

15-3294-CV

United States Court of Appeals

for the

Second Circuit

RITCHIE CAPITAL MANAGEMENT, L.L.C., RITCHIE CAPITAL
MANAGEMENT, LTD., RITCHIE SPECIAL CREDIT INVESTMENTS, LTD.,

Plaintiffs-Appellants,

– v. –

COSTCO WHOLESALE CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX Volume 1 of 2 (Pages A-1 to A-165)

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CLOSED, APPEAL, ECF

**U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:14-cv-04819-VSB**

Ritchie Capital Management, L.L.C. et al v. Costco Wholesale Corporation	Date Filed: 06/27/2014
Assigned to: Judge Vernon S. Broderick	Date Terminated: 09/21/2015
Case in other court: State Court - Supreme, 650382-14	Jury Demand: None
Cause: 28:1332fr Diversity-Fraud	Nature of Suit: 370 Other Fraud
	Jurisdiction: Diversity

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Plaintiff

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V.

Defendant

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/27/2014	1	CIVIL COVER SHEET filed. (jd) (Entered: 07/01/2014)
06/27/2014	2	NOTICE OF REMOVAL from Supreme Court, County of New York. Case Number: 650382-14. (Filing Fee \$ 350.00, Receipt Number 465401099151). Document filed by Costco Wholesale Corporation. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(jd) (Entered: 07/01/2014)
06/27/2014		Magistrate Judge James L. Cott is so designated. (jd) (Entered: 07/01/2014)
06/27/2014		Case Designated ECF. (jd) (Entered: 07/01/2014)
07/01/2014	3	NOTICE OF APPEARANCE by Leonel V. Leyva on behalf of Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., Ritchie Special Credit Investments, Ltd.. (Leyva, Leonel) (Entered: 07/01/2014)
07/01/2014	4	NOTICE OF APPEARANCE by Victoria Jean Cioppettini on behalf of Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., Ritchie Special Credit Investments, Ltd.. (Cioppettini, Victoria) (Entered: 07/01/2014)
07/01/2014	5	NOTICE OF APPEARANCE by Gregg L Weiner on behalf of Costco Wholesale Corporation. (Weiner, Gregg) (Entered: 07/01/2014)
07/01/2014	6	NOTICE OF APPEARANCE by Adam Michael Harris on behalf of Costco Wholesale Corporation. (Harris, Adam) (Entered: 07/01/2014)
07/01/2014	7	CERTIFICATE OF SERVICE of Civil Cover Sheet, Notice of Removal, Individual Rules and Practices In Civil Cases of Judge Vernon S. Broderick and S.D.N.Y. ECF Rules and Instructions served on Leo L. Leyva on 07/01/2014. Service was made by Mail. Document filed by Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., Ritchie Special Credit Investments, Ltd.. (Harris, Adam) (Entered: 07/01/2014)
07/02/2014	8	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by Costco Wholesale Corporation.(Weiner, Gregg) (Entered: 07/02/2014)
07/02/2014	9	LETTER MOTION for Extension of Time <i>to respond to the complaint</i> addressed to Judge Vernon S. Broderick from Gregg L. Weiner dated July 2, 2014. Document filed by Costco Wholesale Corporation.(Weiner, Gregg) (Entered: 07/02/2014)
07/03/2014	10	ORDER granting 9 Letter Motion for Extension of Time. ENDORSEMENT: Application granted. (Signed by Judge Vernon S. Broderick on 7/3/2014) (kgo) (Entered: 07/03/2014)
07/03/2014		Set/Reset Deadlines: Costco Wholesale Corporation answer due 7/21/2014. (kgo) (Entered: 07/03/2014)
07/16/2014	11	MOTION for James T. Kim, Esq. to Appear Pro Hac Vice . Filing fee \$ 200.00,

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		receipt number 0208-9892046. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., Ritchie Special Credit Investments, Ltd..(Kim, James) (Entered: 07/16/2014)
07/16/2014		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. <u>11</u> MOTION for James T. Kim, Esq. to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-9892046. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (wb) (Entered: 07/16/2014)
07/17/2014	12	ORDER granting <u>11</u> Motion for James T. Kim, Esq. to Appear Pro Hac Vice. (HEREBY ORDERED by Judge Vernon S. Broderick)(Text Only Order) (Broderick, Vernon) (Entered: 07/17/2014)
07/21/2014	<u>13</u>	LETTER MOTION for Conference (<i>Pre-motion conference</i>) addressed to Judge Vernon S. Broderick from Gregg L. Weiner dated July 21, 2014. Document filed by Costco Wholesale Corporation.(Weiner, Gregg) (Entered: 07/21/2014)
07/24/2014	<u>14</u>	LETTER addressed to Judge Vernon S. Broderick from Leo V. Leyva, Esq. dated July 24, 2014 re: Response to Defendant Costco Wholesale Corporation's July 21, 2014 letter requesting a pre-motion conference (Docket No. 13). Document filed by Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., Ritchie Special Credit Investments, Ltd..(Leyva, Leonel) (Entered: 07/24/2014)
07/24/2014	15	ORDER granting <u>13</u> Letter Motion for Conference. A pre-motion conference will be held on August 29, 2014, at 10:00 a.m., in courtroom 518, Thurgood Marshall United States Courthouse, 40 Foley Square, New York, New York 10007. (HEREBY ORDERED by Judge Vernon S. Broderick)(Text Only Order) (Broderick, Vernon) (Entered: 07/24/2014)
07/30/2014	<u>16</u>	LETTER MOTION to Adjourn Conference addressed to Judge Vernon S. Broderick from Leo V. Leyva, Esq. dated July 30, 2014. Document filed by Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., Ritchie Special Credit Investments, Ltd..(Leyva, Leonel) (Entered: 07/30/2014)
07/31/2014	<u>17</u>	ORDER granting <u>16</u> Letter Motion to Adjourn Conference. APPLICATION GRANTED. SO ORDERED. The parties are directed to appear for a pre-motion conference on September 12, 2014 at 10:45 a.m. Pre-Motion Conference set for 9/12/2014 at 10:45 AM before Judge Vernon S. Broderick. (Signed by Judge Vernon S. Broderick on 7/31/2014) (mro) (Entered: 07/31/2014)
08/15/2014	<u>18</u>	ORDER: The Pre-Motion Conference previously scheduled for September 12, 2014 at 10:45 a.m. is hereby rescheduled to October 10, 2014 at 11:30 a.m. in Courtroom 518 of the Thurgood Marshall United States Courthouse, 40 Foley Square, New York, New York. (Pre-Motion Conference set for 10/10/2014 at 11:30 AM in Courtroom 518, 40 Centre Street, New York, NY 10007 before Judge Vernon S. Broderick.) (Signed by Judge Vernon S. Broderick on 8/15/2014) (mro) (Entered: 08/15/2014)
10/10/2014		Minute Entry for proceedings held before Judge Vernon S. Broderick: Pre-Motion Conference held on 10/10/2014. Briefing Schedule due by 10/22/2014. (Court Reporter Kristen Carannante) (msa) (Entered: 10/10/2014)

