UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil Case No. 12-3038 (SRN)

Ritchie Capital Management, L.L.C., as administrative and collateral agent, Ritchie Special Credit Investments, Ltd., Rhone Holdings II Ltd., Yorkville Investments I, L.L.C., and Ritchie Capital Structure Arbitrage Trading, Ltd.,

Appellants,

v.

John Stoebner, Trustee,

Appellee.

[SEALED] MEMORANDUM OPINION & ORDER

James M. Jorissen, Leonard, O'Brien, Spencer, Gale & Sayre, Ltd., 100 South Fifth Street, Suite 2500, Minneapolis, Minnesota 55402; Brian A. McAleenan and Michael J. La Mare, Sidley Austin, LLP - IL, One South Dearborn Street, Chicago, Illinois, 60603, for Appellants

George H. Singer, Mark S. Enslin, Sandra S. Smalley-Fleming, and Terrence J. Fleming, Lindquist & Vennum, PLLP, 80 South Eighth Street, Suite 4200, Minneapolis, Minnesota 55402, for Appellee

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SUSAN RICHARD NELSON, United States District Judge

Appellants/Defendants Ritchie Capital Management, L.L.C., Ritchie Special Credit Investments, Ltd., Rhone Holdings II Ltd., Yorkville Investments I, L.L.C., and Ritchie Capital Structure Arbitrage Trading, Ltd. (collectively, "Ritchie Entities") appeal from a November 6, 2012 amended partial final judgment of the United States Bankruptcy Court for the District of Minnesota ("Bankruptcy Court") [Doc. No. 1-10] in the matter of In re Polaroid Corp, 08-BR-46617. (Transmittal of Appeal [Doc. No. 1].)

The amended partial final judgment is based upon a March 30, 2012 Order on Defendants' motion to strike an affidavit filed by Appellee/Trustee/Plaintiff, John Stoebner (the "Strike Order" at 45-58 [Doc. No. 21]), and the April 30, 2012 Order on Plaintiff's partial summary judgment motion ("Partial Summary Judgment Order" at 59-138 [Doc. No. 21]). For the reasons set forth herein, Appellants' appeal is denied.

I. BACKGROUND

This case arises from underlying bankruptcy proceedings involving Polaroid Corporation and other affiliated Polaroid entities (collectively, "Polaroid"). In December 2008, Polaroid filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Minnesota. Stoebner v. Ritchie Capital Mgmt. (In re Polaroid Corp.) ("In re Polaroid"), 472 B.R. 22, 27 (Bankr. D. Minn. 2012). In February 2009, the Polaroid Corporation, in the capacity of debtor-in-possession, commenced an adversary proceeding against the Ritchie Entities in Bankruptcy Court. Id. at 27, n.1. The proceeding was subsequently converted to a case under Chapter 7, at which time Appellee-Trustee John R. Stoebner was substituted as the plaintiff. Id. at 29.

The Trustee seeks to avoid certain liens that Polaroid had granted to the Ritchie Entities pursuant to a September 19, 2008 Trademark Security Agreement, and the disallowance of claims based on that agreement. Id.

A. Tom Petters' Ponzi Scheme

The facts concerning non-party Tom Petters' relationship with Polaroid as well as

Petters' operation of a Ponzi scheme are central to the issues before this court.[1] The background information regarding the Ponzi scheme is set forth in Chief Bankruptcy Judge Gregory F. Kishel's Partial Summary Judgment Order. In re Polaroid, 472 B.R. at 27-28; 36-38.[2] As noted in that order, Petters was convicted for crimes related to his $3 billion Ponzi scheme and is serving a fifty-year prison sentence. Id. at 28, n.3. Appellants do not appear to contest the Bankruptcy Court's underlying factual recitation regarding the general operation of Petters' Ponzi scheme, as their understanding of the background facts is essentially the same. (See Appellants' Mem. at 7-8 [Doc. No. 21].)[3] In any event, the Bankruptcy Court's recitation of the background facts is consistent with several decisions of the Eighth Circuit Court of Appeals, which has considered Petters' Ponzi scheme in various contexts. See United States v. White, 675 F.3d 1073 (8th Cir. 2012); United States v. Petters, 663 F.3d 375 (8th Cir. 2011), cert. denied, 132 S. Ct. 2417 (2012); Ritchie Capital Mgmt. LLC v. Jeffries, 653 F.3d 755 (8th Cir. 2011); United States v. Reynolds, 643 F.3d 1130 (8th Cir. 2011); United States v. Ritchie Special Credit Invs., Ltd., 620 F.3d 824 (8th Cir. 2010).

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[1] A "Ponzi scheme" generally describes a fraudulent investment scheme in which money taken from later participants is paid to earlier participants to create the false appearance that the scheme is generating returns. See Cunningham v. Brown, 265 U.S. 1, 7–9 (1924) (describing the schemes of Charles Ponzi).

[2] For ease of citation, the Court refers to the published version of the Bankruptcy Court's underlying opinion, In re Polaroid Corp., 472 B.R. 22.

[3] Page citations to the parties' memoranda refer to the parties' own internal page number found at the bottom of their respective memoranda, as opposed to the District Court's page numbering, which appears at the top of each page.

In brief, Petters owned numerous businesses, including Petters Group Worldwide LLC (PGW), Petters Company, Inc. (PCI), Sun Country Airlines, Polaroid Corporation, and Fingerhut. Petters, 663 F.3d at 379. PGW and PCI were the two primary companies owned by Petters. Ritchie, 653 F.3d at 758. As to PGW, this Petters entity "held investments in numerous companies, and its principal asset was its stock in Polaroid." Ritchie Special Credit Invs., 620 F.3d at 850. "[T]he ownership of Polaroid was traceable through an intermediate holding entity to [PGW], itself a holding company." In re Polaroid, 472 B.R. at 27. As alleged in Petters' criminal indictment, "PGW was implicated in the scheme as an alleged recipient and conduit of a significant portion of the funding that had been received by PCI or its subsidiary entities." In re Polaroid, 472 B.R. at 28. Petters was the sole shareholder, board chair, and CEO of PGW. Id. at 27.

PCI functioned as "the venture capital arm of the Petters enterprises," utilizing single purpose, or special purpose entities, to obtain billions of dollars of funding. Ritchie Special Credit Invs., 620 F.3d at 850; In re Polaroid, 472 B.R. at 27-28. This funding was purportedly used for Petters' "diverting business," which contemplated PCI's purchase of electronic goods at wholesale to be resold, at a substantial profit, to large retailers. Id.; Petters, 663 F.3d at 379; Reynolds, 643 F.3d at 1132. In reality, however, "[t]he scheme was a classic Ponzi scheme," as the Eighth Circuit has found:

> Investors were told that their money would be used to purchase consumer electronics that would be sold to big box retailers at a substantial profit. Petters, along with his colleagues – including Deanna Coleman and Robert White – used fabricated documents that purported to show the purchase of goods from vendors and the resale of the goods to retailers. Other fabricated documents showed Petters's company wiring funds to the vendors, giving the appearance that the company was investing its own funds. Early

> investors realized a return on their investment, but that return came from funds from new investors, funds from legitimate transactions, and, in some cases, funds from their own investments.

Reynolds, 643 F.3d at 1132; see also In re Polaroid, 472 B.R. at 36-39.

The Bankruptcy Court found that Petters' Ponzi scheme was "most centrally purveyed through PCI and a number of its many subsidiaries, but eventually involving more of his companies in the flow of money to keep it going." In re Polaroid, 472 B.R. at 36. PCI formed several pass-through special purpose entities for the financing of large institutional investors. (Martens Aff. ¶ 4, APP0000633.) These special purpose entities were PC Funding, LLC (assigned to Opportunity Finance, LLC); Thousand Lakes, LLC (assigned to Lancelot Investors Fund); SPF Funding, LLC; PL Ltd., Inc.; Edge One, LLC; MGC Finance, Inc. (assigned to Metro Gem, Inc.); Palm Beach Finance Holdings, Inc. (assigned to Palm Beach Finance Partners, LP); and PAC Funding, LLC (assigned to Acorn Capital Group). (Id.)

Very few genuine diverting transactions occurred through PCI and its subsidiary structure. In re Polaroid, 472 B.R. at 38. As PCI's Vice President of Operations Deanna Coleman testified, in 2007 and 2008, she spent most of her time keeping the Ponzi scheme afloat by creating fictitious purchase orders and working with investors. (Coleman 7/28/10 Dep. at 192, APP0001122.) In short, "PCI did not have any real transactions. They were all fraudulent transactions." (Martens 10/7/10 Dep. at 164, APP0001200.) Tom Petters owned 100% of PCI (id. at 174), proclaiming at trial, "I am PCI." (Petters Trial Tr. at 3170, APP0000584.)

Petters' Ponzi scheme began to officially and permanently unravel on September

8, 2008, when Deanna Coleman revealed to government authorities that she was assisting Petters in perpetrating a massive fraud through PCI. Petters, 663 F.3d at 379. Based on Coleman's information and a federal investigation, the Federal Bureau of Investigation, the Internal Revenue Service, and the United States Postal Inspection Service executed search warrants at Petters' business headquarters and home on September 24, 2008. Id. The searches uncovered counterfeit purchase orders purporting to show that PCI was owed over $3 billion by various retailers. Id.

As noted, Petters and his co-conspirators were indicted and convicted for their participation in the Ponzi scheme. In re Polaroid, 472 B.R. at 28.

B. Polaroid Acquisition

In 2005, Petters used the proceeds of the Ponzi scheme to purchase Polaroid. (Petters Trial Tr. at 3170, APP0000584; Martens 10/7/10 Dep. at 143-57, APP0001195-98; Martens Aff. ¶ 3, APP0000633; In re Polaroid, 472 B.R. at 38-39.) Deanna Coleman testified that Petters bought Polaroid in order to "'lure investors in so investors would think Tom was this wealthy guy.'" In re Polaroid, 472 B.R. at 39, n.28 (citing Coleman Dep. at 111). Coleman further explained at Petters' trial that Petters wanted to buy a viable company making licensed goods to eventually "bury PCI" (Petters' Trial Tr. at 821, APP0000559.)

Deanna Coleman helped raise money for the Polaroid acquisition. (Trustee's Bankr. Ct. Reply Mem. at 6-7, APP0001239-40) (citing Coleman Dep. at 211-15.) While PGW technically owned Polaroid, Coleman testified that PCI paid for Polaroid, or at least "99 percent" of it. (Petters Trial Tr. at 690, APP0000557; Trustee's Bankr. Ct. Reply

Mem. at 7, APP0001240) (quoting Coleman Dep. at 211-15.) Coleman personally "wired the money out of PCI to buy Polaroid." (Trustee's Bankr. Ct. Reply Mem. at 7, APP0001240) (quoting Coleman Dep. at 211-15.) Kathy Klug, an IRS special agent and government witness at Petters' criminal trial, testified that PGW "got its money" from PCI. (Petters Trial Tr. at 2366, APP0000576.) Forensic accountant Theodore Martens testified that one account at PCI was used to fund the pre-purchase of Polaroid and no other accounts were involved. (Martens 10/7/10 Dep. at 143, APP0001195.)

Petters paid $425 million for Polaroid (Martens Aff. ¶ 2, APP0000633), investing $150 "of his own money" and raising $250 million from "commercial lenders," who, by the time of the collapse of the Ponzi scheme, had been repaid. David Phelps, "Polaroid is Latest Petters Firm to File Chapter 11," Mpls. StarTribune, Dec. 18, 2008, APP0001207. Coleman admitted to taking investors' money and using those funds to buy Polaroid. (Petters Trial Tr. at 690, APP0000557.) IRS Special Agent Klug confirmed that her investigation revealed a Wells Fargo account created for the acquisition of Polaroid, funded from "[p]redominantly investors or pretty much investors." (Petters Trial Tr. at 2284-85, APP0000569-70.) Some of the money used to acquire Polaroid came from the Lancelot Investment Management ("Lancelot"), headed by Gregory Bell, as well as from Metro Gem, Inc., run by Frank Vennes. (Martens 10/7/10 Dep. at 150; 156, APP0001196; APP0001198; Trustee's Bankr. Ct. Reply Mem. at 6-7, APP0001239-40) (citing Coleman Dep. at 211-15). Lancelot and Metro Gem only invested with PCI and Tom Petters. (Martens 10/7/10 Dep. at 150; 156, APP0001196; APP0001198.) Both Bell and Vennes were convicted of securities fraud in connection with raising funds for

Petters' Ponzi scheme. United States v. Bell, 09-CR-269 (RHK) [Doc. Nos. 42; 68]; United States v. Vennes, 11-CR-141(1) (RHK/JJK) [Doc. Nos. 167; 291].

Petters himself also testified at trial regarding the acquisition of Polaroid:

Q: You bought Polaroid in April of 2005?
A: Yes.
Q: Again, you used PCI money and PCI investor money?
A: Yes.
Q: The money they thought was secured by collateral that did not exist?
A: Well, I think Polaroid was valued at $80 million.
Q: But the PCI investors for the money that you used to actually buy the Polaroid company was secured by merchandise collateral. That's what they thought they were financing?
A: I'm not familiar with that.
Q: You don't dispute it?
A: I don't dispute it. But I'm not familiar with that.
Q: And so the money that you took from PCI investors to buy $450 million of Polaroid, that just dug the hole a little deeper?
A: Digging the hole deeper.

(Petters Trial Tr. at 3170, APP0000584.)

While PCI funds paid for the purchase of Polaroid, the official ownership of Polaroid was traceable to PGW. In re Polaroid, 472 B.R. at 27-28. PGW's financial stability was important to Polaroid, as PGW's finances affected Polaroid's efforts to raise financing. (Jeffries 4/13/10 Dep. at 126-27, APP0001063; see also Dugan Dep. at 120-21, APP0001052 (testifying, as Polaroid's Vice President of Strategic Planning and Business Development, that a loan default by PGW would limit Polaroid's ability to raise finances.) Although both PCI and Polaroid were owned by Petters and shared debt, Polaroid operated independently of PCI and Petters' diverting business. (Jeffries 4/13/10 Dep. at 239-40, APP0001073.) Polaroid maintained separate management and had a separate financial department. (McDonough Dep. at 29, APP0001187.) Petters,

however, was the sole board member of Polaroid and the 100% beneficial owner of Polaroid's stock. (Jeffries 4/13/10 Dep. at 178, APP0001065; In re Polaroid, 472 B.R. at 41, n.32.)

