1006 (8th Cir. 2007) (holding interest to ensure that defendants in a parallel state case had sufficient resources to satisfy a potential judgment was too remote and indirect to qualify as a cognizable interest under Rule 24 (a)(2)); Arkansas Power & Light Co. v. Arkansas Public Service Com'n, 107 F.R.D. 335 (E.D. Ark. 1985) (holding parties do not have a right to intervene in litigation simply because it indirectly affects their financial position);

Morgan v. Sears, Roebuck and Co., 124 F.R.D. 231 (N.D. GA. 1988) (denying manufacturer's motion to intervene where action was brought against retailer to recover damages sustained when nightgown burned while being worn, where the issues were whether the plaintiff was wearing the gown and whether it was defective, and thus movant's argument that it had not manufactured the gown did not involve a common question of law or fact with the main action). The Eighth Circuit has made clear that "[a]n economic interest in the outcome of the litigation is not itself sufficient to warrant mandatory intervention." Medical Liability Mutual Ins. Co., 485 F.2d at 1008 (citation omitted).

Here, LGE alleges it has "both monetary and equitable interests" in this litigation because the Receiver interpreted the Court's Stay Order to cover the LGE litigation and entered the Notice in that matter. Under LGE's theory, every party in every action impacted by a stay order could intervene in the original action as a matter of right. LGE provides no support for this expansive interpretation of Rule 24(a)(2). Moreover, LGE's interest in seeking redress for alleged patent infringement is not relevant to this litigation, involves claims that are separate and distinct from the allegations and claims in this litigation, and promotes a wholly different purpose. LGE's asserted interest in this litigation does not satisfy the Eighth Circuit's test for intervention as a matter of right.

B. LGE's Alleged Interest in the Subject Matter of the Litigation Will Not Be Impaired or Impeded if Intervention is Denied.

Even if LGE had a cognizable interest in this litigation, which it does not, any such interest would not be impaired or impeded if this litigation proceeds without LGE's intervention. LGE has sought to protect its interest in the Texas Litigation. Rule 24

states that a prospective intervener must be "so situated that the disposition of the action may as a practical matter impair or impede [his]...ability to protect that interest." Fed. R. Civ. P. 24(a)(2). LGE does not meet this requirement.

LGE asserts that if the Stay Order extends to the Texas Litigation, "LGE will be unable to recover damages based on Polaroid's past and ongoing infringement of LGE's patents." (Memo, p. 11.) Of course, LGE has requested in the Texas Litigation that the court enter an order requiring the various defendants to "account for and pay" to LGE all damages related to the infringement, and further requests that "such damages be trebled" if the infringement is found to be willful. (Amended Complaint, Smalley-Fleming Decl., Ex. 1.) LGE cannot in good faith argue that its interests are "not wholly compensable at law." (Memo, p. 11.) Although LGE is barred from maintaining a suit against Polaroid at present, this litigation does not seek or purport to provide LGE with the relief to which it may be entitled under the law. LGE is not precluded from proceeding with the Texas Litigation and may seek any and all available relief, after this litigation is resolved.

Because LGE does not have a cognizable interest in the subject matter of this litigation, and because any such alleged interest will not be impaired or impeded if it is prevented from intervening in this litigation, the Court should deny LGE's motion to intervene as a matter of right.

II. LGE IS NOT ENTITLED TO PERMISSIVE INTERVENTION.

LGE asserts that it should alternatively be permitted to intervene under Rule 24(b). Rule 24(b) provides the Court with discretion to allow intervention to any person who "has a claim or defense that shares with the main action a common question of law or

fact." Fed. R. Civ. P. 24(b)(1)(B). In deciding whether to exercise discretion, the Court should consider whether intervention will "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Here, LGE does not have a claim or defense involving a question of law or fact that is common to this litigation. In the Texas Litigation, LGE asserts five (5) separate counts for patent infringement against Polaroid and several other defendants. (Smalley Decl., Ex. 1.) The questions of law and fact in the Texas Litigation center on the validity of LGE's patents, and whether the named defendants have been infringing upon those patents. None of those questions of law or fact are at issue in this litigation. The interest LGE seeks to address in the Texas Litigation is not relevant to this litigation, and the claims are separate and distinct from the claims in this litigation.