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10/10/2014		Set/Reset Deadlines: Amended Pleadings due by 10/17/2014. (msa) (Entered: 10/10/2014)
10/17/2014	19	FIRST AMENDED COMPLAINT against Costco Wholesale Corporation. Document filed by Ritchie Capital Management, L.L.C., Ritchie Special Credit Investments, Ltd., Ritchie Capital Management, Ltd.. (Attachments: # 1 Exhibit A to First Amended Complaint, # 2 Exhibit B to First Amended Complaint, # 3 Exhibit C to First Amended Complaint)(Leyva, Leonel) (Entered: 10/17/2014)
10/20/2014	20	TRANSCRIPT of Proceedings re: conference held on 10/10/2014 before Judge Vernon S. Broderick. Court Reporter/Transcriber: Kristen Carannante, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 11/13/2014. Redacted Transcript Deadline set for 11/24/2014. Release of Transcript Restriction set for 1/21/2015.(McGuirk, Kelly) (Entered: 10/20/2014)
10/20/2014	21	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a conference proceeding held on 10/10/2014 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days... (McGuirk, Kelly) (Entered: 10/20/2014)
10/22/2014	22	LETTER addressed to Judge Vernon S. Broderick from Gregg L. Weiner dated 10/22/2014 re: Proposed Briefing Schedule for Motion To Dismiss Plaintiff's First Amended Complaint. Document filed by Costco Wholesale Corporation.(Weiner, Gregg) (Entered: 10/22/2014)
10/23/2014	23	MEMO ENDORSEMENT on re: 22 Letter filed by Costco Wholesale Corporation. ENDORSEMENT: SO ORDERED. (Brief due by 11/13/2014. Reply to Response to Brief due by 12/22/2014. Responses to Brief due by 12/8/2014) (Signed by Judge Vernon S. Broderick on 10/23/2014) (ajs) (Entered: 10/23/2014)
11/13/2014	24	MOTION to Dismiss <i>the First Amended Complaint</i> . Document filed by Costco Wholesale Corporation.(Weiner, Gregg) (Entered: 11/13/2014)
11/13/2014	25	DECLARATION of Adam M. Harris in Support re: 24 MOTION to Dismiss <i>the First Amended Complaint</i> .. Document filed by Costco Wholesale Corporation. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G)(Weiner, Gregg) (Entered: 11/13/2014)
11/13/2014	26	MEMORANDUM OF LAW in Support re: 24 MOTION to Dismiss <i>the First Amended Complaint</i> . . Document filed by Costco Wholesale Corporation. (Weiner, Gregg) (Entered: 11/13/2014)
11/18/2014	27	LETTER addressed to Judge Vernon S. Broderick from Leo V. Leyva dated November 18, 2014 re: Modification of briefing schedule. Document filed by Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., Ritchie Special Credit Investments, Ltd..(Weiss, Jed) (Entered: 11/18/2014)