Mary Jeffries became Polaroid's CEO in April 2008. (Jeffries 4/13/10 Dep. at 21, APP0001057.) Prior to becoming CEO of Polaroid, Mary Jeffries worked for PGW as a "Petters Strategic Partner," beginning in 2005, and was promoted to PGW's Chief Operating Officer ("COO") a few months later. (Id. at 17; 20, APP0001056.) In the COO position at PGW, Jeffries had frequent contact with Tom Petters, whose office was next to hers. (Id. at 304-05, APP0001074.) Jeffries testified that during her time at PGW, she had no suspicions that Petters was engaged in any fraudulent activity. (Jeffries 9/29/10 Dep. at 49-50, APP0001078.) While at Polaroid, Jeffries continued to maintain contact with Petters several times per week. (Jeffries 4/13/10 Dep. at 211, APP0001069.)

Jeffries testified that Polaroid was never involved in the Ponzi scheme (Jeffries 4/13/10 Dep. at 176, APP0001065), nor was Polaroid's management aware of the scheme. (Jeffries 9/29/10 Dep. at 55-57, APP0001079.) Despite her proximity and access to Petters, Jeffries testified that she was shocked to learn of Petters' fraudulent activities. (Id. at 54, APP0001079.) To her knowledge, during her tenure at PGW and Polaroid, Polaroid's sole source of income and revenue was generated from legitimate business activities. (9/30/10 Jeffries Dep. at 97, APP0001090.)

In early 2008, Polaroid sought financing from outside investors in order to pay off a $31 million loan to J.P. Morgan. (Jeffries 4/13/10 Dep. at 85-88, APP0001060.) The J.P. Morgan loan was secured by all of Polaroid's assets. (Id. at 88, APP0001060.)

When the J.P. Morgan loan was paid off, Polaroid's assets would be unencumbered. (Id.) The loan was ultimately paid off with cash from a Wal-Mart prepayment. (Jeffries 9/30/10 Dep. at 76, APP0001088.)

Jeffries understood that Polaroid's value in February 2008 was approximately $780 million. (Jeffries 4/13/10 Dept. at 89, APP0001061.) A few months earlier, in September 2007, Polaroid's Vice President of Strategic Planning and Business Development Katherine Dugan was involved in efforts to place a value on the Polaroid brand. (Dugan Dep. at 35-36, APP0001042.) Although a previous brand valuation had been undertaken in 2004 or 2005, Polaroid sought an updated valuation due to the passage of time and because an up-to-date valuation would assist in Polaroid's refinancing efforts. (Id. at 38, APP0001043.) The previous 2007 valuation, performed by the financial advisory firm of Duff & Phelps, was based on Polaroid's then-existing business model, which focused primarily on North American and Western European sales. (Id.) The Duff &Phelps' valuation of $325 million did not, therefore, reflect the value of any Polaroid trademarks outside of those areas. (Id. at 39; 62, APP0001043; APP0001044.) Petters himself testified that if Polaroid could sell its licenses, the company's value would be significantly greater – close to $4.3 billion. (Petters Trial Tr. at 3044, APP0000581.)

At the same time that Polaroid was seeking to pay off its JP Morgan loan, it was attempting to change its business model in order to reduce its working capital needs, as Jeffries testified:

> We went from carrying inventory on the consumer electronics side of the business to more of an indirect [model] where we were an intermediary and licensing the brand and providing services so that we wouldn't have to finance the inventory. So it reduced our working capital requirements.

(Jeffries 9/29/10 Dep. at 71-72, APP0001081.) Under this new business model, Polaroid planned to enter into agreements with manufacturers, allowing them to use the Polaroid name on products that the manufacturers would sell directly to retailers. (McDonough Dep. at 19, APP0001185.) The retailer would then make payments to both Polaroid and to the manufacturer. (Id.) Jeffries believed that as Polaroid moved away from selling to retailers toward more of a licensing business, the company's cash needs would decrease. (Jeffries 9/30/10 Dep. at 67-69, APP0001086.)

C. Ritchie Loans

By January 2008, Petters' Ponzi scheme experienced strain, particularly as the United States economy was slowing and business credit became more difficult to obtain. In re Polaroid, 472 B.R. at 42. Petters testified in his criminal trial that, specifically as to PGW, "we suddenly had major cash flow problems" in late 2007 or early 2008. (Petters Trial Tr. at 3042, APP0000579.) Around the beginning of 2008, David Baer, PGW's Chief Legal Officer, heard Tom Petters use the term "bad paper" in discussions with various people, including Polaroid's Mary Jeffries and tax accountant James Wehmhoff, PGW's Executive Vice President in charge of tax, treasury and finance. (Baer Dep. at 651, APP0000592.) While Baer was unsure what specifically constituted the 'problems with bad paper,' Baer generally understood that Petters' use of the term included problems with slow payments, the faltering general economy, merchandise delays,

defective products, and general dilution. (Id. at 644-45; 717, APP0000591.) Baer testified that Petters estimated that 20 to 25% of PCI's loans were "bad paper." (Id. at 652, APP0000592.)

In late January 2008, an investment broker-finder named George Johnson contacted Thane Ritchie, CEO of Ritchie Capital Management, LLC ("Ritchie Capital") and founder of the Ritchie Entities, about the possibility of the Ritchie Entities' participation in a short-term financing deal. In re Polaroid, 472 B.R. at 43. The broker indicated that the deal would be "secured by the assets of a company with value far exceeding the value of the note." Id. (citing Email chain between G. Johnson and T. Ritchie). Johnson urged Ritchie to "move fast," if he was interested in lending finances, because Johnson was aware of other interested parties. (Email chain of 2/1/08 between G. Johnson and T. Ritchie, APP0001832-43.) In response to Ritchie's query about the particular assets and company, Johnson replied that the deal would involve a 90-day loan, at "20% interest, 80% annualized, backed by the entire Polaroid Corporation." (Email chain of 2/1/08 between G. Johnson and T. Ritchie, APP0002297.)

Ritchie was familiar with Tom Petters, although Ritchie Capital had not previously invested in any of Tom Petters' business entities. (Ritchie Dep. at 25, R.APP00016.) However, Ritchie's "funds-to-funds group," known as Ritchie Multi-Manager, had invested in Lancelot, which in turn, invested hedge fund assets with Petters. (Id.) Shortly after receiving Johnson's emails, Petters, Ritchie, and Johnson held a conference call. In re Polaroid, 472 B.R. at 43. During the call, Tom Petters expressed his desire to bridge a loan or sale of Polaroid's North American brand to the Iconix Corporation.

(Ritchie Dep. at 45, R.APP00017.) Regarding the possible sale to Iconix, Ritchie testified that Petters "expressed a need to kind of clean up some paper around Polaroid to do that." (Id. at 66, R.APP00018.) The "paper" in question was a $31 million loan to Polaroid for which payment was due to JP Morgan. (Id. at 45, R.APP00017.)

In connection with the Ritchie loan transaction, a Petters Capital employee, Camille Chee-Awai, emailed Thane Ritchie several Polaroid-related documents, including a 2006 audited financial statement and an evaluation of the Polaroid brands. (Email chain between C. Chee-Awai and T. Ritchie, APP0001912-2061.) As to any due diligence analysis undertaken by the Ritchie Entities, Ritchie testified:

> We had hired a guy initially named Jeff Nason that did due diligence on Tom Petters when we first invested in Lancelot, and somebody did some work when we looked at the Polaroid deal in '05. I remember we had a package and we looked at the deal. They never made a formal proposal. We dug into the balance sheet and the value of Polaroid at the time. At the time I think they were estimating its value of over a billion dollars.
>
> So we were pretty comfortable I think with the asset at the time. And Jeff had done due diligence roughly six, seven years earlier, and I think did some follow-up due diligence along the way. So, I think in terms of due diligence we had done a lot of due diligence going into February 2008 on Tom Petters and Polaroid.

(Ritchie Dep. at 68, R.APP00018.) Accordingly, Ritchie Capital "relied on the Duff & Phelps report and other information that Petters provided, Northern Trust letter saying that he was in high standing, other things like that." (Id. at 69, R.APP00018.) Ritchie did not ask Jeff Nason to perform an updated investigation prior to issuing any 2008 loans to Polaroid or the Petters entities, explaining that he felt that "Polaroid was pretty straightforward. I don't think we were – it was a different kind of investment, so we

didn't really see the need to hire Jeff to do that?" (Id. at 71, APP0000981.) Instead, Ritchie preferred to rely

> on people that had done due diligence on Petters and Petters interest entities that knew those entities much better than we. And if we had done our own diligence, we probably would have been going to those people anyway. So simpler to see the [Duff & Phelps] summary than to pay for it to do it all over again by the same people that have already done it.

(Id. at 72, APP0000981.)

1. February 1, 2008 Promissory Note

An agreement was soon reached, as reflected in the February 1, 2008 Promissory Note between Ritchie, PGW, and Tom Petters. (2/1/08 Promissory Note, APP0002268-70.) The note provided for $31 million in principal, payable in 90 days, at an interest of 80% on an annualized basis. (Id.) PGW and Tom Petters were signatories to the note, and Petters pledged a personal guarantee. (Id.) Petters further agreed to attempt to secure the note by a pledge of 100% of Polaroid's capital stock, "as soon as reasonably practicable." (Id.) David Baer, Chief Legal Officer at PGW, testified that the note contained the "as soon as practicable" language because at the time it was signed, Polaroid's stock was still encumbered by its JP Morgan loan. (Baer Dep. at 96, APP0001001.)

On February 1, 2008, a Ritchie entity wired the PGW/Tom Petters loan proceeds to an account at M&I Bank. (Email from D. Baer to J. Wappler, APP0000824-25.) PGW's James Wehmhoff recalled that Deanna Coleman instructed him to transfer the funds to her at PCI immediately, as soon as the funds cleared M&I Bank. (Wehmhoff Dep. at 16-17, APP0001161.) Wehmhoff verified the disposition of the funds with Tom

Petters himself. (Id. at 17, APP0001161.) Coleman confirmed that she had telephone conversations with Wehmhoff, asking him to transfer any of the Ritchie loan proceeds in February 2008 to PCI. (Coleman Dep. at 240-41, APP0001129.) Coleman made the request "[b]ecause I had investors to pay and he had control over the PGW account." (Id. at 241.) Because all of the loan proceeds of this loan and subsequent loans were transferred to PCI, PGW – which owned Polaroid – did not have the use of any of the Ritchie loan funds. (Wehmhoff Dep. at 16, APP0001161.) Since PGW was one of the two borrowers on the February 1, 2008 Promissory Note, PGW's James Wehmhoff was concerned about the transmission of the funds to PCI: "it was another $32 million that [PGW] would have to try to come up with . . . ." (Id. at 15, APP0001161.) The money was also not transmitted to Polaroid. (Jeffries Dep. of 4/13/10 at 107-08, 245-46; R.APP00244, R.APP00250; Martens Aff. ¶ 8, APP0000634.) Instead, upon receiving the loan proceeds, PCI transferred $31 million to prior lender-investors that same day. (Martens Aff. ¶¶ 4, 8; Pricewaterhouse Coopers ("PwC") Preliminary Analysis of Ritchie & Assoc. Funds Note Payable Detail ("PwC Preliminary Analysis") at 11-15, Ex. 295 to Martens Dep. [Doc. No. 38-4]; see also Coleman Dep. at 240-41, APP0001129.)

The following day, after the note had been signed and the $31 million in proceeds had been disbursed, Thane Ritchie asked John Wappler, an associate at Ritchie Capital Management, and John Kermath, the president of Ritchie Capital Management, to review the Polaroid documents sent by Chee-Awai, because he "need[ed] to know what Polaroid equity is worth." (Email from T. Ritchie to J. Kermath and others, APP0002252.) Wappler responded to Ritchie's request on February 3, noting Polaroid's most recent net

losses in 2006 and 2007, but concluding that the amount that Petters paid for Polaroid in 2005 was "probably as good an estimate as any" for the value of Polaroid's equity. (Email chain between J. Wappler to T. Ritchie, APP0002250.) Ritchie also asked whether "given the current economy[,] would we lend 100 million at 80% IRR [Internal Rate of Return] for 90 days against a pledge of 2/3s of the Polaroid equity?" (Id.) Wappler responded, requesting confirmation of his understanding that the proposed loan was being used for activities that were "100% unrelated to Polaroid" so that "if the idea that the loan proceeds are being used for doesn't pan out, Polaroid value is unaffected." (Id.)

In a subsequent February 3, 2008 email from John Kermath to Thane Ritchie and others, Kermath – who had only learned of the loan's existence after-the-fact – stated that he was "[s]till thinking through the issue of lending money to the sponsor against company stock where the key lender to the company is the sponsor (and has a demand note)." (Kermath Dep. at 63, APP0001167; Email chain between T. Ritchie, J. Kermath, J. Wappler and others, R.APP00236.) Kermath characterized this arrangement as "[p]retty unusual," and expressed his concerns about future loans to Petters: "At first blush, with $31MM loan outstanding[,] I'm not worried. At $100MM, I'm more worried and we are in a stretched position." (Id.) Ritchie responded the following day, February 4, 2008, stating, "nothing usual about this deal[,] including the IRR!! – need to make sure we get the pledge against Pol[aroid] all lined up this week – standstill or first right of refusal makes sense." (Id.)

In addition to Thane Ritchie, others viewed the 80% interest rate on the February 1 Note as unusually high. Kermath, President of Ritchie Capital, acknowledged that Ritchie did not assess an 80% interest against any other loans in its portfolio at the time. (Kermath Dep. at 79, APP0001169.) Simon Root, an attorney working on drafts of the Ritchie-Petters loan agreements on Petters' behalf, was shocked by the 80% interest rate on the February 2008 Ritchie notes (Root Dep. at 56; 132, APP0001099; APP0001111.) James Wehmhoff, PGW's Executive Vice President of Tax, Finance and Treasury, who was not involved in the negotiation of the Ritchie loans, assumed the 80% interest rate was a typo when he first read the promissory note. (Wehmhoff Dep. at 14-15, APP0001161.)

As to the language in the loan agreement contemplating an eventual pledge of Polaroid stock, Kermath testified that he wanted both a personal guarantee from Tom Petters as well as a pledge of stock from Polaroid to secure the loans, "[b]ecause I like to get more than less." (Kermath Dep. at 144, APP0001177.) Petters' attorney Root understood that "the collateral was going to be either the Polaroid stock or Tom personally, kind of an either or situation." (Root Dep. at 134, APP0001112.)

2. Additional February 2008 Promissory Notes

Whatever concerns that Wappler or Kermath may have had about loaning to the Petters Entities, on February 4, the Ritchie Entities advanced an additional $56 million to PCI via wire transfer. (Martens Aff. ¶¶ 4, 8, APP0000633-34; PwC Preliminary Analysis at 11-15, Ex. 295 to Martens Dep. [Doc. No. 38-4]; Promissory Notes of 2/4/08, APP0002271-79.) That same day, PCI disbursed $55 million to different lenders who

had previously advanced funds to PCI as part of its fraudulent diverting business. (Martens Aff. ¶¶ 4, 8, APP0000633-34; PwC Preliminary Analysis at 11-15, Ex. 295 to Martens Dep. [Doc. No. 38-4].)

