

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil No. 08-SC-5348 (ADM/JSM)

THOMAS J. PETTERS; PETTERS
COMPANY, INC., PCI; PETTERS GROUP
WORLDWIDE, LLC; DEANNA COLEMAN
aka DEANNA MUNSON; ROBERT WHITE;
JAMES WEHMHOFF; LARRY REYNOLDS
dba NATIONWIDE INTERNATIONAL
RESOURCES aka NIR; MICHAEL CATAIN
dba ENCHANTED FAMILY BUYING
COMPANY; FRANK E. VENNES JR. dba
METRO GEM FINANCE, METRO GEM
INC., GRACE OFFERINGS OF FLORIDA,
LLC, METRO PROPERTY FINANCING,
LLC, 38 E. ROBINSON, LLC, 55 E. PINE,
LLC, ORLANDO RENTAL POOL, LLC, 100
PINE STREET PROPERTY, LLC, ORANGE
STREET TOWER, LLC, CORNERSTONE
RENTAL POOL, LLC, 2 SOUTH ORANGE
AVENUE, LLC, HOPE COMMONS, LLC,
METRO GOLD, INC;

Defendants,

**MEMORANDUM OF LAW IN SUPPORT OF STANDING TO OBJECT TO
RECEIVER'S FEE APPLICATIONS**

INTRODUCTION

Asset Based Resource Group as successor servicer for Acorn Capital Group, LLC (“Acorn”) respectfully submits this memorandum of law in support of its standing to be heard on its significant objections to Receiver Douglas A. Kelly’s (the “Receiver”) most

recent fee applications in the above-captioned proceeding. The Court's question of whether Acorn has standing to object to the Receiver's fee applications implicates the fundamental principles of the adversarial process. Acorn has raised important concerns regarding the depletion of funds from, and management of, the Court-appointed receivership encompassing the assets of the above-named Defendants and the entities 100% owned or controlled by them (the "Receivership Estates").¹ By definition, the Receiver cannot be expected to fully and rigorously present these concerns regarding the proprietary and effectiveness of his own actions. Therefore, it is essential that Acorn be permitted to object and to be heard on these issues. Moreover, because Acorn is one of the victims and creditors that should ultimately receive disbursements from the Receivership Estates, Acorn clearly has a substantial stake in the outcome of the ongoing proceedings depleting the funds available for disbursement. Thus, Acorn is motivated to present its legitimate and important concerns that would not be presented but for its objections. Permitting victims and creditors like Acorn to be heard safeguards their interests, serves to fully inform the Court, and enhances the judicial decision-making process.

A finding that Acorn has standing to be heard on these matters is consistent with fundamental standing and intervention principles, the Court's and the Receiver's prior articulations of the nature of the Receivership Estates and the proceedings, and other cases involving the imposition of a receivership due to fraud. For these reasons, Acorn

¹ The Receivership Estates do not include Defendant Frank E. Vennes, Jr., and his entities, which are covered by a separate receivership.

requests that the Court recognize that Acorn has standing to object to the Receiver's most recent fee applications, as well as to be heard concerning its objections to the Receiver's depletion of funds from, and management of, the Receivership Estates going forward.

FACTUAL BACKGROUND

A. Acorn's Substantial Interest in the Receivership Estates

Acorn has a substantial interest in the Receivership Estates and is one of the largest victims of the alleged fraudulent scheme. Acorn provided PAC Funding, LLC ("PAC") an entity 100% owned and controlled by Thomas Petters, with approximately \$273 million. According to the allegations in the criminal, civil, and bankruptcy pleadings, PAC was used by Thomas Petters as an instrumentality of the fraudulent scheme and some portion of the funds Acorn provided to PAC were ultimately used to fund the above-named Defendants' personal lifestyles. In this \$3.5 billion ponzi scheme, Acorn's claims represent 7.8% of the claim pool, and Acorn is properly considered a victim with a substantial interest in the Receivership Estates.

B. The Receivership Estates and the Court's Prior Articulations of the Nature of the Proceedings.

In October 2008, pursuant to the Anti-Fraud Injunction Act of 18 U.S.C. § 1345, the Court created the Receivership Estates to protect the victims of an alleged fraudulent investment scheme. *See* Second Am. Order for Prelim. Inj., Appointment of Receiver, and Other Equitable Relief [Docket No. 127]. Since that time, the Court and the Receiver have consistently expressed their intention that the Receivership Estates be preserved and maintained for the eventual restitution to victims and creditors, and the Court has

consistently permitted leeway for those with interests in the Receivership Estates to be heard.