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11/24/2014	28	ORDER: The parties are directed to review Docs. 59, 61, 62, 63, and 65 filed in Case No. 14-CV-2557, Ritchie Capital Management, L.L.C. et al v. JPMorgan Chase & Co. et al (S.D.N.Y.). The parties are further directed to file on ECF no later than December 19, 2014 letters of no more than three pages explaining why this case should not be transferred to the District of Minnesota. (Signed by Judge Vernon S. Broderick on 11/24/2014) (kgo) (Entered: 11/24/2014)
11/24/2014	29	MEMO ENDORSEMENT on re: 27 Letter, filed by Ritchie Capital Management, L.L.C., Ritchie Special Credit Investments, Ltd., Ritchie Capital Management, Ltd.. ENDORSEMENT: APPLICATION GRANTED (Signed by Judge Vernon S. Broderick on 11/24/2014) (kgo) (Entered: 11/24/2014)
11/24/2014		Set/Reset Deadlines: Responses due by 12/19/2014 Replies due by 1/16/2015. (kgo) (Entered: 11/24/2014)
12/19/2014	30	MEMORANDUM OF LAW in Opposition re: 24 MOTION to Dismiss <i>the First Amended Complaint</i> . . Document filed by Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., Ritchie Special Credit Investments, Ltd.. (Leyva, Leonel) (Entered: 12/19/2014)
12/19/2014	31	DECLARATION of Leo V. Leyva, Esq. in Opposition re: 24 MOTION to Dismiss <i>the First Amended Complaint</i> .. Document filed by Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., Ritchie Special Credit Investments, Ltd.. (Attachments: # 1 Exhibit A to Leo Levya, Esq.'s Declaration, # 2 Exhibit B to Leo Levya, Esq.'s Declaration, # 3 Exhibit C to Leo Levya, Esq.'s Declaration)(Leyva, Leonel) (Entered: 12/19/2014)
12/19/2014	32	LETTER addressed to Judge Vernon S. Broderick from Leo V. Leyva dated December 19, 2014 re: Response to the Court's Order dated November 24, 2014. Document filed by Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., Ritchie Special Credit Investments, Ltd..(Leyva, Leonel) (Entered: 12/19/2014)
12/19/2014	33	LETTER addressed to Judge Vernon S. Broderick from Gregg L. Weiner dated December 19, 2014 re: responding to the Court's Nov. 24, 2014 Order, setting forth the reasons why this action should not be transferred to the US District Court for the District of Minnesota. Document filed by Costco Wholesale Corporation. (Weiner, Gregg) (Entered: 12/19/2014)
01/16/2015	34	REPLY MEMORANDUM OF LAW in Support re: 24 MOTION to Dismiss <i>the First Amended Complaint</i> . . Document filed by Costco Wholesale Corporation. (Weiner, Gregg) (Entered: 01/16/2015)
01/16/2015	35	DECLARATION of Adam M. Harris in Support re: 24 MOTION to Dismiss <i>the First Amended Complaint</i> .. Document filed by Costco Wholesale Corporation. (Attachments: # 1 Exhibit A - Costco Warehouse Locations)(Weiner, Gregg) (Entered: 01/16/2015)
06/04/2015	36	ORDER: I thank the parties for their letters addressing whether this case should be transferred to the District of Minnesota. (Docs. 32, 33.) Based on my review of the parties' letters, and in light of both parties' opposition to transfer, I will not transfer this case to the District of Minnesota. This action will proceed in this Court. (Signed by Judge Vernon S. Broderick on 6/4/2015) (kko) (Entered: 06/04/2015)

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07/30/2015	37	LETTER addressed to Judge Vernon S. Broderick from Gregg L. Weiner dated July 30, 2015 re: to advise the Court of a recent ruling that is relevant to Costco's statute of limitations arguments advanced in its pending motion to dismiss. Document filed by Costco Wholesale Corporation.(Weiner, Gregg) (Entered: 07/30/2015)
08/07/2015	38	LETTER addressed to Judge Vernon S. Broderick from Leo V. Leyva, Esq. dated August 7, 2015 re: Response to Defendant's July 30, 2015 Letter (related document(s) 37). Document filed by Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., Ritchie Special Credit Investments, Ltd..(Leyva, Leonel) (Entered: 08/07/2015)
08/13/2015	39	LETTER addressed to Judge Vernon S. Broderick from Gregg L. Weiner dated August 13, 2015 re: Reply to Plaintiffs' August 7, 2015 Letter (related documents 37 and 38). Document filed by Costco Wholesale Corporation.(Weiner, Gregg) (Entered: 08/13/2015)
09/21/2015	40	MEMORANDUM & ORDER granting 24 Motion to Dismiss. For the foregoing reasons, Defendant's motion to dismiss, (Doc. 24), for lack of personal jurisdiction is GRANTED, and the Amended Complaint is DISMISSED. The Clerk's Office is respectfully directed to terminate all pending motions and close the case. (As further set forth in this Order) (Signed by Judge Vernon S. Broderick on 9/21/2015) (lmb) (Entered: 09/21/2015)
09/21/2015		Transmission to Judgments and Orders Clerk. Transmitted re: 40 Order on Motion to Dismiss, to the Judgments and Orders Clerk. (lmb) (Entered: 09/21/2015)
09/21/2015	41	CLERK'S JUDGMENT: That for the reasons stated in the Court's Memorandum and Order dated September 21, 2015, Defendant's motion to dismiss, for lack of personal jurisdiction is granted, and the Amended Complaint is dismissed; accordingly, the case is closed. (Signed by Clerk of Court Ruby Krajick on 9/21/2015) (Attachments: # 1 Notice of Right to Appeal, # 2 Notice of Right to Appeal)(dt) (Entered: 09/21/2015)
09/21/2015		Terminate Transcript Deadlines (dt) (Entered: 09/21/2015)
10/16/2015	42	NOTICE OF APPEAL from 41 Clerk's Judgment, 40 Order on Motion to Dismiss,. Document filed by Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., Ritchie Special Credit Investments, Ltd.. Filing fee \$ 505.00, receipt number 0208-11515574. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Leyva, Leonel) (Entered: 10/16/2015)
10/16/2015		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 42 Notice of Appeal,. (nd) (Entered: 10/16/2015)
10/16/2015		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 42 Notice of Appeal, filed by Ritchie Capital Management, L.L.C., Ritchie Special Credit Investments, Ltd., Ritchie Capital Management, Ltd. were transmitted to the U.S. Court of Appeals. (nd) (Entered: 10/16/2015)

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Billable Pages:	6	Cost:	0.60

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 RITCHIE CAPITAL MANAGEMENT,
4 LLC, et al.,

Plaintiffs,

New York, N.Y.

v.