On February 5, 7, 15, and 19, the Ritchie Entities provided $59 million in additional funds to PCI through wire transfers pursuant to additional promissory notes. (Id.; February Notes, APP0002259-88.) The borrowers on each of the notes were PGW and Tom Petters, personally, and bore an 80% annual interest rate. (February Notes, APP0002259-88.) By February 19, 2008, Petters had executed ten separate promissary notes on behalf of PGW and himself (the "February Notes"), totaling $146 million. (Id.) Three of the notes were due in March 2008, while the remainder were due in May 2008. (Id.) The Ritchie Entities later assigned two of the February Notes, with a $25 million face value, to a third party. (Appellants' Mem. at 9 [Doc. No. 21].)

On each of the additional four February 2008 loan dates, PCI again disbursed funds to benefit prior lenders in amounts equal to or larger than the Ritchie Entities had lent. (Martens Aff. ¶¶ 4, 8, APP0000633-34; PwC Preliminary Analysis at 11-15, Ex. 295 to Martens Dep. [Doc. No. 38-4].) Again, Mary Jeffries testified that Polaroid did not receive any of these funds. (Jeffries Dep. of 4/13/10 at 107-08, R.APP00244.)

3. February 19, 2008 Note Purchase Agreement

On the same day that the February 19, 2008 loan was executed, Thane Ritchie and Tom Petters executed an additional agreement, a "Note Purchase Agreement," memorializing the terms for the previously-made loan advances and consequences for default. (Note Purchase Agmt., APP0002156-78.) The Note Purchase Agreement

identified Petters and PGW as the "Borrowers," and Ritchie Capital Management as the initial "Administrative Agent." (Id.) The signatory parties to the agreement were PGW and Ritchie Capital Management. (Id. at APP0002166.) Under the agreement, the obligations of Petters and PGW were to a group of "Purchasers" (several of the appellants in this case): Ritchie Special Credit Investments, Ltd., Rhone Holdings II, Ltd., and Yorkville Investments I, L.L.C. (Id., Schedule A at APP0002178.) The Borrowers reauthorized the issuance and sale of up to $155 million of promissory notes by the "Purchasers." (Id. at APP0002156, § 1.1.) According to the terms of the agreement, Petters and PGW had the sole discretion to use the proceeds from the Ritchie Entities' loans for any purpose. (Id.) The Ritchie Entities did not require any additional security on these notes, other than Tom Petters' personal guaranty. (Id.; Root Dep. at 134, APP0001112; Kermath Dep. at 179, R.APP00235.) Ritchie did not attempt to place any restrictions on PGW's and Petters' use of the loan proceeds, as Thane Ritchie explained, "Tom was pretty convincing that it would really screw up their business if we put a lot of restrictions on the loans. And we felt like the collateral was good, so we didn't really have an issue." (Ritchie Dep. at 76, APP0000982.)

Again, Thane Ritchie's understanding was that Petters planned to use the Ritchie loan money to pay off the $31 million loan to JP Morgan, and possibly other lenders to Polaroid. (Id.) At trial, Petters testified that Thane Ritchie "absolutely" knew that the loans were used to pay off other hedge funds. (Petters Trial Tr. at 3045, APP0000582.) According to David Baer, PGW's in-house legal counsel, the Ritchie Entities were aware of Tom Petters' problems concerning "bad paper":

> There were general discussions, over the time period of [the Ritchie Entities'] loans, that they wanted to potentially secure their loans by receivables at Petters Company. And – and Tom refused or resisted that, and didn't want to do that because he said, listen, we have some of these, you know, issues with some of the receivables, and I don't want to pledge them to you until I can sort out what . . . the issues are.

(Baer Dep. at 653, APP0000592.)

Ritchie identified several reasons why he felt comfortable about Petters' ability to repay the loans:

> They had – there were, you know, infinite ways they could pay us back, but one of the ways is they could get the Iconix deal done. That was first and foremost what they introduced to us.
>
> Number 2, they could go out and raise debt from other sources because they had a really good company in Polaroid. Number three – especially if they cleaned up their balance sheet.
>
> Number 3, they could – they had other assets at PGW which they could sell including Zink and some other venture capital and private equity assets, real estate. Or they – or they could get financing on those assets. And then there's probably 2,000 other ways that I didn't name that they could do also to get – to get cash in.

(Ritchie Dep. at 84, R.APP00021.) At his deposition, the Trustee's counsel asked Thane Ritchie whether paying off other investors with the loaned funds, or the prospect of another lender paying off the Ritchie loans, caused Ritchie concern:

> Q: Let's talk about one of the alternatives that you just suggested, that is other lenders come forward to pay you off. Were you concerned at all about the fact that you were in in [sic] February 2008, within a short time period had provided $150 million in loans, that these loans were being used in part to pay off earlier investors, and that one of the avenues for you to get paid off was to have still other lenders come in?
>
> I mean did the idea that this was a Ponzi scheme concern you at all?

[Objection.]

A: No, there was no Ponzi scheme in Polaroid and the CEO has already stated there was no Ponzi scheme in Polaroid. So that's ridiculous, absolutely not.

(Id. at 84-85, R.APP00021.)

When Petters and PGW failed to make any payments on the three notes that were due in March 2008, the Ritchie Entities extended the deadlines by 60 days without requiring additional security. (Allonges, APP0002186-2205.)

4. March 2008 PlayStation Deal

On March 21, 2008, PCI and one of the Ritchie Entities executed a note purchase agreement for a purported diverting transaction involving Sony PlayStation game consoles. (PlayStation Note Purchase Agreement, R.APP00278-91.) Earlier, Petters had approached one of the Ritchie Entities "about a loan on PlayStations that could be purchased directly from Sony and sold to Costco, and [Petters] was willing to put in $21 million subordinate to investors loaning $31 million." (Ritchie Dep. at 115, R.APP00022.) The parties contemplated that the Ritchie entity would take half of the profit from the anticipated sale, in addition to the repayments of its initial $31 million advance. (3/21/08 Letter Agreement Between PCI and Ritchie Capital at 1, R.APP00292-301). The PlayStation advance was effected in two notes, executed by Tom Petters and PCI, with a 67% annual interest rate, and a due date of July 14, 2008. (PlayStation Promissory Notes, R.APP00296-301.)

Thane Ritchie received a purported purchase agreement for the game consoles from a purchaser known as Ubid.com Holdings ("Ubid"). (Email of 3/20/08 from D.

Coleman to T. Ritchie, with attachments, R.APP00302-05). Deanna Coleman admitted to fabricating the purported purchase agreement and related documents. In re Polaroid, 472 B.R. at 48 (citing Coleman Dep. at 68-78). When the Ritchie Entities' counsel questioned whether the purported purchaser, Ubid, could follow through on the $79 million deal in light of the fact that Ubid's net revenue the prior year was only $43 million (Email chain of 3/21/08 between K. Rosenblum, S. Root, and others, R.APP00306-08), that same day, PCI substituted Costco as the purchaser. (Email chain of 3/21/08 between D. Coleman, S. Root, and others, R.APP00311-14.) Outside counsel Root provided some input into the PlayStation deal on behalf of the Petters Entities. (See Root Dep. at 148-59, R.APP00257-60.) Root testified that none of the discussions between the Ritchie and Petters Entities suggested that the Ritchie Entities attempted to verify the PlayStation transaction with either Ubid or Costco directly. (Root Dep. at 154-59, R.APP00259-60.) When Thane Ritchie was asked whether the Ritchie Entities sought verification that Petters had put in his $21 million share, Ritchie testified that he believed that they sought verification from M&I Bank, but he could not "recall the specifics." (Ritchie Dep. at 116-17, R.APP00022.)

To effect the PlayStation deal, the Ritchie Entities advanced $31 million in a March 21, 2008 wire transfer to PCI. (Martens Aff. ¶ 8, APP0000634; PwC Preliminary Analysis at 13-14, Ex. 295 to Martens Dep. [Doc. No. 38-4].) On the same date of PCI's receipt of the funds, PCI made several disbursements: (1) $33 million to its creditors – the Fidelis Foundation, and three special purpose entities related to PCI lenders; (2) $1 million to Sun Country Airlines; and (3) $200,000 to PGW. (Id.)

5. May 2008 Promissory Notes

On May 9, 2008, two additional promissory notes were executed (the "May Notes"), extending an additional $12 million in loans from the Ritchie Entities. (May Notes, APP0002179-85.) The May Notes included PCI as a signatory, in addition to PGW and Tom Petters personally. (Id.) The annual interest rate on these notes was significantly higher than the 80% interest rate on the previous notes – the May Notes bore an annual interest rate of 362.10%. (Id.) After receiving the loan proceeds on May 9, PCI made the following disbursements: (1) over $40 million to three special purpose entities related to PCI's lenders; (2) $1.5 million to Sun Country Airlines; (3) $7.8 million to ZINK Imaging, LLC; and (4) $200,000 to PGW. (Martens Aff. ¶ 8, APP0000634; PwC Preliminary Analysis at 15, Ex. 295 to Martens Dep. [Doc. No. 38-4].)

D. Default

By May 19, 2008, the ten February Notes came due, with over $20 million of accrued interest. (Allonges, APP0002186-2205; February Notes, APP0002259-88.) The Ritchie Entities granted a 60-day extension, requiring no additional consideration and no security for the debt. (Allonges, APP0002186-2205.)

In the summer of 2008, Thane Ritchie asked John Wappler and John Kermath to oversee discussions with Petters about the loans. (Ritchie Dep. at 150-52, APP0000987.) In June 2008, Wappler asked Deanna Coleman questions about where the Ritchie Entities' loan money had been distributed. (Coleman 7/28/10 Dep. at 222, APP0001127.) This prompted Coleman to email Petters, asking, "I have no clue what to tell them as far as where the money went. Did you tell them it was for a deal or what do they think it was

for?" (Id.) Even though it was Coleman's understanding that the Ritchie Entities were already aware that the loan money had paid off other PCI investors, she raised the issue because "Mr. Petters lied to me a lot" and she wanted confirmation of Petters' explanation to the Ritchie Entities. (Id.) Coleman testified:

> I found it really hard to believe that some company would wire you $150 million to pay other investors off. So I just wanted to make sure that is actually what he told them or if he told them it was for a deal and he just was lying to me.

(Id.) Petters insisted that they speak by phone on this subject, as he did not want to reply by email. (Id. at 223, APP0001127.)

Petters informed Coleman that the Ritchie Entities understood that the loan money paid off other investors. (Id. at 224; 229, APP0001127-28.) On June 25, 2008, Coleman responded to Wappler, telling him just that – that the Ritchie money had been used to pay off other investors. (Id. at 225, APP0001127.) Based on Wappler's response, Coleman assumed that Wappler was previously aware that the money had paid off other Petters' investors, explaining, "He wasn't surprised at all. I mean it was just a casual conversation. It wasn't like ['']what investors did you use it for['], ['']why did you use it to pay off the investors['']. It was ['']can you do a spreadsheet showing me how the money was used to pay off the investors['']." (Id. at 225, APP0001127.) Coleman testified that Petters informed Ritchie that he used the Ritchie loan money to pay off other investors, "and that is what they wanted, because that is why I did the spreadsheet showing what investors we paid off." (Id. at 223-24, APP0001127.) Nonetheless, Coleman also testified that she had no reason to believe that Ritchie knew about the Ponzi

scheme prior to the September 2008 FBI raid, or that Ritchie worked with Petters in order to shore up the Ponzi scheme prior to the raid. (Coleman 7/29/10 Dep. at 274, APP0001134.)

During early summer 2008, members of the Ritchie and Petters Entities continued to discuss the unpaid debt. (Ritchie Dep. at 142-43; 149-53, R.APP00025-27.) At these meetings, Tom Petters focused on Polaroid's future potential in the retail market. (Id.) According to Thane Ritchie, Petters and his associates "continued to promise [Ritchie] Polaroid collateral and they made a bunch of presentations about how well Polaroid was doing." (Ritchie Dep. at 152, APP0000987.) Petters also represented that PGW's assets were solid, and that "PGW had no outside creditors; we were the only ones to speak of besides some employees." (Id.)

With the approaching July 2008 due dates of the notes to the Ritchie Entities, Thane Ritchie asked Wappler to investigate other sources of collateral from the Petters' Entities. In re Polaroid, 472 B.R. at 49 (citing Wappler Dep. at 33; 42-43; 68-69; 150-51; 168.) Because the loans had been unsecured up to that point and were not paid off, Wappler was concerned. Id. (citing Wappler Dep. at 50-52.) Wappler believed that difficulties in the general capital markets added pressure on all of the parties to the notes, including the Ritchie Entities. (Id.) The testimony of Petters' outside legal counsel confirms the escalating demands faced by the Petters' Entities from their creditors at this time: "[M]y recollection is that August/September were a period of intense pressure coming from numerous creditors demanding payment and/or collateral." (Root Dep. at 159, R.APP00260.)

In August 2008, Thane Ritchie himself became more involved in discussions with the Petters Entities, after learning of a lawsuit brought by another lender to Tom Petters, Acorn Capital Group ("Acorn"). (Ritchie Dep. at 152-53, APP0000987.) In the suit filed in the United States District Court for the Southern District of New York, Acorn alleged that pursuant to a grant made by Tom Petters, it held a security interest in some of Polaroid Corporation's intellectual property rights, but that Petters had committed fraud in the inducement by misrepresentations and breaches of warranty regarding the identity and value of the collateral. In re Polaroid, 472 B.R. at 50 (citing Acorn Complaint, Acorn Capital Grp., LLC v. Petters, 08-CV-7236 (S.D.N.Y.) [Doc. No. 65].) The Acorn suit caused Thane Ritchie to question Tom Petters' representations that Polaroid's assets were unencumbered. (Ritchie Dep. at 152-53; 183-85, R.APP00030.) Ritchie testified, "Well, Tom had promised us that collateral, and he told us he wasn't giving it to anyone else. And, he, in fact, was giving it away or according to the lawsuit anyway." (Id. at 184, R.APP00030.) Subsequently, Ritchie contacted Petters in order to finalize "our Polaroid collateral deal." (Id. at 153, R.APP00027.) In response, "[Petters] said that Acorn had limited . . . pieces of the Polaroid assets, but there were other parts of Polaroid that they could give us and that he would try to give us other pieces of collateral to make up for the difference of the fact that we weren't getting all of Polaroid." (Id.) Ritchie dispatched Wappler to Minnesota, telling him not to leave "until we had our collateral." (Id. at 175, R.APP00029.)