For example, on December 5, 2008, the Court heard Acorn's Motions to Intervene for the limited purpose of lifting the stay. In his Opposition to Acorn's Motion to Intervene, the Receiver recognized that, as the Receiver, his function is to "perform[] all acts necessary or advisable to preserve the value of the assets of the receivership estate for the benefit of the defendants' creditors." [Docket 109 at 5]. Citing *United States v. Payment Processing Ctr., LLC*, 439 F. Supp. 2d 435, 438 (E.D. Pa. 2006), the Receiver also recognized that the anti-fraud injunction statute is primarily focused on victim restitution. [*Id.* at 6].

On December 12, 2008, the Court permitted Acorn to intervene to request a lift of the stay of litigation. *See* [Docket 143]. Although the Court ultimately denied Acorn's request to lift the stay as premature at that time, the Court stated that the Receiver's duty is to preserve the assets in the "*best interest of all* (creditors, claimants and victims alike)," [*Id.* at 8] (emphasis in original), and that there must be "an appropriate escape valve, which allows potential litigants to petition the court for permission to sue so that such individuals are not denied a day in court during a lengthy stay." [*Id.*] (quoting *United States v. Acorn Tech. Fund, L.P.*, 429 F.3d 438, 441 (3d Cir. 2005)). In that order, the Court also noted that "as was contemplated when the stay was ordered, considerations of fairness and due process require the presence of a mechanism to permit nonparties affected by the stay to petition the Court for relief." [*Id.* at n.2].

The Court's stated preference for broad leeway in permitting interested parties the opportunity to be heard appears to extend to fee applications specifically. The Receiver submitted fee applications on behalf of himself, his counsel, and counsel for certain Defendants in December, 2008, and February, April, June, and July, 2009. *See* [Docket No. 152, 191, 251 and 469]. Acorn, among other victims and creditors, objected to several of the Receiver's fee applications. In response to those objections, the Court imposed the following "protocol for each fee application":

(1) the Receiver's review of itemized statements showing the fees and costs incurred in representing the Receivership or Defendants, (2) the Receiver's motion requesting the Court approval of fees and costs the Receiver has found to be reasonable and necessary, (3) the Court's independent, *in camera* review of the itemized statements, (4) **a public hearing on the fee applications**, and (5) Court approval of fees and costs found to be reasonable and necessary in representing the Receivership or Defendants.

See U.S. v. Petters, No. 08-5348, 2009 WL 1922320 at *2 (D. Minn. June 30, 2009) (emphasis added). The Court's clear requirement for a public hearing reflects the critical importance of providing interested parties with the opportunity to be heard with regard to the Receiver's depletion of funds from, or management of, the Receivership Estates.

ARGUMENT

Equities weigh in favor of permitting those victimized by the fraud, including Acorn and other creditors, the opportunity to be heard with regard to the depletion of funds from, and management of, the Receivership Estates. A Court determination that Acorn has standing to be heard on these matters is consistent with (1) fundamental standing and intervention principles; (2) the Court's and the Receiver's prior articulations

of the nature of the Receivership Estates and the proceedings; and (3) other similar cases involving the imposition of a receivership due to fraud.

A. Acorn Has Standing in Accordance With Fundamental Standing and Intervention Principles.

The facts and circumstances here show that the Court should find that Acorn has standing to be heard regarding the Receiver's depletion of funds from, or management of, the Receivership Estates, such as Acorn's objection to the Receiver's most recent fee applications. Acorn has standing because Acorn has a substantial interest in the Receivership Estates, which may be impaired or injured absent Acorn's opportunity to be heard. Moreover, Acorn's participation in the proceedings will enhance the effectiveness of the process. The adversarial nature of the judicial process relies upon allowing parties such as Acorn with an interest in the proceedings to challenge the positions taken by other parties, which serves to further inform the Court and enhance the judicial decision-making process. As the Supreme Court put it in *Crawford v. Washington*, 541 U.S. 36, 62, 124 S.Ct. 1354 (2004), "adversarial testing beats and bolts out the Truth." *See also Sierra Club v. U.S. E.P.A.*, 995 F.2d 1478, 1483 (9th Cir. 1993) ("[T]he adversary process can function only if both sides are heard."); *Bowling v. Vose*, 3 F.3d 559, 561 (1st Cir. 1993) ("[A]dversary process [has a] truth-seeking function by ensuring that the trial court hears the full array of admissible facts pertinent to the case.").