14 Civ. 4819 (VSB)

5 COSTCO WHOLESALE CORPORATION,
6

7 Defendant.
8

-----x

9 October 10, 2014
10 11:35 a.m.

11 Before:

12 HON. VERNON S. BRODERICK,

13 District Judge

14
15 APPEARANCES

16
17 COLE SCHOTZ MEISEL FORMAN & LEONARD, PA
Attorneys for Plaintiffs

18 BY: JAMES T. KIM
JED WEISS

19
20 FRIED FRANK HARRIS SHRIVER & JACOBSON
Attorneys for Defendant

21 BY: GREGG L. WEINER
ADAM M. HARRIS
22
23
24
25

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1 (Case called; all parties present)

2 THE COURT: Good morning. We are here on a promotion
3 conference.

4 Let me review for the parties the documents that I
5 have in connection with today's conference. I have the July 21
6 letter from Mr. Weiner and the July 24 letter from Mr. Leyva.

7 MR. KIM: Yes. That's my partner, Mr. Leyva.

8 THE COURT: Is there any other correspondence I should
9 have in connection with this appearance?

10 MR. KIM: I don't believe so, your Honor.

11 THE COURT: The way I typically proceed is that I ask
12 certain questions that I have about the motion. At the
13 conclusion we can talk about scheduling, in other words, the
14 timing of the filing of the motion. Then if there are other
15 issues related to the motion they want to advise me of, you
16 should feel free to do so.

17 My intent is that hopefully my questions will
18 alleviate, obviously, some of the questions I have, but maybe
19 give you direction in terms of the motion and some of the
20 things I would like the parties to focus on.

21 Mr. Weiner, with regard to the *Daimler* and *Sonera*
22 cases, do those holdings apply to cases that are brought,
23 diversity cases? Do you know?

24 MR. WEINER: Sure, absolutely. It is a constitutional
25 case, *Daimler*, in terms of when a party can be subject to

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1 jurisdiction in a foreign forum, in this case a Washington
2 corporation with Washington principal place of business,
3 Costco, and they do apply. There is no distinction whether it
4 is a federal question or a diversity case.

5 THE COURT: In connection with the briefing, I would
6 like to see the cases where it is discussed in the diversity
7 context.

8 MR. WEINER: Sure.

9 THE COURT: I think there was an argument made under
10 CPLR 301 that there would be jurisdiction. I would like the
11 parties to address if in fact that would be sufficient.

12 Is it Mr. Kim or Mr. Weiss who is going to be
13 speaking, or both?

14 MR. KIM: I will take lead, your Honor.

15 THE COURT: Okay. Where is Ritchie Capital's
16 principal place of business? Where is their headquarters? Let
17 me start with that. That was the wrong question. Where are
18 their headquarters?

19 MR. KIM: Their main offices are in New York and
20 Chicago. There are a number of Ritchie funds. Some of them
21 operate predominantly out of New York. Some of them operate
22 predominantly out of Chicago.

23 THE COURT: The interaction Ritchie had with
24 Mr. Peters, first of all, were they directly with Mr. Peters?

25 MR. KIM: Yes. I think one of the critical issues --

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1 I think I know where your Honor is headed with this issue -- is
2 with respect to the principal place of business issue, our
3 position, your Honor, is that the underlying tort as to the
4 Ritchie companies occurred in New York. Ritchie met with
5 competitors in New York. The transactions were negotiated in
6 New York. It was through New York counsel. It was through
7 their New York office. The general counsel of Ritchie resides
8 in the New York office. So with respect to the CPLR 202 issue,
9 our position is that the principal place of business should not
10 matter as much because all of the --

11 THE COURT: The activity occurred in New York.

12 MR. KIM: Yes. Our principals met with competitors in
13 New York several times, as I pointed out, through New York
14 counsel, negotiated in New York, documents were prepared in New
15 York.

16 In any event, the New York office was substantially
17 involved in connection with this specific issue and the
18 underlying fraud that was committed with respect to the Ritchie
19 companies.

20 THE COURT: Obviously there maybe dispute as to that.
21 Quite frankly, I have not read through the complaint enough to
22 know if there are allegations in the complaint with regard to
23 that. For example, the location of the meetings, is that
24 alleged in the complaint?

25 MR. KIM: It is not, your Honor.

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1 THE COURT: The drafting of the documents, is it
2 alleged in the complaint where those were drafted?

3 MR. KIM: No, it is not, your Honor.

4 THE COURT: What I am getting at is there may be an
5 issue there just with regard to the allegations that are
6 currently in the complaint. Putting aside the other legal
7 issue, I think there may be issues related to that.

8 This is a separate question, not directly on point, on
9 the issue of the motion. Let me ask you this. This is on the
10 question which is related to when you say the documents were
11 prepared here. Were the documents prepared by Ritchie's
12 in-house staff or did they retain a law firm and was that law
13 firm a New York law firm?

14 MR. KIM: It was through their in-house attorneys as
15 well as their outside counsel who is based New York.

16 THE COURT: And the in-house counsel, are they based
17 here in New York or elsewhere?

18 MR. KIM: The general counsel of Ritchie lives in New
19 Jersey and works full-time in the New York office.

20 THE COURT: Was it his staff here in New York that was
21 involved in drafting and preparing the documents or part of his
22 staff in Chicago or some other location?

23 MR. KIM: There were some business people involved
24 from the Chicago office and I would say Chicago is more of
25 their, it's called their trading, traders were more staffed in

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1 the Chicago office, but their attorneys, their in-house
2 attorneys, their outside counsel, with respect to this
3 transaction, were based in New York at the time.