By September 1, 2008, all of the notes were in default to the Ritchie Entities. (February Notes, APP0002259-88; May Notes, APP0002179-85; Allonges, APP0002186-

2205.) Ritchie was disinclined to litigate Petters' default: "litigation is expensive, it's costly and it can actually lead to you getting paid back slower than faster." (Ritchie Dep. at 159, APP0000988.) Instead, he continued to press Tom Petters for collateral, in consideration for not calling the notes due. (E-mail of 8/28/08 from T. Ritchie to T. Petters, R.APP00336; E-mail of 9/6/08 from M. Legamaro to D. Baer, S. Root, and others, R.APP00337; Second Email of 9/6/08 from M. Legamoro to D. Baer, S. Root, and others, R.APP00339.) The prospect that Tom Petters and his corporate structure were insolvent was "an issue on the table and being discussed" between Tom Petters and the Ritchie organization. (Root Dep. at 173-74, R.APP00261.)

Ritchie's outside counsel raised with Dave Baer, PGW's in-house counsel, the specter of a lawsuit, absent "a blanket lien on the assets of PCI":

> [Given that this is not the first such "inability to give us what which has been promised and the overall unwillingness to be transparent with us, you are only further putting the nail in your coffin, presumably causing things to unravel from here."] If you want to work an amicable [sic] resolution of our issues, you must—immediately—release to us credit agreements which supposedly impact your ability here. Frankly, you are losing credibility fast and that will be a very dangerous path to take.

(E-mail of 9/6/08 from M. Legamaro to D. Baer, S. Root, and others, R.APP00337.)

Also at this time, in early September 2008, the Petters' Entities in general, and Polaroid individually, experienced strain and difficulty paying creditors. Creditors called for payment, audits, and the physical inspection of collateral. (E-mail chain of 9/4/08 between D. Coleman and T. Petters, R.APP00340.) On September 4, 2008, Tom Petters sent the following email to David Baer and others, expressing increasingly desperate concerns about the Petters' Entities' financial affairs:

> I have serious need to get this done so we can get out of the box? Otherwise I am afraid I will not be able to? Any ideas on short term money to nbe [sic] taken out in 30 days nby [sic] this new 200mm dollar deal will A [sic] must. Any or all ideas [sic] I can't be there till Friday afternoon to [sic] late to do Sabes and Ubid and others. I know everyone will ask what about the money we are owed. So do I. We need hedge deal resolved first or risk even larger problems. We need a team effort on getting Fhut, real estate, sun country notes, mu equity in hedge fund and or whatever assets we need or choices are bleak. please respond ig [sic] you have any sold [sic] ideas for all or part of a 60million dollar bridge? ? ? I need your help.
>
> Thanks tom

(E-mail chain of 9/4/08 between T. Petters, D. Baer, and others, APP0000631.)

Polaroid also experienced a cash shortage and delinquency in paying vendors. (E-mail chain between Polaroid employees S. Hardy and P. Kalmbach, and others, R.APP00341.) Polaroid's Katherine Dugan testified about Polaroid's financial situation as of September 2008:

> I know that we were extending payables with our vendors. That much I knew. It was common knowledge that Polaroid was struggling. We had no working capital facility. We had to buy parts from Alps and other vendors in order to be able to launch the Zink product. That was creating a strain on the company with no working capital facility in place.

(Dugan Dep. at 84-85, APP0001046.) Dugan testified that Polaroid was not meeting its debts as they came due. (Id. at 84, APP0001046.) Polaroid's efforts to obtain working capital included discussions with an investment group and discussions about selling a minority stake in Polaroid. (Id. at 85, APP0001046.) Polaroid's CEO Mary Jeffries generally held a more positive view of Polaroid's financial situation in early-mid September 2008, believing that it remained a "going concern." (Jeffries 9/29/10 Dep. at 131-32, APP0001082.) But Jeffries acknowledged that by September 19, 2008, Polaroid

was not able to pay its debts as they came due, at least as to trade accounts payable. (Jeffries 9/30/10 Dep. at 63-64, APP0001085.) Amid concerns about Acorn's allegations that Polaroid had preexisting secured debt to an Acorn-related special purpose entity, the Ritchie Entities' outside counsel questioned the value of taking security against Polaroid at all. (E-mail chain of 8/28/08 between K. Rosenblum, S. Root, and others, R.APP00342; E-mail chain of 8/28/08 between K. Rosenblum, S. Root, and others, R.APP00346-48.)

Between September 15-16, 2008, Thane Ritchie and Tom Petters exchanged a series of emails, with Ritchie demanding that they finalize their loans, urging "let's get docs signed." (E-mail chain of 9/16 between T. Petters and T. Ritchie, R.APP00349.) On September 18, Ritchie threatened Petters that "this will get very messy without an agreement in place today," claiming that he "was last money in and should be first out," as compared to the Lancelot entities that had lent into PCI. (E-mail of 9/18/08 from T. Ritchie to T. Petters, R.APP00351.)

E. Grant of Trademark Security Interests

Thane Ritchie met with Tom Petters twice in September 2008. (Ritchie Dep. at 146, R.APP00026.) At the first meeting, on September 19, the parties executed a final extension agreement on the ten outstanding notes – five days before the FBI raid on Petters' home and office. (Extension and Amendment Agreement, APP0002206-28.) Petters "was excited about the value of Polaroid and wanted to raise money from I think Deutsche Bank and Morgan Stanley and we were hoping that he would do that and pay us back." (Ritchie Dep. at 146, R.APP00026.) In addition to the extension, Petters, on

behalf of Polaroid and in the status of "Chairman," executed a Trademark Security Agreement in favor of Ritchie Capital Management, as "collateral agent" for "the February Note Purchasers" under the Note Purchase Agreement executed on February 19, and the "May Note Purchasers" that had been involved in the May 9 advance to which Tom Petters had committed himself, PCI, and PGW. (Trademark Security Agreement, APP0002229-49.) Pursuant to the Trademark Security Agreement, Polaroid granted a security interest in the trademarks in Brazil, India, and China, and associated property rights that the Polaroid Corporation then held or would thereafter adopt or acquire. (Id. at Term 2(a).) This was done to secure the various debt obligations of the PCI/PGW note debtors that had been reset to the new due date. (Id.) Polaroid itself received nothing in exchange for the loan extensions and the pledge of its assets. (Jeffries 4/13/10 Dep. at 245-46, R.APP00250.)

Polaroid's CEO Jeffries learned that the Trademark Security Agreement was about to be signed when David Baer emailed her a copy of the final agreement, shortly before the agreement was executed. (Id. at 120, R.APP00245.) Jeffries opposed the agreement, and had previously expressed her objections to Petters and Baer. (Id. at 121, APP0001062.) Asked at her deposition whether she found the Trademark Security Agreement to be overreaching, Jeffries did not have an opinion, because she did not read it. (Id. at 242, APP0001073.) As to her disagreement with the plan in general, Jeffries testified that "Ritchie was getting collateral for loans they had already made to Petters." In re Polaroid, 472 B.R. at 52 (citing Jeffries 4/13/10 Dep. at 116). She feared that the assignment would make it difficult to raise new financing for Polaroid, which Polaroid

needed in order to furnish working capital for its operations. (Jeffries 4/13/10 Dep. at 122; 128, R.APP00246-47.) Based on financial projections, Jeffries "always knew [that Polaroid] needed outside working capital." (Id. at 128, APP0001063.)

The final September meeting between Thane Ritchie and Tom Petters took place on September 25 – the day after the September 24 FBI raid on Petters' home and office. (Ritchie Dep. at 147, R.APP00026.) Petters' secretary directed Ritchie and John Wappler away from Petters' office and to his home instead. (Id.) After waiting at Petters' house for two hours, Petters' secretary phoned, instructing them to go to Petters' aircraft hangar. (Id.) At the hangar, Petters was throwing a "big party," with 400-500 people in attendance. (Id.) At the meeting, Petters signed an agreement contemplated by the earlier September 19 agreement – an additional inter-creditor agreement between Petters Capital, LLC, RWB Services LLC (by Lancelot Investment Management, LLC), Ritchie Capital Management, LLC, and others. (Security and Inter-creditor Agreement, R.APP00352-83.) Ritchie testified about the substance of discussion at the meeting:

> We wanted to one, know what was going on. Two, we wanted to make sure he appointed a business person to put in charge of the assets. We were very nervous about getting lawyers involved and running up massive fees and destroying the value of the assets.
>
> And three, we had a consent – we had a deal on September 19 and there was a consent that Greg Bell needed to agree and Tom had a week to sign it. Greg Bell and Tom both had a week to sign it. And that signature was needed to finalize the – otherwise he would be in default of his loan if he didn't sign it.

(Ritchie Dep. at 148, R.APP00026.) At the meeting, Petters referenced the FBI raid, describing it as a "small issue," and assured Ritchie that there were no problems with PGW or Polaroid. (Id. at 149, R.APP00026.)

On December 1, 2008, Petters was charged with multiple counts of fraud, conspiracy to commit fraud, and money laundering. (Indictment, United States v. Petters, 08-CR-364 (RHK/AJB) (D. Minn. Dec. 1, 2008) [Doc. No. 70].)

F. Polaroid's Bankruptcy

Polaroid's CEO Jeffries testified that she had no reason to believe that Polaroid became insolvent prior to September 24, 2008, the day of the raid. (Jeffries 9/29/10 Dep. at 132, APP0001082.) After the raid, however, Jeffries suspected that the market value of Polaroid's assets might not exceed its liabilities. (Jeffries 4/13/10 Dep. at 198-99, APP0001066.) According to Jeffries, the FBI raid "distressed" Polaroid by prompting lenders to claim an interest in Polaroid's assets. (Id. at 199, APP0001067.) "After that point in time, there were assertions on the assets. There were people who came forward and said they had an interest in the Polaroid assets," Jeffries testified. (Id.) Jeffries also believed that but for the FBI raid, the Stillwater investor group would have funded a line of credit to Polaroid – a line of credit that she believed would have been adequate for Polaroid's needs, including its strategic plan needs. (Jeffries 9/29/10 Dep. at 69-70, APP0001080-81.)

After the appointment of Doug Kelley as the receiver for Polaroid on October 6, 2008, Jeffries reported to him. (Jeffries 4/13/10 Dep. at 210, APP0001068.) Jeffries felt optimistic about Polaroid's business plan at that point, provided Polaroid could obtain

financing. (Id. at 214, APP0001069.) On Polaroid's behalf, the Houlihan Lokey firm sought financing from over 200 potential investors. (Id. at 215-16, APP0001070.) None of the potential investors provided financing to Polaroid. (Id. at 217-18, APP0001070.) Jeffries believed that investors were "scared off" because Tom Petters was charged with operating a Ponzi scheme. (Id. at 220-21, AP0001071. Jeffries testified that Polaroid survived for a few months after the raid by managing expenditures, cutting costs, collecting cash, and settling certain patent litigation. (Id. at 219, APP0001071.) While Doug Kelley ultimately decided to place Polaroid into bankruptcy in December 2008, he relied on a group of advisors, including Jeffries, who recommended bankruptcy as the only viable option. (Id. at 219-21, APP0001071.) Various factors affected the decision, as Jeffries testified:

> We were running out of capital. We only had a certain amount of cash that we forecasted going forward would last us, left over from the, um, litigation. Um, we were mindful and respectful that there were some cash collateral issues, that we couldn't spend that cash, and we had to conserve cash. And we were not able to get an investor or a lender to step in. . . and loan any money or buy Polaroid.

(Id.)

G. Procedural Background

On or about September 26, 2008, the Ritchie Entities declared a default on the February and May Notes. (Answer ¶ 45 [Doc. No. 8], APP0000144.) After Polaroid was placed into bankruptcy in December 2008, the Ritchie Entities claimed to hold enforceable security interest liens in Polaroid's trademarks and related rights registered in China, India, and Brazil. See In re Polaroid, 472 B.R. at 28.

Polaroid's Trustee seeks to avoid the liens as fraudulent transfers pursuant to 11 U.S.C. §§ 548 and 544, and Minn. Stat. § 513.44(a)(1). (Compl. ¶¶ 26, 52-56; 62-27 [Doc. 1], APP0000006; APP0000013-16.) The Trustee characterizes the grant of security interests as both actually fraudulent – i.e., made with actual intent to hinder, delay, or defraud creditors – and constructively fraudulent – i.e., "made for less than reasonably equivalent value given to the Polaroid Corporation, coupled with the contemporaneous or subsequent insolvency of the Polaroid Corporation." Id.[4] In their Answer, while the Ritchie Entities admit to having made loan advances to Tom Petters and companies owned and controlled by him in February, March, and May, 2008, the Ritchie Entities deny that the grants of security interests were made with actual intent to hinder, delay, or defraud a creditor. (Answer ¶¶ 53; 64 [Doc. No. 8], APP0000145-46.)

The Bankruptcy Court entered a bifurcated schedule in which it first considered a motion for partial summary judgment on the Trustee's claims of actual fraudulent transfer prior to the resolution of the Trustee's other remaining claims, including constructive fraudulent transfer. In re Polaroid, 472 B.R. at 30-31. The Bankruptcy Court's April 30, 2012 order on partial summary judgment, and as amended, is the primary ruling on appeal here. In the partial summary judgment motion, the Trustee argued that the transfers at issue were actually fraudulent under two theories: (1) by application of the "Ponzi scheme

[4] The Trustee also seeks to avoid the grant of liens under different theories of relief pursuant to 11 U.S.C. §§ 547(b); 502(b); 502(d); 506(d); and 510(c). These alternative or additional remedies are not at issue in this appeal.

presumption;" and (2) under a traditional "badges of fraud" analysis. (Trustee's Bankr. Ct. Partial Summ. J. Mem., APP0000396-453.)

Chief Bankruptcy Judge Kishel granted in part, and denied in part, the Trustee's partial summary judgment motion.[5] In re Polaroid, 472 B.R. at 77. The Trustee's motion was granted on the issue of actual fraudulent transfer, to which the Bankruptcy Court applied both a Ponzi scheme presumption and a badges of fraud analysis. Id. at 40-60. The Bankruptcy Court considered Tom Petters' overarching level of control, finding that under either theory, the Ritchie Entities' liens resulted from actual fraudulent transfers and were therefore avoidable. Id. at 40-41; 59-60. The Bankruptcy Court applied the Ponzi scheme presumption to the transfer ostensibly made by Polaroid – a related entity outside the main operation of the scheme – in order to further the scheme as maintained through the central entity, Tom Petters. Id. at 40-41. Explaining that while the presumption of fraudulent intent could be rebutted by "probative, significant evidence that the transferor-debtor lacked the intent to take the transferred value away from contemporaneous or future creditors," id. at 35, the Ritchie Defendants failed to meet the burden of production necessary to demonstrate such non-fraudulent intent. Id. at 55. The Bankruptcy Court held that its ruling applied equally to the fraudulent transfer claim brought under Minnesota's Uniform Fraudulent Transfer Act, noting that corollary state

[5] The Court denied the Trustee's motion for partial summary judgment as to a contract claim, for which the Trustee asserted that the agreement between Polaroid and Ritchie was invalid, unenforceable, or lacked consideration. Id. at 73.

and federal laws addressing intentionally fraudulent transfers are subject to the same construction and application. Id. at 55.