LGE asserts that the "common question" between its interests and the law and facts of this case is the scope of this Court's grant of injunctive relief. But the scope of the Court's grant of injunctive relief is not at issue in this litigation; none of the parties to this litigation have raised an issue with respect to the Court's authority to grant injunctive relief. And as the Court made clear in granting the Stay Order, there was no opposition from Plaintiff or any of the defendants to the proposed Stay Order.[4] (Transcript, Adkisson Decl. Ex. C at p. 20-21) LGE has not raised a common issue of law or fact, and therefore permissive intervention is not proper. Additionally, permitting LGE to intervene for the purpose of seeking a lift of the Stay Order as to Polaroid will unduly delay and prejudice

[4] The case cited by LGE in support of its request for permissive intervention, *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), is inapposite. In *United Nuclear*, after the parties had settled the dispute, a non-party was permitted to intervene for the sole purpose of objecting to the protective order to gain access to discovery materials. Given the procedural posture of this litigation, the infancy of the receivership, and the relief LGE seeks, *United Nuclear* is readily distinguishable from the facts here.

the parties rights in this litigation, as it will indefinitely lead to a flood of motions by similarly-situated parties in the numerous civil litigation matters across the country that are affected by the receivership stay. The burden and expense of responding to these motions, and proceeding with the litigation if such motions are granted, would defeat the purpose of the Stay Order.

III. THE COURT HAS APPROPRIATELY STAYED LITIGATION AGAINST POLAROID AND SHOULD REFUSE TO AMEND OR OTHERWISE LIFT THE STAY.

A. The Court Has Stayed All Litigation Against Polaroid.

The Court's first preliminary injunction, dated October 6, 2008, froze the assets of PGW, Petters Company, Inc. and any affiliates, subsidiaries, divisions, successors or assigns owned 100% or controlled by Petters Company, Inc. or PGW, including the assets of Polaroid Corporation, which is owned 100% by Polaroid Holding Company, which is owed 100% by PGW. On October 14, 2008 the Court issued an amended preliminary injunction, which froze the assets of the individual defendants. On October 22, 2008, the Court entered the Stay Order, which identified both the October 6, 2008 and October 12, 2008 Orders, and expressly states that "the October 14, 2008 Order of Entry of Preliminary Injunction, Appointment of Receiver, and Other Equitable Relief...is hereby amended." (October 22, 2008 Order). LGE asserts that because the Stay Order did not expressly amend the October 6, 2008 Order which related to the Petters entities, including Polaroid, that the Stay Order does not act as a stay on pending and future litigation against Polaroid. Under LGE's interpretation of the Stay Order, there is no stay in place with respect to any Petters–related entities. LGE's interpretation

of the Stay Order ignores the express language of the parties and the Court during the October 22, 2008 hearing, the clear intent of the Court, which is apparent from an overall reading of the Order, and puts form over substance by giving undue weight to a scrivener's error.[5]

On October 22, 2008, Steve Wolter ("Wolter") acting on behalf of Kelley, appeared before this Court on a motion to amend the preliminary injunction. As Wolter made clear:

> Mr. Kelley was appointed a receiver about two weeks ago for the corporate entities, he was appointed a receiver for the individuals about a week ago, and so we're still in the process of gathering information and trying to sort through this complex jumble of transactions and records underlying the various pending civil actions. There are about 30 cases, to our knowledge, currently pending against the Petters companies. They're pending in a variety of courts throughout the country...what we're seeking to sort of stave off for the time being is this multitude of lawsuits that are out there pending either against the individual defendants or the corporations.

(Transcript, Adkisson Decl., Ex. C at pp. 6 – 7.) The Government supported Kelley's motion arguing that the wave of civil litigation throughout the country would overwhelm the receiver, consume a majority of his time, and would drain the receivership assets. (Id. at p. 10.) During the hearing, in addressing the argument of a non-party that sought to intervene, the Court noted that the issue before the Court was whether there was "a need under exigent circumstances for a stay of all civil litigation to be put in place so that the receiver can go about the other duties." (Id. at p. 21.) Without doubt, the Receiver, the Government, and the Court intended the Stay Order to cover the named entity-defendants

[5] On November 24, 2008, Kelley filed a motion to amend and clarify the preliminary injunction and receivership orders to clarify that, consistent with the express language of the parties and the Court during the October 22, 2008 hearing, the Amended Order for Entry of Preliminary Injunction, Appointment of Receiver, and other Equitable Relief entered October 22, 2008, amended both the October 6 and October 14 Orders, and thus the stay of litigation covers the individual defendants as well as the entity defendants, and their affiliates.

and their affiliates, not just the individual defendants.