4 Your Honor, if I may, and I know your Honor said that
5 there maybe other issues or issues that we may bring up at the
6 end of the conference, but I thought it would be important for
7 me to disclose to the court that we actually have a draft of a
8 first amended complaint that addresses a number of issues. It
9 does not specifically address your Honor's questions about
10 location, negotiation, New York versus Chicago, and that's
11 certainly something that we can add to the proposed amended
12 complaint, which we intend to file, with the court's approval,
13 within a matter of days.

14 But putting aside that issue, it goes more into the
15 details of Costco's actual knowledge and all of the other
16 things that are addressed in Costco's letter. I know we
17 haven't gotten to it yet, but I wanted to disclose to the court
18 that we do have a draft amended complaint -- as you see, I have
19 a black-line version here -- which we are prepared to file.
20 And one of the issues that I think we should discuss is does it
21 make sense for plaintiffs to go ahead and file an amended
22 complaint, of course with your Honor's approval, prior to the
23 filing or the briefing of their motion to dismiss. We
24 understand that's going to occur, but maybe it is more
25 efficient for us to file it, let Costco then move or at least

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1 review the amended complaint before they file and brief their
2 motion to dismiss.

3 THE COURT: I wasn't aware of the amended complaint.
4 What I will tell the parties is typically when there is going
5 to be a motion to dismiss, I am going to have this conversation
6 with you. What I say is, once it is fully briefed, and under
7 the rules you have opportunity to amend, but I take that sort
8 of a step further. In other words, it is my view that once you
9 are put on notice of the defendant's claims as to the
10 deficiencies of the complaint, if you choose to go forward and
11 I rule, if certain claims are dismissed or the complaint is
12 dismissed and you seek leave to file an amended complaint, I
13 would say that in order to do that I would ask that the parties
14 would need to show good cause, by that I mean, something that
15 happened after you had gotten the briefs and briefed it. So
16 what I am saying is I don't think it makes sense for the
17 defendant to file a motion against an old complaint or a
18 complaint that's not the most current one.

19 But let me hear from Mr. Weiner on that.

20 MR. WEINER: Sure.

21 Your Honor, this is the first we are hearing about an
22 amended complaint; but, by all means, it makes no sense for to
23 us brief a motion in respect of a complaint that's going to be
24 superseded by an amended complaint. So I would say I think
25 they should file their amended complaint promptly, and we will

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1 make our motion. If we are successful, that should be the end
2 of it and no further amended complaints, this should be their
3 chance to amend. They are on notice of the nature of what our
4 motion to dismiss will be, but it is certainly inefficient for
5 to us file the motion, then have another complaint come in. So
6 I would, by all means, want to proceed in that fashion.

7 THE COURT: I think that makes sense. Again, this is
8 up to the parties and whether they want to do this, but I think
9 you do have a sense of the contours of what the motion is going
10 to look like from the papers.

11 So, Mr. Kim, how long do you think -- it seems like
12 you have a draft there -- will it take you to get that on file?

13 MR. KIM: I was planning on filing it with the court's
14 approval within a week of today, by next Friday.

15 THE COURT: So by next Friday.

16 Mr. Weiner, how much time do you want to take to look
17 at that? When do you want to put in your letter, and then they
18 would get a chance to put in their letter. If the issues
19 aren't going to change, do you just want to meet and confer and
20 figure out a briefing schedule?

21 MR. KIM: I would have no problem having a
22 meet-and-confer and, if there is a need for one, the parties or
23 joint parties to come back before your Honor for another
24 pre-motion conference. That's fine. But if counsel can just
25 simply agree that let's just go forward with the motion to

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1 dismiss, that may be something that we can decide on our own.

2 MR. WEINER: I wouldn't anticipate the motion would
3 change very much based on the amended complaint. I am
4 certainly content if your Honor thinks it is appropriate and
5 the right way to go to just go straight into the briefing at
6 that point, and we can certainly discuss a briefing schedule.

7 THE COURT: That would be great. Why don't you
8 propose a briefing schedule to me. Typically I wait until I
9 get all the briefs and determine whether or not I think oral
10 argument is something that's going to be necessary.

11 I just have a couple of factual questions, Mr. Kim.
12 There was a trial and Mr. Peters' conviction in 2009. Were
13 there any representatives from Ritchie that testified in that
14 case?

15 MR. KIM: I don't believe any representative Ritchie
16 actually testified in the criminal proceeding.

17 THE COURT: Do you know whether or not your client was
18 considered a victim from the government's perspective? By that
19 I mean did they receive notice that they were a victim? I
20 don't know if there was any money recovered in connection with
21 this, but I am just trying to figure out from a factual
22 standpoint, do you know whether they were considered a victim?
23 Usually you get written notification. Do you know one way or
24 the other?

25 MR. KIM: I think one thing the parties agree on is

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1 that there was a pretty well known F.B.I. raid that occurred
2 sometime toward the end of September 2008. Then the various
3 Peters companies, including PCI, PGW, and a host of other
4 companies, filed a Chapter 11 proceeding in United States
5 Bankruptcy Court for the District of Minnesota, I believe
6 toward the end of 2008, and that's where the Ritchie parties,
7 as creditors, received notice of the bankruptcy filing. I
8 don't believe we were formally put on notice as a potential
9 victim by the U.S. government or the F.B.I. in connection with
10 their raid in the end of September 2008.

11 THE COURT: Okay.

12 The amended complaint a week from today. Could you
13 get me a schedule, do you think, by the middle of the following
14 week?