As an alternative basis for finding actual fraudulent intent, the Bankruptcy Court found that the following badges of fraud sufficiently established actual intent: (1) the lack of reasonably equivalent value for the transfer; (2) concealment of the transfer; (3) suit, or threat of suit; (4) the transfer of "substantially all" of the transferor's assets; and (5) the transfer was effected by the sole person in common control. Id. at 55-60.

On appeal, Appellants/Ritchie Defendants argue that the Bankruptcy Court erred in granting partial summary judgment on the Trustee's claims. (Appellants' Mem. at 1 [Doc. No. 21].) Specifically, Appellants argue that the Ponzi scheme presumption is inapplicable because the debtor, Polaroid, was not a participant in Tom Petters' Ponzi scheme. (Id. at 13-15.) In addition, Appellants contend that the Bankruptcy Court misconstrued the "in furtherance" element of the Ponzi scheme presumption. (Id. at 19-20.) Appellants also argue that the Bankruptcy Court's alternative finding of actual fraudulent intent under the traditional badges of fraud analysis misconstrued the law and ignored contrary evidence. (Id. at 22-29.)

The other ground of appeal concerns whether the Bankruptcy Court abused its discretion in denying the Ritchie Defendants' Motion to Strike Certain Materials from the Trustee's Motion for Partial Summary Judgment. (Appellants' Mem. at 30-35 [Doc. No. 21].) In support of the Trustee's partial summary judgment motion, the Trustee had offered the Affidavit of Theodore Martens and supporting exhibits. (Martens Aff., APP0000632-35.) The Ritchie Defendants moved to strike the Martens Affidavit and

supporting materials, arguing that the Trustee had failed to disclose Martens as a qualified expert witness as required by Fed. R. Civ. P. 26.[6] (Ritchie Defs.' Bankr. Ct. Mem. Supp. Mot. to Strike, APP0001213-29.) In addition, the Ritchie Entities argued that Martens was not qualified as a fact witness, as he lacked personal knowledge. (Id.)

The Bankruptcy Court ruled that Martens was not a fact witness, but was a qualified expert witness, whose affidavit and testimony were probative and to which the court assigned weight. (Strike Order at 3-6, APP0001562-66.) While the Bankruptcy Court found that the Trustee had failed to comply formally with Fed. R. Civ. P. 26(a)(2) "in a purely technical sense," the court concluded that the Ritchie Defendants had received a full and meaningful equivalent of the disclosure required by Rule 26(c), and had had a full opportunity to challenge and counter Martens' opinion. (Id. at 7, APP0001566.) Accordingly, the court denied the portion of the Ritchie Defendants' motion based on a failure to disclose.[7] (Id. at 9, APP0001568.) On appeal, Appellants argue that the Bankruptcy Court abused its discretion in ruling that the Trustee's failure to disclose Martens as an expert was harmless. (Appellants' Mem. at 31-35 [Doc. No. 21].)

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[6] Fed. R. Bank. P. 7026 provides that Fed. R. Civ. P. 26 applies in adversary proceedings.

[7] The Bankruptcy Court granted in part the Ritchie Defendants' Motion to Strike as to certain portions of two exhibits attached to the Martens' Affidavit. (Strike Order at 9-11, APP0001568-70.) The court found that Martens lacked the ability to authenticate certain underlying bank records and unexecuted notes and other instruments that were included in the exhibits to the affidavit. (Id.)

II. DISCUSSION

In an appeal from a bankruptcy court proceeding, the Court acts as an appellate court. See 28 U.S.C. § 158(a). The Bankruptcy Court's legal conclusions are reviewed de novo and its findings of fact are reviewed for clear error. Tri–State Fin., LLC v. First Dakota Nat'l Bank, 538 F.3d 920, 923–24 (8th Cir.2008); accord Fed. R. Bankr. P. 8013. A bankruptcy court's entry of summary judgment is reviewed by a district court de novo. Tudor Oaks Ltd. P'ship v. Cochrane (In re Cochrane), 124 F.3d 978, 981 (8th Cir. 1997).

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), as incorporated by Fed. R. Bankr. P. 7056. The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. Enter. Bank v. Magna Bank of Missouri, 92 F.3d 743, 747 (8th Cir. 1996). The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c), as incorporated by Fed. R. Bankr. P. 7056; Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Enter. Bank, 92 F.3d at 747. A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials, but must set forth specific facts in the record showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). If a party fails to support an assertion of fact or fails to properly respond to another party's assertion of fact as required by Rule 56(c), the court may "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it. . . ." Fed. R. Civ.

P. 56(e)(3), as incorporated by Fed. R. Bank. P. 7056; Celotex, 477 U.S. 322-23.

The standard of review applicable to the appeal of the Bankruptcy Court's ruling on the motion to strike is an abuse of discretion. Trost v. Trek Bicycle Corp., 162 F.3d 1004, 1008 (8th Cir. 1998). This Court gives deference to the Bankruptcy Court's decision regarding the admissibility of evidence. See Kontz v. K-Mart Corp., 712 F.2d 1302, 1304. Under an abuse of discretion review, the Bankruptcy Court's decision will not be disturbed unless it is based on "'an erroneous view of the law or a clearly erroneous assessment of the evidence.'" Trost, 162 F.3d at 1008 (quoting Richards v. Aramark Servs., Inc., 108 F.3d 925, 927 (8th Cir. 1997)). The Court addresses the appeal of the motion to strike first, as evidence that was the subject of the motion to strike was relied upon in the Bankruptcy Court's partial summary judgment order.

A. Martens Affidavit

Both Rules 26 and 37 of the Rules of Civil Procedure apply in adversary proceedings in bankruptcy. See Fed. R. Bankr. P. 7026 & 7037. Pursuant to Rule 26(a)(2), parties are required to disclose the identity of any witness who may testify at trial as an expert. Fed. R. Civ. P. 26(a)(2)(A). Such disclosure must be accompanied by:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) the facts or data considered by the witness in forming them;
> (iii) any exhibits that will be used to summarize or support them;
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

Fed. R. Civ. P. 26(a)(2)(B)(i). Parties must disclose their experts and produce expert reports "at the times and in the sequence that the court orders." Id. § 26(a)(2)(D). A party that fails to identify an expert witness or provide an expert report for such a witness as required by Rule 26(a) is not permitted to use the expert witness to supply evidence "on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

Chief Bankruptcy Judge Kishel accepted the Ritchie Defendants' argument that pursuant to Fed. R. Evid. 602, Theodore Martens' statements could not be received as those of a fact witness because he was not present or involved in any of the events for which he was designated to testify. (Strike Order at 3-6, APP0001562-66.) "But given the extensive pre-motion vetting of Martens' work product through discovery and otherwise," the Bankruptcy Court found, "the Ritchie Defendants do not have a basis to bar the receipt and use of his conclusions as an expert." (Id. at 3-4, APP0001562-63.) The court identified the following ways in which the Ritchie Defendants had notice of Martens' opinion and/or the chance to explore, challenge or counter it:

> 1. At a hearing on March 19, 2010, the Trustee's counsel disclosed that his client would use expert testimony from PwC in support of his contemplated partial motion for summary judgment on his actual-fraud theories. He was challenged on that point, both by his opponents and from the bench – given his prior statements that the Trustee did not wish to develop expert testimony on any complex issue of value yet. (His reason was valid under the circumstances: to limit substantial expense to the estate that might not be necessary.) In response, the Trustee expressly stated that the subject matter would be limited to the sequences of the flow of funds that have been identified earlier; it was not to entail such issues as the valuation of the business of the Polaroid Corporation at any relevant time or the reasonable equivalence of the Polaroid Corporation's grant of liens to

the Ritchie Defendants to the "indirect benefit" of staving off the default of PCI and other obligors to the Ritchie Defendants under the 2008 promissory notes. He also indicated that the Trustee was willing to make the specific witness from PwC available for deposition before the Trustee filed his motion.

2. By September, 2010, counsel for the Ritchie Defendants had served the Trustee's counsel with a notice of deposition under Fed. R. Civ. P. 30(b)(6), as to the PwC witness, and had communicated via e-mail regarding the conducting of that deposition. These communications evidence the Ritchie Defendants' knowledge and expectation that Martens would be the expert witness to be produced and deposed.

3. At the deposition, counsel for the Ritchie Defendants extensively examined Martens on his qualifications; the basis of opinion; and his conclusions as to the flow of funds.

4. Long before the deposition, the general processes by which PwC obtained its information for the forensic accounting project and the scope of its services were disclosed in the receivership proceeding ancillary to the criminal case against Tom Petters.

(Id. at 7-8, APP0001566-67) (citations omitted). Essentially, the Bankruptcy Court found that the Trustee's failure to formally disclose Theodore Martens as an expert was ultimately harmless. (Id.)

This Court finds that Chief Bankruptcy Judge Kishel's ruling was not clearly erroneous. Trost, 162 F.3d at 1008. First, as the Bankruptcy Court observed, any challenge to Theodore Martens' qualification as an expert is without merit. As noted in the Bankruptcy Court's Order, Fed. R. Evid. 702 provides that a "witness who is qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise . . . ." (Strike Order at 4, APP0001563.) As of 2010, when Martens was deposed, he had been at PwC for 32 years, and had worked in the area of forensics accounting for approximately 20 years. (Martens Dep. of 9/15/10 at 16-17 [Doc.

No. 38-1].) In his accounting career, Martens has performed forensic accounting investigations and corporate investigations (including the investigations of other Ponzi schemes), assessed and quantified damages, performed work related to accountant malpractice, and performed general audits. (Id. at 16-18.) He has testified or functioned as an expert approximately 45-48 times. (Id. at 16.) Martens possesses an MBA degree in accounting and is a licensed CPA in good standing. (Id. at 18.) He testified that he was retained in this litigation to offer his opinions in his own, individual expert capacity, as opposed to his capacity as a representative of PwC. (Id. at 15-16.) The Court agrees with the Bankruptcy Court that Martens meets the qualifications to render admissible opinions on the fact questions for which the Trustee/Appellee offers them. (Strike Order at 4-5, APP0001563-64) (citing In re Bonham, 251 B.R. 113, 132 (Bankr. D. Alaska 2000)).

Likewise, the Court agrees with the Bankruptcy Court that Martens' deposition and affidavit establish that his opinions were formed based on data of which he was made aware, or that he personally observed, in satisfaction of Fed. R. Evid. 703. (Id. at 5, APP0001564.) Martens based his opinion on "the lengthy forensic analysis conducted by PwC, which he supervised and with which he was personally and intensely involved." (Id. at 5-6, APP0001564-65) (citing Martens Dep. of 9/15/10 at 8.) As the Bankruptcy Court observed, "[o]nce an expert is qualified, and the probity of his testimony is established through that means, the weight to be given to it is within the discretion of the trial court." (Id. at 6, APP0001565) (citing Sylla-Sawdon v. Uniroyal Goodrich Tire Co., 47 F.3d 277, 283 (8th Cir. 1995); In re Gran, 964 F.2d 822, 827 (8th Cir. 1992); Fox v. Dannenberg, 906 F.2d 1253, 1256 (8th Cir. 1990)). Finding that the Ritchie Defendants had produced

nothing to diminish the weight of Martens' opinion, the Bankruptcy Court found him qualified as an expert. (Id.)

Regarding the requirements for the disclosure of expert opinion, the Court agrees with Appellants and the Bankruptcy Court that Martens' affidavit and supporting materials contain opinion evidence. Rule 26 clearly sets forth the requirements for the disclosure of such evidence, with which the Trustee/Appellee failed to strictly comply. Fed. R. Civ. P. 26(a)(2)(B)(i). To the extent that the Martens Affidavit contains expert evidence, it would have been prudent for the Trustee/Appellee to have disclosed him in accordance with Rule 26.

However, as thoroughly set forth in the Bankruptcy Court's Order, and quoted above, Martens was not an unexpected witness of any stripe – fact or expert. In addition to having received the PwC preliminary analysis, the Ritchie Defendants/Appellants had a full opportunity to explore the facts contained therein, in addition to the bases of Martens' opinion. Martens was deposed on two separate dates: September 15, 2010 and October 7, 2010. (Martens Dep. of 9/15/10 & Martens Dep. of 10/7/10 [Doc. No. 38-1].) Notably, the second deposition date, October 7, 2010, came after the Trustee had filed his summary judgment motion, along with the Martens Affidavit, on October 1, 2010. (See Trustee's Bankr. Ct. Notice of Hr'g, Mot. & Mem. in Supp. Mot. for Partial Summ. J., APP0000396-461.) The Ritchie Defendants did not respond to the Trustee's partial summary judgment motion until December 1, 2010. (Ritchie Defs.' Bankr. Ct. Opp'n Mem., APP0001285-1303.) Given the amount of notice and time, the Ritchie Defendants/Appellants could have consulted a forensic accountant expert of their own,

regardless of the Trustee's representations about avoiding the expense of expert evidence at this stage of the litigation. Accordingly, the Bankruptcy Court's ruling on the admissibility of the Martens Affidavit and any of Martens' testimony was not clearly erroneous.

In addition, Theodore Martens' Affidavit essentially corroborates the testimony of other fact witnesses, notably Mary Jeffries and Deanna Coleman, as to whether Polaroid received any of the proceeds of the Ritchie Entities' loans, and Deanna Coleman and Tom Petters, as to the flow of funds leading to the acquisition of Polaroid in 2005. For all of these reasons, the Court affirms Chief Judge Kishel's ruling as to the admissibility of the Martens Affidavit.

B. Avoidance of Liens Based on Actual Fraud (Counts I & III)

At an operational level, Polaroid functioned as a legitimate business outside of the core of Tom Petters' Ponzi scheme. But at a higher corporate control level, Polaroid was inextricably intertwined with the Ponzi scheme. Polaroid was purchased with the fruits of the Ponzi scheme. (Petters Trial Tr. at 3170, APP0000584; Martens 10/7/10 Dep. at 143-57, APP0001195-98; Martens Aff. ¶ 3, APP0000633; Petters Trial Tr. at 690, APP0000557; Trustee's Bankr. Ct. Reply Mem. at 7, APP0001240 (quoting Coleman Dep. at 211-15).) But most importantly, the facts make clear that the very transaction at issue here – the transfer of Polaroid's security interests – was effectuated by Tom Petters, in furtherance of his Ponzi scheme.