Acorn meets the basic requirements for standing and intervention. Constitutional standing requires a showing of: (1) an injury in fact, which is an invasion of a legally protected interest that is concrete, particularized, and either actual or imminent; (2)

causation; and (3) redressability. *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 561, 112 S.Ct. 2130 (1992)). Constitutional standing is required for intervention in a proceeding. *Id.*

Rule 24(a)(2) of the Federal Rules of Civil Procedure, permits intervention when “(1) the proposed intervenor has an interest in the subject matter of the action; (2) the interest may be impaired; and (3) the interest is not adequately represented by an existing party to the action.” *Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992). Intervention is also appropriate when “an applicant’s claim or defense and the main action have a question of law or fact in common.” Fed. R. Civ. P. 24(b). The rules of intervention are “construed liberally” and courts “resolve all doubts in favor of the proposed intervenors.” *United States v. Union Elec. Co.*, 64 F.3d 1152, 1160 (8th Cir. 1995).

As the Court recognized in its December 12, 2008, order granting Acorn’s motion to intervene, “[i]n 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.’” [Docket 143 at 4] (citing 6 James Wm. Moore, et al., *Moore’s Federal Practice* § 24.03(1)(b) (3d ed. 2008), and *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) (explaining that courts are “guided primarily by practical and equitable considerations,” and “generally interpret the requirements broadly in favor of intervention”)).

Acorn has legitimate and substantial interests in the Receivership Estates and, consequently, any fees paid from the Receivership Estates. If Acorn is not permitted to object to the Receiver’s fee applications and other motions to deplete funds from the

Receivership Estates, then the amount Acorn and other creditors are allocated under the eventual distribution plan may be inappropriately altered. Because Acorn holds such a large stake in the estimated amounts at issue, Acorn's potential for prejudice in being denied the opportunity to be heard is amplified to an even greater degree.

The Receiver has previously argued that, if the Court were to permit Acorn standing to be heard regarding the Receiver's depletion of funds from, and management of, the Receivership Estates, then *every* person or group claiming an interest in *any* asset owned by the above-named Defendants or their owned entities would have standing, which would create too-large-a-burden on the Receiver. This argument is hyperbolic, to say the least, and is also inconsistent with the Receiver's stated purpose of preserving the Receivership Estates for victims and further fails as a matter of practicality.

First, the Receiver has recognized that his proper function is preserving the Receivership Estates' assets for eventual distribution to victims of the fraud, including creditors such as Acorn. [Docket 109 at 5]. The Receiver also has acknowledged that the focus of the anti-fraud injunction statute is victim restitution. [*Id.* at 6]. Accordingly, the Receiver cannot fairly argue that the very creditors and victims whose interests the Receiver and the Receivership Estates are in place to protect should be muzzled and prevented from challenging whether the Receiver's actions are truly in their best interests.

Second, it is unjustifiable to assume that any, much less *every*, individual investor defrauded in this scheme has the means and ability to hire counsel to attend the proceedings and be heard with regard to their interests. In fact, based on the record

before the Court and the information available from the various bankruptcy cases stemming from the fraudulent scheme, there are only four major creditors at issue: Acorn, Ritchie, Lancelot, and Palm Beach.² These four creditors have enough resources and enough of a financial interest at stake to make it worthwhile for them to participate in these proceedings. These creditors' objections to the depletion of the Receivership Estates' funds and demands for transparency provide some material benefit to all classes of creditors and victims alike. To the extent the Receiver faces a burden in further explaining its motions to deplete the Receivership Estates or in hearing objections from interested parties, such a "burden" hardly outweighs the fundamental due process concerns involved in providing victims and creditors an opportunity to be heard when the value of their recovery is being depleted. As such, consistent with fundamental legal standing and intervention principals, Acorn should be permitted to be heard in these proceedings.

B. Acorn Has Standing Consistent With the Court's Prior Articulations of the Nature of the Receivership Estates and the Proceedings.

Acorn should have standing to be heard in these proceedings in accordance with the Court's prior-articulated preference for a full and fair opportunity for expression by parties with an interest in the Receivership Estates.

² "Ritchie" refers to Ritchie Special Credit Investments, Ltd., Rhone Holdings II. Ltd., Yorkville Investment I, L.L.C., Ritchie Capital Structure Arbitrage Trading, Ltd., and Ritchie Capital Management L.L.C. "Lancelot" refers to Lancelot Investors Fund, L.P. (f/k/a Granite Investors Fund, LP), Lancelot Investors Fund II, L.P., Lancelot Investors Fund, Ltd., Colossus Capital Fund, L.P., Colossus Capital Fund, Ltd., and RWB Services L.L.C. "Palm Beach" refers to Palm Beach Finance Partners, L.P. and Palm Beach Finance II, L.P.