15 MR. WEINER: Sure.

16 MR. KIM: Yes, your Honor. That would be the week of
17 the 20th?

18 MR. WEINER: Yes.

19 THE COURT: By the 22nd?

20 MR. KIM: Yes, your Honor.

21 THE COURT: That would be great. If reasonable, I
22 will sign off on it.

23 MR. KIM: Would your Honor prefer we submit it a
24 certain way, hand deliver or E file it?

25 THE COURT: Just E file it in a letter. That way it

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1 is easier, it is on the docket, and we can take care of it from
2 there.

3 Is there anything else that we need to deal with
4 today?

5 MR. WEINER: Not that I am aware of.

6 MR. KIM: No, your Honor.

7 THE COURT: Thank you for coming in.

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

RITCHIE CAPITAL MANAGEMENT, L.L.C.,
RITCHIE CAPITAL MANAGEMENT, LTD. and
RITCHIE SPECIAL CREDIT INVESTMENTS,
LTD.,

Case No. 14 Civ. 4819 (VSB)

Plaintiffs,

FIRST AMENDED COMPLAINT

v.

COSTCO WHOLESALE CORPORATION,

Defendant.

Plaintiffs, Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd. and Ritchie Special Credit Investments, Ltd. (collectively, “Plaintiffs” or “Ritchie”), by their attorneys, complain against defendant, Costco Wholesale Corporation (“Defendant” or “Costco”), as follows:

I. INTRODUCTION

1. Plaintiffs bring this action against Costco for damages arising from Costco’s civil conspiracy with convicted felon Thomas Petters (“Petters”) to support a decade-long criminal enterprise operated by Petters and his companies. Petters and his criminal associates, including Deanna Coleman, Bob White and others, through a host of business entities including Petters Company, Inc. (“PCI”), operated one of the largest fraud schemes in history, spanning more than a decade resulting in unpaid debts to PCI’s creditors of over \$3 billion. In December 2009, following a jury trial that lasted several weeks, Petters was convicted on twenty counts of fraud, money laundering and related offenses. In April 2010, Petters was sentenced to 50 years in prison and substantially all of his assets were forfeited to the United States pursuant to a forfeiture judgment in excess of \$3.5 billion.

2. Petters' fraud scheme was based on intentional misrepresentations that Petters was engaged in the lawful and profitable "diverting" business. With the purpose of inducing lenders to loan money to him or his companies, Petters represented that he was able to buy brand name consumer electronics at below wholesale prices and sell those goods at substantial profits to wholesale warehouse club retailers like Costco that were otherwise unable to purchase brand name merchandise directly from major manufactures like Sony. Petters typically promised prospective lenders high interest rates and in some cases profit-sharing in consideration for short-term purchase-money loans to enable PCI to buy merchandise that had supposedly been pre-sold to an affiliate of Costco named National Distributors f/k/a National Clothing ("National Distributors"), which would in turn sell and/or deliver the goods to Costco.

3. Between 1992 and early 1998, Costco entered into a substantial business relationship with Petters which was mutually beneficial and profitable to both parties. Costco relied on Petters to obtain access to Sony and other brand name consumer electronics goods from manufacturers and/or authorized distributors that were contractually prohibited from selling these goods to wholesale warehouse club retailers like Costco. Through Petters' special relationship with certain authorized distributors, like Best Buy and/or other diverting intermediaries, Petters was able to acquire thousands of units of consumer electronics goods that were in high demand, at below regular wholesale prices, to deliver to Costco. By providing Costco with Sony televisions and other brand name goods Petters assisted Costco in achieving the explosive growth in sales of its warehouse club memberships between 1992 and 2005 that enabled Costco to outperform its competitors and become the internationally recognized wholesale warehouse club retailer it is today.

4. By October 2000, however, Costco acquired actual knowledge of Petters' use of counterfeit National Distributors purchase orders to fraudulently induce lenders to loan money to PCI or other entities controlled by Petters. On October 24, 2000, General Electric Capital Corporation ("GECC") wrote a letter to Costco requesting verification that 14 purchase orders purportedly issued by National Distributors between June 1, 2000 and October 1, 2000, were valid purchase orders and that the amounts stated in corresponding invoices (which exceeded \$45 million) were then actually due and owing to PCI by National Distributors and/or Costco. Rather than responding truthfully to GECC's request and informing GECC that the purchase orders were issued as part of an elaborate scheme to defraud the holders of copyrights and trademarks on diverted goods, or reporting PCI to the appropriate law enforcement authorities, Costco decided not to disclose the truth about this scheme to GECC and instead joined Petters' conspiracy to defraud other Petters' lenders into providing the money Petters needed in order to pay off GECC and perpetuate the fraudulent purchase order scheme.

5. To further advance the parties' agreement and to assist Petters in refinancing approximately \$50 million owed to GECC, Costco agreed, at the request of Petters, to issue "guaranty letters" to certain of Petters' lenders. Beginning in early 2001, Costco issued guaranty letters to prospective lenders to Petters' companies that stated that Costco would guaranty payment of National Distributor's obligations to Petters' companies under outstanding invoices. Those guaranty letters included, without limitation, a guaranty letter dated July 2001 delivered to investment funds managed by Epsilon Investment Management LLC and Westford Investment Management LLC ("Epsilon-Westford"), that induced lenders associated with those funds to lend hundreds of millions of dollars to Petters and his companies purportedly to finance the purchase of inventory that was to be sold to Costco. But for Costco's guaranty letters that were

provided to Petters' lenders, Petters and PCI would not have been able to obtain billions of dollars of purchase-order financing loans from investment funds between January 2001 and September 2008.