As noted by the Bankruptcy Court, the bankruptcy process may be used to "redress the consequences of a failed Ponzi scheme and to provide some relief to unsatisfied

creditors of the corporate vehicle of the scheme." In re Polaroid, 472 B.R. at 33. Particularly through "clawback actions," the Bankruptcy Code vests a bankruptcy trustee with the power to redress these unsatisfied creditors through the filing of avoidance remedies under federal and state law.[8] Id.; 11 U.S.C. § 544. Under the fraudulent transfer provision of the Bankruptcy Code, a trustee may seek to avoid a transfer of the debtor in a property interest that was either actually or constructively fraudulently made. 11 U.S.C. § 548(a)(1). For the transfer to be deemed "actually fraudulent," the trustee must establish that the debtor "made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted. . . ." 11 U.S.C. §

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[8] In another Petters-related case, the Bankruptcy Court described the general clawback process:

> Via "clawback," a trustee or receiver puts all parties that transacted with the purveyor of a failed Ponzi scheme onto a parity in the matter of restitution. This would be done by invoking remedies of avoidance (under theories of fraudulent transfer, unjust enrichment, and the like) against those lenders and investors who got repaid in whole or in part before the collapse. The extant wreckage of the scheme, i.e., the property that had remained in-hand with the purveyor as of the collapse, would be augmented by recoveries of funds from those lenders and investors who got out early. The identity of parties subject to the trustee's claims would be fixed by a temporal measurement, as those that had been paid during the periods of vulnerability to avoidance or recovery specified by the law of fraudulent transfer or other invoked remedies. Those with debts unsatisfied at the downfall would share pro rata with those whose claims would perforce be revived via the avoidance of the payments to them and the recovery from them of corresponding amounts of money.

In re Petters Co., Inc., 440 B.R. 805, 806 (D. Minn. 2010).

548(a)(1)(A). Similarly, Minnesota's Uniform Fraudulent Transfer Act, Minn. Stat. § 513.43, *et seq*., provides for a fraudulent conveyance claim if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud its creditor. Minn. Stat. § 513.44(a)(1). The grant of a lien is well-established as a "transfer" in fraudulent conveyance law. In re Polaroid, 472 B.R. at 32, n.8 (citing In re Craig, 144 F.3d 587, 591 (8th Cir. 1998)); 11 U.S.C. § 101(54); Minn. Stat. § 513.41.

The Bankruptcy Court framed the issue with respect to the Trustee's summary judgment motion on Counts I and III as "whether the grants of lien to the Ritchie Defendants were made with the intent to hinder, delay, or defraud the creditors of the relevant debtor, the Polaroid Corporation." Id. at 31. Because proof of such actual intent "may rarely be established by direct evidence, courts infer fraudulent intent from the circumstances surrounding the transfer." Brown v. Third National Bank (In re Sherman), 67 F.3d 1348, 1353-54 (8th Cir. 1995). A common method of inferring actual fraudulent intent requires the court to consider whether the transfer in question bears the indicia of fraud, or "badges of fraud." Id. Another method of inferring fraudulent intent arises in cases involving Ponzi schemes. Under the "Ponzi scheme presumption," where the circumstance surrounding the transfer is a Ponzi scheme, courts have found that the existence of the Ponzi scheme satisfies the requirement of "actual intent." Wagner v. Pruett (In re Vaughan Co., Realtors), 477 B.R. 206, 218 (Bankr. D. N.M. 2012) (collecting cases). This is because "transfers made in the course of a Ponzi scheme could have been made for no other purpose other than to hinder, delay or defraud creditors." In re

Manhattan Inv. Fund Ltd., 359 B.R. 510, 517-18 (Bankr. S.D.N.Y. 2007), rev'd in part, 397 B.R. 1 (S.D.N.Y. 2007).

The Bankruptcy Court, applying the Ponzi scheme presumption, held that the transfer of Polaroid's security interests fell within the "actual fraud" provision of § 548 of the Bankruptcy Code, and the corollary provision of Minn. Stat. § 513.11(a)(1). In re Polaroid, 472 B.R. at 55.[9] As noted, under de novo review of the Bankruptcy Court's partial summary judgment ruling, all conflicts in the evidence and all reasonable inferences are drawn in favor of the Appellants. Enter. Bank, 92 F.3d at 747.

The Eighth Circuit Court of Appeals has not yet ruled on the application of the Ponzi scheme presumption to alleged fraudulent transfers under the federal bankruptcy statutes, the Uniform Fraudulent Transfer Act, or parallel state statutes.[10] While this

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[9] While the Bankruptcy Court also granted summary judgment in favor of the Trustee/Appellee as to the good faith defense of the Ritchie Defendants/Appellants, Appellants do not appeal this ruling. (Appellants' Reply Mem. at 1 [Doc. No. 31]; see also Appellants' Mem. at 1 [Doc. No. 21]) (identifying issues on appeal).

[10] The discovery of Ponzi schemes and consequent Ponzi scheme-related litigation appears to be a growing area of law in recent years, as some commentators have observed. See, e.g., Samuel P. Rothschild, Bad Guys in Bankruptcy: Excluding Ponzi Schemes from the Stockbroker Safe Harbor, 112 Colum. L. Rev. 1376, 1384 (observing that the recent "economic downturn exposed an increasing number of Ponzi schemes," with authorities uncovering nearly four times as many Ponzi schemes in 2009 as in 2008); Amy J. Sepinwall, Righting Others' Wrongs: A Critical Look at Clawbacks in Madoff Type Ponzi Schemes and Other Frauds, 78 Brook. L. Rev. 1, 6, 21, n.88 (2012) (noting that the author's legal research for all federal and state cases containing the terms "Ponzi" and "fraudulent conveyance" or "fraudulent transfer" turned up 190 cases, of which only four arose before 1984, and 149 were decided in or after the year 2000). Here, in the order on appeal, Chief Bankruptcy Judge Kishel described rulings on the application of the Ponzi scheme presumption to fraudulent transfer actions as "a narrow body of case law that has burgeoned only since 2007-2008." In re Polaroid, 472 B.R. at 33.

Court does not presume whether the Eighth Circuit would adopt the presumption, at least four other federal circuits have adopted or applied it. See, e.g., Wing v. Dockstader, 482 Fed. App'x 361, 363 (10th Cir. 2012); Perkins v. Haines, 661 F.3d 623, 626-27 (11th Cir. 2011); Donell v. Kowell, 533 F.3d 762, 770-71 (9th Cir. 2008), cert. denied, 555 U.S. 1047 (2008); Warfield v. Bryon, 436 F.3d 551, 558-59 (5th Cir. 2006). In addition to the underlying Bankruptcy Court decision, one other district court in the Eighth Circuit has recently applied the Ponzi scheme presumption to a fraudulent transfer claim under 11 U.S.C. §§ 544 and 548(a)(1) and the Nebraska Uniform Fraudulent Transfer Act, assuming that the Eighth Circuit would recognize the Ponzi presumption. In re M&M Mktg., LLC, Nos. BK09-81458-TJM; A11-8033-TJM, 2013 WL 5592909, at *3 (Bankr. D. Neb. Oct. 10, 2013.)

In its analysis of actual fraudulent intent, the Eighth Circuit has applied the traditional badges of fraud. See, e.g., Kelly v. Armstrong, 141 F.3d 799, 802 (8th Cir. 1998); In re Sherman, 67 F.3d 1348, 1353 (8th Cir. 1995). The badges of fraud test and the Ponzi scheme presumption function in much the same way, however, permitting a court to apply a rebuttable presumption that the transferor acted with actual intent to defraud.

The Minnesota Supreme Court also has not considered whether to adopt or apply the Ponzi scheme presumption. Finn v. Alliance Bank, 838 N.W.2d 585, 597 (Minn. Ct. App. 2013) (noting the lack of precedent under Minnesota law, and determining that the facts did not support the application of the Ponzi scheme presumption to presume a lack of reasonably equivalent value, without deciding the general question of whether the Ponzi scheme presumption can be applied to claims arising under the Minnesota Uniform Fraudulent Transfer Act, Minn. Stat. §§ 513.51-.51), pet. for further review granted, Nos. A12-1930; A12-2092 (Minn. Nov. 13, 2013).

In any event, Appellants do not appear to broadly argue that the application of the presumption to a fraudulent conveyance action is incorrect or improper. Rather, they argue that the Bankruptcy Court's particular application of the presumption here – voiding, as actually fraudulent, the transfer of security interests owned by an entity ostensibly outside the main operation of the Ponzi scheme – was in error.

1. Application of Ponzi Scheme Presumption to Satisfy Actual Intent

There is no dispute that Tom Petters operated a Ponzi scheme, for which he was criminally convicted. See In re Polaroid, 472 B.R. at 28, n.3; 36.[11] The criminal conviction of a Ponzi scheme operator may be considered determinative of the existence of the scheme and of its fraudulent intent. Some courts find such a conviction to have preclusive effect: "Numerous courts have found that a criminal conviction for operating a Ponzi scheme establishes the operator's fraudulent intent and precludes relitigation of this issue." Terry v. June, 432 F. Supp.2d 635, 640 (W.D. Va. 2006) (citing Floyd v. Dunson

[11] Although the Bankruptcy Court engaged in independent findings in the underlying order, the court first observed that any fact-finding analysis concerning the existence of a Ponzi scheme as it relates to Tom Petters is essentially "superfluous [] to anyone . . . involved in the intense three-year history of related federal court proceedings in this district, under criminal, civil, and bankruptcy jurisdiction." In re Polaroid, 472 B.R. at 36.

Recently, at an evidentiary hearing on Tom Petters' motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, Petters testified that he was guilty of orchestrating the enormous fraud scheme, was guilty of every count in the criminal indictment, and that he intended to defraud his investors. United States v. Petters, 08-CR-364 (RHK/AJB), Tr. of 11/04/14 Hearing at 36, 38, 76 [Doc. No. 624]. This Court denied Petters' § 2255 motion, describing it as an attempt "to pull off one final con." Id., Order of 12/5/13 at 1 [Doc. No. 628].)

(In re Rodriguez), 209 B.R. 424, 433 (Bankr. S.D. Tex. 1997); Martino v. Edison Worldwide Capital (In re Randy), 189 B.R. 425, 440 (Bankr. N.D. Ill. 1995)). Appellants do not contest that Petters operated a Ponzi scheme.

Rather, Appellants contend that application of the Ponzi scheme presumption is limited to only those situations in which the debtor-transferor itself runs a Ponzi scheme. (Appellants' Mem. at 13-15 [Doc. No. 21].) In discussing the underlying rationale for the application of the Ponzi scheme presumption, courts generally refer to the debtor's participation in the non-sustaining scheme. As the court in In re Indep. Clearinghouse Co. explained:

> One can infer an intent to defraud future [investors] from the mere fact that the debtor was running a Ponzi scheme. Indeed, no other reasonable inference is possible. A Ponzi scheme cannot work forever. The investor pool is a limited resource and will eventually run dry. The perpetrator must know that the scheme will eventually collapse as a result of the inability to attract new investors. The perpetrator nevertheless makes payments to present investors, which, by definition, are meant to attract new investors. He must know all along, from the very nature of his activities, that investors at the end of the line will lose their money.

77 B.R. 843, 860-61 (D. Utah 1987). This rationale may also explain why courts have applied the Ponzi scheme presumption to transfers that might appear theoretically legitimate. For example, the court in Scholes v. Lehmann applied the presumption to a legitimate-appearing transfer:

> It is no answer that some or for that matter all of Phillips's profit may have come from "legitimate" trades made by the corporations. They were not legitimate. The money used for the trades came from investors gulled by fraudulent representations. Phillips was one of those investors, and it may seem "only fair" that he should be entitled to the profits on trades made with his money. That would be true as between him and [the Ponzi scheme operator or his] corporations. It is not true as between him and either the

> creditors of or the other investors in the corporations. He should not be permitted to benefit from a fraud at their expense merely because he was not himself to blame for the fraud.

56 F.3d 750, 757-58 (7th Cir. 1995), cert. denied, 516 U.S. 1028 (1995).

The Bankruptcy Court's application of the Ponzi scheme presumption to void the liens of Polaroid, which operated as a legitimate business outside the operational core of the Ponzi scheme, follows a similar rationale. As the Bankruptcy Court noted, "[t]he past operation of a freestanding business by the 'legitimate' related entity and the abstract possibility of continuing such an operation do not bar the application of the presumption." In re Polaroid, 472 B.R. at 41. While Appellants contend that there is no authority for such an "iteration" of the Ponzi presumption (Appellants' Mem. at 12 [Doc. No. 21]), Appellants overlook the facts of this case. Certainly, if Mary Jeffries had pledged Polaroid's assets, and if Polaroid had received anything in exchange for the security interests, the Ponzi scheme presumption would be inapplicable. But these are not the facts of this case. Rather, the facts demonstrate that Tom Petters – the architect and purveyor of the Ponzi scheme – controlled Polaroid as its Chairman and sole board member. And Tom Petters effected the transfer despite the objections of Mary Jeffries, Polaroid's CEO. In light of these facts, the Bankruptcy Court's application of the Ponzi scheme presumption is entirely consistent with legal authority in which the presumption has been applied.

The Ponzi scheme presumption short-circuits the inquiry into actual fraudulent intent because "transfers made in the course of a Ponzi scheme could have been made for no other purpose other than to hinder, delay or defraud creditors." In re Bernard L. Madoff Investment Securities, LLC, 458 B.R. 87, 104 (Bankr. S.D.N.Y. 2011). The

existence of a Ponzi scheme is, as Chief Bankruptcy Judge Kishel called it, essentially "one big badge of fraud." In re Polaroid, 472 B.R. at 35. The Bankruptcy Court observed that under either the Bankruptcy Code or state law, "the relevant fraudulent intent [is] that harbored by the transferor, or an individual person who effected the transfer on behalf of a corporate debtor-transferor." Id. at 34. While Appellants contends that "the relevant intent concerns Polaroid's intent in transferring the [l]iens" (Appellants' Mem. at 17 [Doc. No. 21], that argument overlooks perhaps the most glaring fact of the transfer – Polaroid had no intent to effect the transfer, but instead opposed it entirely. (Jeffries 4/13/10 Dep. at 121, APP0001062.) The transfer occurred solely because Tom Petters, who had the authority to effect it over the objections of Polaroid's management, intended it to occur. The Bankruptcy Court's decision is supported by the specific facts of this case.

The evidence demonstrates that Polaroid itself operated as a legitimate business and was not a direct participant in Petters' Ponzi scheme. (Coleman Dep. at 205, APP0001125-26; Jeffries 4/13/10 Dep. at 176, APP0001065; Jeffries 9/29/10 Dep. at 55-57, APP0001079; (9/30/10 Jeffries Dep. at 97, APP0001090.) Its CEO, Mary Jeffries, denied any knowledge of the scheme prior to the FBI raid and Petters' subsequent indictment. (Jeffries 9/29/10 Dep. at 54, APP0001079.) In terms of its corporate structure, Polaroid was technically a stand-alone operating company. (Dugan Dep. at 81, APP0001045.) However, Polaroid was inextricably intertwined with the Ponzi scheme from the outset of Tom Petters' acquisition of the company. The evidence demonstrates that Petters purchased Polaroid entirely, or nearly entirely, with the fruits of his Ponzi scheme transactions. (Petters Trial Tr. at 3170, APP0000584; Martens 10/7/10 Dep. at

143-157, APP0001195-98; Martens Aff. ¶ 3, APP0000633; In re Polaroid, 472 B.R. at 38-39.) At least one of the reasons for the acquisition of Polaroid was Petters' desire to appear wealthy to potential investors in his ostensible diverting business. In re Polaroid, 472 B.R. at 39, n.28 (citing Coleman Dep. at 111).