In granting the motion, the Court amended the preliminary injunction to stay litigation against the Receivership Defendants. Although the term "Receivership Defendants" was not expressly defined in the Stay Order, this term was intended to cover the named defendants as well as "any affiliates, subsidiaries, divisions, successors, or assigns owned 100% or controlled by [them]," including Polaroid, which is owned 100% by Polaroid Holding Company, which is owned 100% by Petters Group Worldwide, LLC. (Stay Order, at p. 3.) Any other interpretation of the term "Receivership Defendants" would defeat the purpose of the stay, would cause the Receiver to spend unnecessary time and resources in litigation across the country, and would drain the receivership assets to the detriment of the victims.

As written, the Stay Order effectively stays all pending and future litigation against Polaroid. However, should the Court determine that the express language of the Stay Order does not provide a stay of all litigation against Polaroid, it should amend the order to provide for such a stay.

B. LGE's Request To Lift The Stay is Premature.

The Court should deny LGE's motion to amend and/or lift the Stay Order to permit LGE to proceed against Polaroid. 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. See SEC v. Universal Financial, 760 F.2d 1034, 1038 (9th Cir. 1985) (refusing to lift receivership stay where the stay was necessary to maintain the status quo,

and because a lift of the stay would result in excessive litigation costs related to a multiplicity of actions in different forums, thereby diminishing the size of the receivership estate); and SEC v. Pittsford Capital Income Partners, LLC, No. 06-civ-6353, 2007 WL 61096, at *2 (W.D.N.Y. Jan. 5, 2007) (rejecting judgment creditors' motion to lift stay to enforce judgment so as to receive full compensation rather than pro rata recovery available to hundreds of other fraud victims). As discussed above, the power of the Court to supervise and protect receivership assets is extremely broad, and is controlled by 18 U.S.C. §1345, not by 11 U.S.C. § 362(a) which controls automatic stays in bankruptcy. As such, LGE's reliance on case law interpreting stays in the bankruptcy context is misplaced.

To determine whether to lift a stay of litigation, a district court should consider: "(1) whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merit of the moving party's underlying claim." SEC v. Wenke, 742 F.2d 1230 (9th Cir. 1984); see also U.S.A. v. Acorn Tech. Fund, L.P., 429 F.3d 438, 443 (3rd Cir. 2005). A district court should give substantial weight to the receiver's need to proceed unhindered by litigation, and the risk that litigation expenses will diminish the receivership assets. Acorn, 429 F.3d at 443. The Court should also consider how early in the receivership a party seeks to lift the stay: "very early in a receivership even the most meritorious claims might fail to justify lifting a stay given the possible disruption of the receiver's duties." Id. (refusing to lift stay where receivership had been in effect for

just 30-36 months); Wenke, 622 F.2d at 1374 (refusing to lift stay where receivership had been in effect for just two years); SEC v. Universal Financial, 760 F.2d 1034, 1039 (9th Cir. 1985) (denying lift of four-year old stay where new facts continued to come to light); compare SEC v. Wenke, 742 F.2d 1230 (9th Cir. 1984) (holding district court abused its discretion by refusing to lift the stay seven (7) years after creation of the receivership, where no new facts had come to light for six (6) years, and where the receiver was ready to distribute the assets).

Here, refusing to lift the stay as to Polaroid will preserve the status quo, and will not cause substantial injury to LGE. See e.g., SEC v. Pittsford Capital Income Partners, LLC, No. 06-Civ-6353, 2007 WL 61096, at *1 (W. D. N.Y. Jan. 5, 2007). Because the receivership is in its infancy, LGE's motion is premature. The Court should deny LGE's motion to amend and/or lift the stay of litigation as to Polaroid, which will not prevent LGE from having its day in court, will not cause irreparable harm to LGE, and will promote the goals of the receivership.

CONCLUSION

Based on the foregoing, the Receiver and Plaintiff respectfully request that the Court deny LGE's motion to intervene and further deny LGE's motion to modify and/or lift the Stay Order as to Polaroid.

DATED: November 26, 2008

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