6. On or about March 21, 2008, Plaintiffs were fraudulently induced to lend \$31 million to Petters and PCI in reliance on Petters' and PCI's false representations that the loan proceeds would be used by PCI to purchase Sony Playstation video game consoles that had been pre-sold to Costco for approximately \$79 million, that would be paid by Costco within 115 days of March 21, 2008.

7. At Petters' criminal trial in November 2009, the entire March 2008 Playstation purchase-order financing transaction was exposed as a complete fabrication. There were no Sony Playstations that were being purchased by PCI and resold to Costco. The testimony and documents received into evidence at Petters trial demonstrated that from as early as October 24, 2000 until at least March 2007, Costco knowingly and substantially assisted Petters in creating and perpetuating PCI's fraudulent purchase-order financing scheme, as well as providing PCI with the appearance of being a legitimate consumer electronics business through systematic misrepresentations that Petters had a long-standing and profitable business relationship with Costco in order to enable Petters to provide purchase order financing for Costco's other diverting brokers and agents and to repeatedly refinance his fraudulent purchase order financing debts.

8. As a foreseeable and direct consequence of Costco's corrupt agreement with Petters and its knowing and substantial acts in furtherance of Petters' and PCI's fraudulent purchase-order financing scheme, Plaintiffs were defrauded by Petters and PCI and have suffered damages in excess of \$31 million.

II. JURISDICTION AND VENUE

9. Venue is proper in this county because at all relevant times Costco conducted substantial business operations in New York County and because one or more of the events that gave rise to the claims set forth herein occurred in New York County.

10. Plaintiffs also maintained an office in New York City during the time the relevant acts and events giving rise to Plaintiffs' causes of action occurred. In addition, Thane Ritchie, then chief executive officer of Ritchie Capital Management, L.L.C., met with Petters several times in New York City to discuss and negotiate Plaintiffs' potential investment with PCI in connection with the financing of the purchase of numerous Sony Playstations for resale to Costco. Other Ritchie employees also met with Petters in New York City to discuss and negotiate the terms of the Playstations transaction.

11. In addition, Plaintiffs' outside legal counsel at the time, Kenneth A. Rosenblum of the law firm Sonnenschien Nath & Rosenthal LLP, negotiated the terms of the agreements with Petters and PCI in the Spring of 2008, from his office located at 1221 Avenue of the Americas, New York, New York.

III. PARTIES

12. Plaintiff Ritchie Capital Management, L.L.C. ("RCM") is a Delaware limited liability company with an office in New York, New York.

13. Plaintiff Ritchie Capital Management, Ltd. ("RCM Ltd.") is a Cayman Islands exempt company with an office in the Cayman Islands.

14. Ritchie Special Credit Investments, Ltd. ("RSCI") is a Cayman Islands exempted company that invests in securities of for-profit corporations operating in the United States and abroad. RSCI and RCM Ltd. are collectively, the "Ritchie Lenders."

15. Defendant Costco is, upon information and belief, a Washington corporation with its headquarters located at 999 Lake Drive, Issaquah, Washington 98027.

IV. FACTUAL ALLEGATIONS

A. *Costco Learns of Petters' Misconduct as Early as 2000.*

16. During all relevant times, Petters and his companies were based in Minnesota and conducted their operations in Minnesota. In or around March 1998, Petters and Petters Capital, Inc. ("Petters Capital") obtained a \$50 million credit facility from General Electric Capital Corporation ("GECC"). That GECC credit facility was used, on a deal by deal basis, to finance the purported purchase of consumer electronics. In connection with dozens of transactions financed by GECC between March 1999 and July 2000, Petters and Petters Capital falsely represented to GECC that those goods had actually been purchased by a Petters company and had then been re-sold to National Distributors under a purchase order issued by National Distributors to Petters Capital. With the intent to induce GECC to provide purchase order financing, Petters Capital intentionally misrepresented to GECC that it had a property interest in the goods described in the National Distributors purchase order and agreed to grant a security interest to GECC in Petters Capital's interest in the National Distributors purchase orders, the underlying goods and the proceeds from the sale of those goods to National Distributors and Costco.

17. Upon information and belief, with respect to each deal, Petters Capital furnished GECC with a copy of a purchase order issued by National Distributors and granted GECC a security interest in the National Distributors purchase order and proceeds, to secure its obligation to repay the amount of the loan from GECC. Upon information and belief, Costco agreed to

guaranty payment of National Distributors' obligations under the purchase orders that were subject to a security interest in favor of GECC.

18. In a series of separate purchase-order financing transactions that occurred between June and August 2000, Petters Capital induced GECC to make a series of loans totaling approximately \$50 million in consideration for Petters Capital's promise to make certain payments and grant GECC a security interest in each of the related National Distributors purchase orders, the inventory described in the purchase orders and the proceeds from the sale of the goods to National Distributors to secure the loans made by GECC. In connection with each of these separate loan transactions, Petters and his criminal associates provided GECC with orders issued by National Distributors and a corresponding invoice from Petters Capital to National Distributors representing that Petters Capital had a right to receive payment of approximately \$50 million from National Distributors and/or Costco on account of those purchase orders.

19. As the criminal prosecutions of Petters, Coleman, White and others revealed, the National Distributors purchase orders that Petters and PCI had provided to GECC between June and October 2000, did not reflect actual sales of goods by PCI or Petters Capital to National Distributors. Rather, those purchase orders were counterfeits that had been created by Petters and his co-conspirators for the purpose of fraudulently inducing lenders, including GECC, to make loans to Petters' companies in reliance on Petters' false representations that the National Distributors purchase orders were genuine and that Petters Capital had an enforceable right to payment from National Distributors on account of the sale of the goods described in the purchase orders, issued by National Distributors (which obligation was guaranteed by Costco), which would provide the source of funds required to repay the lenders.