Polaroid fell under the ownership of PGW – the entity that Petters also controlled as sole shareholder, board chair, and CEO. (Coleman Dep. at 205, APP0001125; In re Polaroid, 472 B.R. at 27.) As PGW's subsidiary, Polaroid's financial stability was dependent on PGW. (Jeffries 4/13/10 Dep. at 126-27, APP0001063.) Tom Petters exerted ultimate control over the debtor-transferor Polaroid, just as he did over PGW and PCI. Petters was the 100% beneficial owner of Polaroid's stock and its sole board member. (Jeffries 4/13/10 Dep. at 178, APP0001065; In re Polaroid, 472 B.R. at 41, n.32.) Polaroid's CEO Mary Jeffries had frequent contact with Petters: immediately prior to becoming Polaroid's CEO in 2008, Jeffries had been in executive management at PGW, with an office next to Tom Petters. (Jeffries 4/13/10 Dep. at 17; 304-05, APP0001056; APP0001074.) As Polaroid's CEO, Jeffries had contact with Petters several times per week. (Jeffries 4/13/10 Dep. at 211, APP1069.) Petters was familiar with Polaroid's long-term strategic operations, as well as its day-to-day operations. (Jeffries 4/13/10 Dep. at 212.)

Tom Petters' control over Polaroid concerning the specific transfer of the Polaroid trademarks to the Ritchie Entities is well-supported by the evidence. All of the February and May Ritchie Notes preceding the Trademark Security Agreement were signed by Tom Petters, in his own personal capacity, and on behalf of PGW. (February Notes,

APP0002259-88; May Notes, APP0002179-85.) Petters signed the two final notes on his own behalf, and on behalf of both PGW and PCI. (May Notes, APP0002179-85.) With respect to all of these notes, Tom Petters gave ultimate approval. (Root Dep. at 132, R.APP00255.)

Thane Ritchie initially understood that some or all of the loan proceeds would go to Polaroid, to pay off its $31 million debt to JP Morgan to clean up the "bad paper." (Ritchie Dep. at 45, 66; R.APP00017, R.APP00018.) Yet none of the proceeds from any of the $189 million in Ritchie loans went to Polaroid.[12] (Wehmhoff Dep. at 16, APP000161; Jeffries Dep. of 4/13/10 at 107-08, 245-46; R.APP00244, R.APP00250, Martens Aff. ¶ 8, APP0000634.)

At the hearing on the instant appeal, Appellants argued that the Trustee's analysis of the flow of funds failed to show the ultimate disposition of the loan proceeds, and therefore disputed issues of material fact remain. (Tr. of 9/11/13 Hearing at 14 [Doc. No. 56].) The Court disagrees. The evidence shows that the funds went to PCI, which used the funds to pay off investors in Petters' Ponzi scheme. (Wehmhoff Dep. at 16-17, APP0001161; Coleman Dep. at 240-41, APP0001129; Martens Aff. ¶ 8, APP0000634). Mary Jeffries testified that Polaroid did not receive the proceeds of the Ritchie notes (Jeffries Dep. of 4/13/10 at 107-08, R.APP00244), nor did it receive anything in exchange

[12] The February Notes totaled $146 million, and the May Notes were an additional $12 million, for a total of $158 million. (February Notes, APP0002259-80; May Notes, APP0002179-85.) In addition, the Ritchie Entities loaned $31 million to PCI in the March 2008 PlayStation deal. (Martens Aff. ¶ 8, APP0000634; PwC Preliminary Analysis at 13-14, Ex. 295 to Martens Dep. [Doc. No. 38-4].) Thus, the Ritchie Entities loaned Petters a total of $189 million. (Id.; Martens Aff. ¶ 6, APP0000634.)

for the loan extension or pledge of its assets in the Trademark Security Agreement. (Jeffries 4/13/10 Dep. at 245-46, R.APP00250.) There is no material evidence to the contrary purporting to show that these funds went to Polaroid. The Bankruptcy Court rejected as purely speculative this suggestion that some of the Ritchie funds "could have" flowed to Polaroid. In re Polaroid, 472 B.R. at 72, n.67. Likewise, and "more to the point of the summary judgment context," the Bankruptcy Court found this argument was "unsupported by any probative, direct evidence to controvert the Trustee's evidence on the matter." Id.

The evidence shows that in the summer of 2008, Petters' Ponzi scheme was essentially in shambles.[13] Petters failed to make any of the payments on the Ritchie notes, the Ritchie Entities constantly pressed him for Polaroid collateral in exchange for extending the deadlines on the notes, and Acorn filed its lawsuit. By the fall of 2008, Petters' sense of desperation was evident, as he emailed his inner circle, asking for "any and all ideas" to "get out of the box." (E-mail chain of 9/4/08 between T. Petters, D. Baer, and others, APP0000631.) The Acorn lawsuit prompted Thane Ritchie to dispatch his colleagues to Minnesota, telling them to not return until they had some Polaroid collateral. (Ritchie Dep. at 175, R.APP00029.) When Polaroid's Mary Jeffries learned of the plan to grant the Ritchie Entities a security interest in the Polaroid trademarks, she told Petters that she opposed it. (Jeffries 4/13/10 Dep. at 121, APP0001062.) Just five days before the FBI raid on Petters' home and office, and over the objections of the CEO of Polaroid, Tom

[13] As noted by the Bankruptcy Court, forensic accountants later calculated Petters Entities' contractual losses alone at $3.5 billion. In re Polaroid, 472 B.R. at 39, n.29.

Petters nevertheless signed away the security interest in Polaroid's trademarks in Brazil, India, and China. (Extension and Amendment Agreement, APP0002206-28; Jeffries 4/13/10 Dep. At 121, APP0001062.)

While Mary Jeffries believed that Polaroid still remained a going concern in early-mid September 2008 (Jeffries 9/29/10 Dep. at 131-32, APP0001082), Polaroid's Katherine Dugan, in global licensing was not so sanguine. (Dugan Dep. at 84-85, APP0001046.) Dugan testified that Polaroid was unable to meet its debts as they came due. (Id. at 84, APP0001046.) Jeffries herself also tacitly acknowledged that by September 19, 2008 – the date on which Petters signed over Polaroid's security interests to the Ritchie Entities – Polaroid was unable to pay its debts as they came due. (Jeffries 9/30/10 Dep. at 63-64, APP0001085.) Polaroid filed for bankruptcy just three months later, in December 2008. (Jeffries 4/13/10 Dep. at 219-21, APP0001071.) While the Ritchie Entities argue that Petters' arrest did not make Polaroid's failure inevitable, Mary Jeffries testified that but for the FBI raid, she believed that the Stillwater investor group would have funded a line of credit to Polaroid sufficient to keep it afloat. (Jeffries 9/29/10 Dep. at 69-70, APP0001080-81.) Yet the Ritchie Entities argue that Polaroid's failure was not inevitable, pointing to other Petters-related companies, such as Fingerhut, which did not file for bankruptcy. If anything, this argument bolsters the Trustee's case – Petters did not pledge the assets of Fingerhut as security for the Ritchie loans. Instead, he pledged the assets of Polaroid, leaving Polaroid's fate dependent upon the continued viability of his over-arching Ponzi scheme.

On the element of actual fraudulent intent, the Bankruptcy Court noted that

> it is pivotal here that the transfer was directed and effected at the sole instance of Tom Petters, who held iron control of all of the business entities involved via his 100% ownership, and who had the very most to lose were he not to use the ploy of pledging the trademarks.

In re Polaroid, 472 B.R. at 59 (analyzing actual fraudulent intent under the badges of fraud). The Bankruptcy Court therefore attributed Tom Petters' intent to the Polaroid Corporation as transferor, "because Petters controlled that artificial entity." Id. at 40. Focusing on the intent of the transferor, Tom Petters, Chief Bankruptcy Judge Kishel noted that ". . . [t]he applicability of the presumption comes down to the controlling person's motivation for effecting the specific transfer by the non-purveyor, 'legitimate' business entity, when and as the transfer is made." Id. at 40-41. Addressing Petters' common control of Polaroid within the larger Petters business structure, the Bankruptcy Court explained that

> [w]hen this is the governing consideration, the automatic inference of fraudulent intent is made when the person in common control effects the transfer by the entity extrinsic to the Ponzi scheme, but in order to further the scheme as it has been maintained through the central entity. Yes, the creditors hindered, delayed, and defrauded by the transfer are not the direct victims of the Ponzi scheme in its operation, i.e., investors into the entity through which the scheme has been purveyed. Nonetheless, it is a readily-identifiable group: the creditors of the related entity that makes the transfer for the benefit of the purveyor-entity. The intent that is deemed via the inference is the intent to deprive those parties of the value of their legal recourse against the debtor with which they are in privity, i.e., the transferor that gives up its own assets at the beck of the person in common control, to satisfy a creditor of the purveyor-entity that is not a creditor of the transferor-entity.

Id. Thus, while it is true that Polaroid was not operating a Ponzi scheme, Polaroid was purchased with the proceeds of the scheme, and was controlled, for all practical purposes, by the purveyor of the scheme. Its financial fate was inextricably linked to that scheme.

Appellants argue that the Bankruptcy Court's ruling impermissibly renders Polaroid's corporate form an "abstraction," because at all times Polaroid remained a legally separate, legitimate entity. (Appellants' Mem. at 18 [Doc. No. 21].) While there is a presumption that a parent corporation is legally separate from its subsidiary entity, Brown v. Wells Fargo & Co., 284 F.R.D. 432, 441 (D. Minn. 2012), a parent corporation may be held liable given proof that it "performed acts sufficient to create liability, or actively influenced [the subsidiary] in its violations. H.J., Inc. v. Int'l Tel. & Tel. Corp., 867 F.2d 1531, 1549 (8th Cir. 1989) (citing Watson v. Gulf & Western Indus., 650 F.2d 990, 993 (9th Cir. 1981)). Here, not only was Petters Polaroid's sole board member, he decided to transfer Polaroid's security interests by fiat, effecting the transfer himself. Petters did not simply influence Polaroid – he controlled the transfer completely.

This Court is unaware of another case involving this factual scenario in the context of a claim of actual fraudulent transfer. However, other courts have applied the Ponzi scheme presumption or have found actual fraudulent intent by attributing the requisite intent to a controlling entity. In Emerson v. Maples (In re Mark Benskin & Co., Inc.), 161 B.R. 644, 647 (Bankr. W.D. Tenn. 1993), aff'd, Nos. 94-5421, 94-5422, 1995 WL 381741 (6th Cir. June 26, 1995), a bankruptcy trustee sought to avoid transfers from the debtor corporation and a related debtor to third parties. The related debtor was the principal of the solely-controlled debtor corporation. Id. at 648. The court found that the debtor corporation's actual fraudulent intent was established by the guilty pleas to criminal fraud charges entered by both the corporate debtor and its principal. Id. at 649-50. While the debtor corporation in Benskin was itself clearly engaged in fraud, whereas Polaroid was

not, Benskin nonetheless demonstrates a finding of actual fraud based on the actions of a corporate principal.

Similarly, in Zazzali v. 1031 Exchange Group LLC (In re DBSI, Inc.), 476 B.R. 413, 421-22 (D. Del. 2012), the court considered the relationships between two debtors in applying the Ponzi scheme presumption to a motion to dismiss. The trustee alleged that DBSI's real estate enterprise as a whole "took on the characteristics of a Ponzi scheme," propped up by sales of tenant-in-common ('TIC") real estate interests. Id. at 421. One affiliate, FOR 1031, sold and marketed those interests. An infusion of cash from new investors created an illusion of high returns on the TIC interests, as well as the sales of other investments. Id. DBSI promised investors high rates of return, despite the fact that the properties sold to its investors were risky and unattractive. Id. The court found that "[t]his structure, in which DBSI incurred all of the liabilities and obligations in the scheme while FOR1031 received all of the profits from the TIC sales allowed Debtors [which included both DBSI and FOR1031] to "portray FOR1031 on the papers as an immensely profitable company." Id. at 422. As the plaintiff alleged, the scheme rendered DBSI insolvent, as "[f]or every dollar of gross profit received through the sale of TIC interests, DBSI assumed, through its guaranties of the master lease obligations, [liabilities] that far exceeded the front-end gross profits." Id. While DBSI and FOR1031 were both debtors, the court's focus on the respective roles and risks assigned to them in its analysis of the Ponzi scheme presumption is instructive. Tom Petters' entities as a whole not only 'took on the characteristics" of Ponzi scheme – they were a Ponzi scheme. While Polaroid itself operated legitimately, outside the core of the Ponzi scheme, it was a useful tool for Petters

when attempting to impress and lure new investors into his scheme. In re Polaroid, 472 B.R. at 39, n.28 (citing Coleman Dep. at 111). And it was a useful resource from which Petters extracted collateral to prolong his floundering scheme. But when Petters signed away Polaroid's security interests on September 19, 2008, one entity – Polaroid – ultimately incurred the loss and received nothing in return.

Appellants rely on Grede v. Bank of New York Mellon, 441 B.R. 864, 882 (N.D. Ill. 2010), for the proposition that the Ponzi scheme presumption is inapplicable where the plaintiff presents no evidence showing that the debtor was engaged in a Ponzi scheme, and thereby fails to prove that the debtor knew at the time of transfer that the scheme would collapse. (Appellant's Mem. at 15 [Doc. No. 21].)[14] The trial court in Grede found that the transfers of customer assets out of segregated accounts, which the debtor, Sentinel, transferred into "lienable" accounts, and then used as collateral for an overnight loan from the Bank of New York Mellon ("BNYM"), merely represented an attempt to "stay in business:"

> If Trustee is correct that Sentinel was insolvent at the time of the Transfers, it is equally reasonable to infer that the Transfers were made to secure the loan in an attempt to continue conducting business and paying off existing creditors. Even if the Transfers were not designed to drain the assets, they can still be voidable if they result in the draining of the asset pool. But here, this was not the case—in exchange for the collateral, BNYM gave a loan of significant value, thereby adding to the [asset] pool.