In the December 12, 2008, order granting Acorn's intervention to request a lift of the stay of litigation, the Court stated that there must be "an appropriate escape valve, which allows potential litigants to petition the court for permission to sue so that such individuals are not denied a day in court during a lengthy stay." [Docket 143] (quoting *Acorn Tech. Fund, L.P.*, 429 F.3d at 441). In that order, the Court also noted that "as was contemplated when the stay was ordered, considerations of fairness and due process require the presence of a mechanism to permit nonparties affected by the stay to petition the Court for relief." [*Id.* at n.2].

The Court's preference for broad leeway permitting interested parties an opportunity to be heard is also evident with regard to the Court's description of "the protocol for each fee application," which includes "a public hearing on the fee applications." See *Petters*, 2009 WL 1922320 at *2. The Court's preference for a public hearing recognizes its importance as a mechanism for parties to test one another's positions. Such a hearing safeguards and enhances the judicial process by further informing the Court and ensuring that judicial decisions need not be made in a vacuum.

Here, a public hearing is important so all interested parties can be apprised of the nature of the fees and have the opportunity to lodge an objection before the funds in the Receivership Estates are depleted. However, a public hearing with no corresponding right to participate is meaningless. Accordingly, consistent with the Court's prior-articulated preference for permitting interested parties to participate in hearings impacting the Receivership Estates, Acorn should be permitted to voice its objection to the

Receiver's most recent fee applications and other motions to deplete the Receivership Estates going forward for the benefit of the Court as well as for its own interests.

Other courts have similarly provided victims and creditors with the opportunity to be heard regarding a receiver's depletion of funds from, or management of, a receivership estate. Regardless whether these interested parties have formally intervened, Courts have exercised broad discretion in favor of providing these interested parties the opportunity to lodge objections to a receiver's proposed distribution of funds from a receivership estate, whether by objecting to particular fee applications or by objecting to the liquidation and distribution of the receivership proceeds as a whole. When a non-party creditor with a financial investment in a receivership entity has a "legitimate interest in the method of distribution of the [receivership entity's] assets" the non-party creditor is generally permitted to make objections and appeal orders regarding the receivership. *Commodity Futures Trading Cmm'n v. Topworth Int'l*, 205 F.3d 1107, 1113 (9th Cir. 1999) (holding non-party creditor had standing to appeal from distribution order); *Exch. Comm'n v. Wencke*, 783 F.2d 829, 834 (9th Cir. 1986) (nonparty creditors may appeal order regarding receivership where "they did not formally seek to intervene in the trial court, but nevertheless participated in the district court's proceedings and had a legitimate interest in the outcome"); *See S.E.C. v. Byers*, No. 08 Civ. 7104(DC) 2009 WL 2185491 at *1 (S.D.N.Y. July 23, 2009) (noting that over 100 investors and creditors objected to the receiver's distribution plan for the receivership estate).

In *Sec. & Exch. Comm'n v. Forex Asset Mgmt, LLC*, creditors appealed the district court's order approving a receivership distribution plan. 242 F.3d 325, 329 (5th Cir.

2001). The court raised *sua sponte* the question of whether the creditors had standing to appeal when they were not named parties to the complaint and at no time sought to intervene. *Id.* The court held that the non-party creditors had “legitimate interests” and “participated in the district court to the extent their interests were involved,” and, therefore, they had a right to be heard on appeal. *Id.*

In *Gaskill v. Gordon*, 27 F.3d 248, 252 (7th Cir. 1994), Southmark Corporation, a mortgagee claiming right to funds held in a ponzi-scheme receivership, appealed the receiver’s payment of fees from the receivership estate. Implicitly finding that Southmark had the right and opportunity to be heard on the receiver’s fee petitions at the district court level, the court rejected Southmark’s objection to the receiver’s fee petitions on appeal as untimely because Southmark was served with copies of the receiver’s fee petitions before they were approved by the district court. *Id.*

These cases demonstrate that, regardless whether objecting to fee petitions or distribution plans, creditors with an interest in the outcome of the Receiver’s motions are generally permitted by courts to be heard in the proceedings. Acorn should be no exception, as it is consistent with fundamental standing and intervention principles, the Court’s prior articulations of the nature of the proceedings, and the proceedings in other ponzi-scheme cases, to provide creditors such as Acorn standing to be heard.

CONCLUSION

Because Acorn has a substantial interest in the Receivership Estates, Acorn respectfully requests that the Court determine that Acorn has standing to object to the Receiver’s most recent fee applications and to be heard on the Receiver’s motions

seeking depletion of funds from, and management of, the Receivership Estates going forward.

Dated: August 24, 2009

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