Id. at 884. Finding that Sentinel was not attempting to strip itself of its assets, the court found that the plaintiff failed to demonstrate actual intent. Id

[14] Appellants also included a quotation from Grede in their PowerPoint slides at oral argument before this Court. (Ritchie's Oral Argument Materials of 9/11/13 at 34.)

Subsequent to the filing of Appellants' briefs in this appeal, the Seventh Circuit reversed the portion of Grede that found no actual fraudulent intent. In re Sentinel Mgmt. Group, Inc., 728 F.3d 660, 668 (7th Cir. 2013). The Seventh Circuit explained:

> [The trial court's] finding that Sentinel's pledge of segregated funds as collateral for loans with the Bank of New York was driven by a desire to stay in business correctly identified the motive. Nonetheless, we disagree with the district court's legal conclusion that such motivation was insufficient to constitute actual intent to hinder, delay, or defraud Sentinel's FCM clients. Such a result too narrowly construes the concept of actual intent to hinder, delay, or defraud. When Sentinel pledged the funds that were supposed to remain segregated for its FCM clients, Sentinel's primary purpose may not have been to render the funds permanently unavailable to these clients (although Sentinel falsely reported to both its FCM clients and the CFTC that the funds remained in segregation). But Sentinel certainly should have seen this result as a natural consequence of its actions. In our legal system, "every person is presumed to intend the natural consequences of his acts."

Id. (citations omitted). The appellate court found, as a matter of law, that Sentinel's transfers of the segregated funds demonstrated the requisite "actual intent to hinder, delay, or defraud" under § 548. Id. Likewise, here, when Petters raided Polaroid by pledging its trademark assets – assets that should have been available for Polaroid's own financing needs, and ultimately, for its creditors – Petters either intended to render those assets unavailable to Polaroid, or at the very least, "should have seen this result as a natural consequence of [his] actions." Id.

2. "In Furtherance of" Requirement

Even where the facts sufficiently demonstrate the existence of a Ponzi scheme, "the [c]ourt must focus precisely on the specific transaction or transfer sought to be avoided in order to determine whether that transaction falls within the statutory parameters of [an

actually fraudulent transfer]." Bayou Superfund, LLC v. WAM Long/Short Fund II, LP (In re Bayou Group, LLC), ("Bayou I"), 362 B.R. 624, 638 (Bankr. S.D.N.Y. 2007). The "in furtherance element" is related to the inference of fraudulent intent, as the intent to defraud future investors can only be found where the transfers at issue somehow perpetrate the Ponzi scheme. See Kapila v. Phillips Buick-Pontiac-GMC Truck, Inc. (In re ATM Fin. Servs., LLC), No. 6:08-bk-969-KSJ, 2011 WL 2580763, *5 (Bankr. M.D. Fla. June 24, 2011) (transfers unrelated to the Ponzi scheme do not warrant an inference of fraudulent intent); see also In re Manhattan Inv. Fund Ltd., 397 B.R. 1, 11 (S.D.N.Y. 2007) (noting that "courts must be sure that the transfers sought to be avoided are related to the scheme"); Cuthill v. Greenmark (In re World Vision Ent., Inc.), 275 B.R. 641, 658 (Bankr. M.D. Fla. 2002) (observing that "[s]imply because a debtor conducts its business fraudulently does not make every single payment by the debtor subject to avoidance"); Daly v. Deptula (In re Carrozzella & Richardson), 286 B.R. 480, 490-91 (D. Conn. 2002) (affirming the bankruptcy court's ruling that the proper focus was on the particular transfer itself, and not on overall business practices).

While Appellants do not contest that Petters operated a Ponzi scheme, they again argue that the transfer was not in furtherance of the Ponzi scheme because Polaroid did not operate a Ponzi scheme. Appellants contend that the "in furtherance" requirement is a "limitation that restricts application of the Ponzi presumption to transfers that both are made by a Ponzi scheme and also 'further' it." (Appellants' Mem. at 19 [Doc. No. 21].) The facts here, however, support the application of Appellants' standard. Not only was

the transfer "made by a Ponzi scheme," as Tom Petters himself signed the Trademark Security Agreement, but the transfer furthered that scheme.

Discussing the "in furtherance" requirement, the Bankruptcy Court observed:

> There is nothing untoward about using the presumption in this way. Under the judicial articulation of the presumption, the idea of "furthering" the scheme is act-oriented (as signified by the use of a verb) rather than structure-oriented (as would be signified by identification to a noun). Where the close relationship inherent in common and exclusive control of closely-held companies is present, and surrounding conditions are desperate enough for the fortunes of the individual purveyor-controller, the deeming of intent to basic actions is a simple matter of recognizing a continuity inherent in the circumstances. . . .

In re Polaroid, 472 B.R at 41-42

Appellants criticize as speculative the Bankruptcy Court's finding that Petters signed away Polaroid's assets in order to prolong the Ponzi scheme. (Appellants' Mem. at 28-29 [Doc. No. 21].) Specifically, the Bankruptcy Court found that Petters was struggling to prevent a default on the Ritchie notes, and subsequent litigation, which he believed would have finished him. In re Polaroid, 472 B.R. at 53. Appellants do not, however, point to facts that would lead to a different conclusion. Rather, the Ritchie Entities argue that Petters may have been motivated in making the transfer for other reasons, such as avoiding a default by PGW or himself. (Appellants' Mem. at 29 [Doc. No. 21].) But as the architect and chief perpetrator of the Ponzi scheme, and the owner of PGW, Petters' motivations – whether based on fears of personal financial ruin or criminal liability, or concern for PGW specifically, or all three – such motivations are indistinguishable from Petters' motivation in perpetuating the operation of the Ponzi scheme. Petters' personal interests were entirely intertwined with the Ponzi scheme and

the scheme's continuation. Petters considered himself indistinguishable from the primary entity through which the Ponzi scheme operated, stating, "I am PCI." (Petters Trial Tr. at 3170, APP0000584.) For all practical purposes here, Petters was also Polaroid. As the sole board member and 100% beneficial owner of Polaroid's stock (Jeffries 4/13/10 Dep. at APP0001065l; In re Polaroid, 472 B.R. at 41, n.32), and the sole board member of PGW (In re Polaroid, 472 B.R. at 27; Coleman Dep. at 205, APP0001125), Petters ultimately called the shots. Regarding the specific transfer at issue here, Petters held the power to sign over Polaroid's assets to the Ritchie Entities, despite Mary Jeffries' objection.

The evidence demonstrates that the "in furtherance" element is met. First, Polaroid received none of the proceeds from the Ritchie loans, which were issued at several points between February and May 2008. (Jeffries Dep. of 4/13/10 at 107-08, R.APP00244; Martens Aff. ¶¶ 6-8, APP0000634.) In August and September 2008, Petters' scheme was crumbling. The faltering global economy made it more difficult to obtain credit. In re Polaroid, 472 B.R. at 42. PGW experienced "major cash flow problems" in 2007 or 2008. (Petters Trial Tr. at 3042, APP0000579.) Acorn had filed its lawsuit, prompting Thane Ritchie to aggressively seek collateral from Petters. (Ritchie Dep. at 152-53; 183-85, R.APP00030.) On September 18, Thane Ritchie threatened Petters that things would get "very messy" without an agreement in place, claiming that as "last money in," the Ritchie Entities "should be first out." (E-mail of 9/18/08 from T. Ritchie to T. Petters, R.APP00351.) As noted, in early September 2008, Petters issued a personal plea to his inner circle, asking for "any and all ideas" to extricate the Petters' organization from the situation. (E-mail chain of 9/4/08 between T. Petters, D. Baer, and others, APP0000631.)

With the FBI raid occurring only five days after the transfer of Polaroid's assets, Petters' Ponzi scheme did, in fact, inevitably fail. In short order, Polaroid – its fate intertwined with that of the Ponzi scheme operator/transferor – was unable to meet its debts, and filed for bankruptcy. (Jeffries 4/13/10 Dep. at 219-21, APP0001071.)

For all of the foregoing reasons, given this particular factual context, the Court finds that the Ponzi scheme presumption applies to the facts presented here to satisfy the requirement of actual fraudulent intent under both federal and state law.[15] There can be no dispute that Tom Petters operated a massive Ponzi scheme. Through his control of Polaroid, he looted Polaroids' assets in order to appease the Ritchie Entities, whose loan money had gone not to Polaroid, but to pay off other investors. Petters effected the transfer in a desperate attempt to keep his Ponzi scheme afloat in its waning days. Appellants' appeal regarding the application of the Ponzi scheme presumption is therefore denied.

3. Badges of Fraud

Where the Ponzi scheme presumption applies to the transfers at issue, courts have held that consideration of the badges of fraud is unnecessary. In re Manhattan Inv. Fund Ltd., 397 B.R. at 10, n.13 (citing Securities Investor Protection Corp. v. Old Naples Securities, Inc. (In re Old Naples Securities, Inc., 343 B.R. 310, 319 (Bankr. M.D. Fla.

[15] As the Bankruptcy Court noted, Minn. Stat. § 513.44(a)(1), the state law corollary to the Bankruptcy Code's fraudulent transfer provision, furnishes equal authority for the application of the Ponzi scheme presumption to these facts. In re Polaroid, 472 B.R. at 55. As the state and federal statutes are so similar, the rulings in this Order apply equally to the actual fraudulent transfer claim brought pursuant to state law.

2006)). While the Bankruptcy Court also found on an alternative basis that the transfers at issue were actually fraudulent under the badges of fraud analysis, because this Court finds that the Ponzi scheme presumption applies, it does not address the alternative basis for the Bankruptcy Court's ruling.

C. Disallowance and Avoidance of Appellants' Claims (Counts VI and VII)

The Bankruptcy Court also granted the Trustee's partial summary judgment motion as to the Trustee's disallowance claim in Count VI and his lien avoidance claim in Count VII of the Complaint. The Trustee brings the disallowance claim pursuant to 11 U.S.C. § 502(b) and (d), and the lien avoidance claim pursuant to 11 U.S.C. § 506(d). (Compl. ¶¶ 80-86 [Doc. No. 1-2].) A court may disallow claims of an entity that is a transferee of fraudulent transfer under §§ 544 and 548, "unless such entity or transferee has paid the amount, or turned over any such property" for which the transferee is liable. 11 U.S.C. § 502(d). "In other words, section 502(d) requires the recipient of a preferential transfer to return the transfer to the trustee prior to receiving payment on any claims the recipient may possess." In re Midwest Agri Dev. Corp., 387 B.R. 580, 585 (8th Cir. 2008). Lienholders "remain entitled to adequate protection of their interests, and to the other rights enjoyed by secured creditors." Id. (citing United States v. Whiting Pools, Inc., 462 U.S. 198, 211 (1983)). After the creditor-transferee turns over the property in question, the "secured creditor may seek payment of his claim through the bankruptcy process." Id.

In Appellants' briefing and argument on this appeal, the Ritchie Entities did not raise or address the Bankruptcy Court's rulings on the Trustee's disallowance and avoidance claims. (See Appellants' Mem. at 1 [Doc. No. 21].) Apparently, the

disallowance and avoidance claims were not the focus of the parties' argument in the bankruptcy proceeding below, as Chief Bankruptcy Judge Kishel observed that "[n]either side paid particular attention to this aspect of the Trustee's motion, in briefing or argument." In re Polaroid, 472 B.R. at 71, n.65. In any event, because Appellants identified these two claims in one of their initial filings – the Statement of Issues Presented [Doc. No. 1-16] – the Court considers these claims on appeal, even though the parties presented no argument or briefing on them.

As the Bankruptcy Court summarized, through the Trustee's avoidance and disallowance claims, "[t]he Trustee basically seeks to terminate all participation by the Ritchie Defendants as creditor-claimants in the Polaroid Corporation's bankruptcy case, in any capacity whether secured or unsecured." In re Polaroid, 472 B.R. at 71. To the extent that a transfer is voided under §§ 544 or 548, "the trustee may recover, for the benefit of the estate, the property transferred, or, . . . the value of such property. . . ." 11 U.S.C. § 550(a). Claims arising under § 550 "shall be determined, and shall be allowed. . . , or disallowed . . ., the same as if such claim had arisen before the date of the filing of the petition. 11 U.S.C. § 502(h). Pre-petition claims are allowed, "except to that extent that . . . such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured. . . ." 11 U.S.C. § 502(b)(1). "[F]or the purpose of contesting claims of creditors against a bankruptcy estate the trustee in bankruptcy may assert all defenses to which the debtor would be entitled." In re Stevenson Assoc., Inc., 777 F.2d 415, 419 (8th Cir. 1985).

This Court agrees with the Bankruptcy Court that, on this record, there is no evidence showing that the Ritchie Entities lent money to Polaroid. To the contrary, the evidence shows that Polaroid received none of the money from the Ritchie notes. As discussed herein, the evidence supports this conclusion and Appellants do not point to probative evidence to the contrary. Also, as the Bankruptcy Court noted, Polaroid did not guarantee the debt under the notes. Accordingly, Polaroid incurred no pre-petition liability to Appellants under the contract or other applicable law. This Court thus agrees with the Bankruptcy Court that "the Ritchie Defendants have no underlying allowable unsecured claim against the bankruptcy estate of the Polaroid Corporation," and that a "compelled post-avoidance accounting to the estate cannot legally give rise to a newly-allowable claim in favor of the Ritchie Defendants, against the estate of the Polaroid Corporation." In re Polaroid, 472 B.R. at 72. Moreover, as a practical matter, the Ritchie Entities cannot account to the estate in consequence of avoidance because the Polaroid trademarks in question were sold free and clear of the liens in the Chapter 11 phase of Polaroid's bankruptcy. Id. Instead, replacement liens were impressed against the proceeds of the sale to provide protection pursuant to 11 U.S.C. §§ 363(c)(2)(B), 363(f), and 361. Id. Because the transfer of the original liens is avoided, the replacement lien is likewise vitiated and the Ritchie Entities have no interests in the bankruptcy estate's proceeds. In addition, as the Bankruptcy Court found, the lien is cumulatively avoidable under 11 U.S.C. § 506(d), because Appellants do not hold an allowed claim against the estate and the original attachment of their lien is avoidable under §§ 548 and 544. Id. For all of these reasons, to the extent that Appellants appeal the Bankruptcy Court's ruling with respect to the

Trustee's claims for disallowance and lien avoidance, their appeal is denied.

D. Order to Show Cause

Various submissions of the parties in support of their motion papers were filed under seal. If the parties believe that any portion of this Order warrants redaction, the Court orders the parties to show cause ten days from the date of this Order, stating why the Order should not be unsealed and specifying any portion of the order warranting redaction.

THEREFORE, IT IS HEREBY ORDERED that:

1. Appellants' Appeal from Bankruptcy Court [Doc. No. 1] is **DENIED**; and
2. The parties are ordered to show cause ten (10) days from the date of this Order why the Order should not be unsealed, and to specify any portion warranting redaction.

Dated: January 6, 2014

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Judge