20. On October 23, 2000, GECC sent a letter to Costco requesting: (i) verification of 14 separate purchase orders purportedly issued by National Distributors between June 1, 2000 and August 9, 2000, totaling over \$50 million; and (ii) verification that the stated accounts were currently “open” on Costco’s accounts payable system. (A copy of the October 23, 2000, letter from GECC to Costco is attached as Exhibit A).

21. On or about October 23, 2000, after Costco employee Eric Hulseley discovered that the only legitimate information regarding the 14 purchase orders identified by GECC were the purchase order numbers (which were specific numbers that had been used by National Distributors on purchase orders that were actually issued to other vendors), Costco contacted Petters and obtained actual knowledge from him that someone associated with Petters Capital had somehow obtained and used valid National Distributors purchase order numbers to intentionally misrepresent to GECC that: (i) National Distributors had issued to Petters Capital the purchase orders identified in the letter from GECC; and (ii) as of October 23, 2000, National Distributors and/or Costco owed Petters Capital approximately \$50 million dollars on account of those purchase orders.

22. Instead of responding truthfully to GECC’s request for verification of those purchase orders and informing GECC that it had been defrauded by Petters Capital, Costco employees instead immediately contacted Petters and entered into an agreement with Petters under which Costco agreed to assist Petters in covering up the truth concerning the National Distributors diverting scheme and these purchase orders, as well as to assist Petters with refinancing the substantial debts owed to GECC in order to avoid public disclosure about National Distributors diverting scheme and Costco’s active participation in Petters Capital’s fraudulent inducement of hundreds of millions of dollars of purchase-money loans from GECC .

23. As part of the consideration for entering into this agreement for an unlawful purpose with Petters, Costco required that it be relieved of its potential liability to GECC as the guarantor of National Distributors' obligations under the purchase orders identified in the October 24, 2000 letter GECC sent to Costco. Petters accepted this condition, and further acknowledged that he and his companies would not reveal Costco's role in assisting Petters with obtaining the loans from GECC or in refinancing the approximately \$46 million that Petters owed to GECC.

24. At Costco's request, Petters send a letter dated October 24, 2000, addressed to Scott Haggbloom of Costco/National, stating as follows:

The Purchase Orders listed below, I realize were never issued to Petters Company from you or from Costco/National. I deeply apologize Scott that this happened.

(A copy of the letter dated October 24, 2000, from Petters to Costco is attached as Exhibit B).

25. When asked at the Petters trial why he requested this letter from Petters, Costco's employee Erik Hulsey testified that he wanted confirmation that Costco would not be exposed to potential liability to GECC.

26. In furtherance of the corrupt agreement between Petters and Costco and to assist Petters in his efforts to obtain additional loans from GECC for a Petters Capital affiliate known as RedTag.Biz, sometime between November 2, 2000 and December 20, 2000, agents of Costco and/or National Distributors provided Petters with the check numbers and dates of 11 checks that had been drawn on an account in the name of National Clothing Company, Inc. ("National Clothing") in the total amount of approximately \$48 million. On information and belief, National Clothing is a subsidiary of Costco that does business under the assumed name "National

Distributors”. Each of the check numbers corresponded to checks that had actually been drawn on National Clothing’s account that had cleared before December 20, 2000.

27. As of December 20, 2000, no one from Costco had informed GECC that the purchase orders identified in its October 23, 2000 letter to Costco were phony.

28. With the intent to deceiving GECC as to the legitimacy of the purchase orders and invoices that were identified in GECC’s October 23, 2000 letter to Costco and to fraudulently induce GECC to make additional loans to one of Petters companies, Petters represented to GECC that PCI had received the 11 checks from National Clothing (described in paragraph 23 above) in satisfaction of the account receivables from National Distributors that were the subject of GECC’s October 23, 2000 request to Costco for verification of those accounts receivable. On December 20, 2000, Petters sent copies of those 11 National Clothing checks from Minnesota to GECC in Illinois by facsimile transmission across state lines.

29. On October 29, 2009, Costco employee Erik Hulseley testified at the Petters trial and was asked about payments that National Distributors had made to PCI in 2000. Eric Hulseley testified that there was only one check issued to PCI in the entire year of 2000, and that was a check in the amount of \$81,418.70 that had been issued on January 27, 2000.

30. Upon information and belief, all 11 of the National Clothing checks that Petters transmitted to GECC on December 20, 2000, had actually been issued to payees other than PCI and that the actual checks that had cleared the bank were issued in amounts much smaller than the amounts set forth in the altered National Clothing checks that Petters transmitted to GECC on December 20, 2000.

31. Petters could not have obtained copies of 11 National Clothing checks with authentic, sequential check numbers and corresponding dates of checks that had actually cleared

the bank identified on the checks in November and December 2000, that were required to fabricate the 11 counterfeit National Clothing checks Petters transmitted to GECC on December 20, 2000, without the knowing and substantial assistance of Costco and/or National Distributors employees who had access to those authentic checks and check numbers.

32. Between March 2001 and March 2008, Petters, with the knowing and substantial assistance of Costco in accordance with the agreement he made with Costco in October 2000, repeatedly refinanced the \$50 million debt that was originally owed to GECC, using National Distributors purchase orders and Costco guaranty letters to fraudulently induce new lenders to provide loans to continually refinance this ever increasing debt.

33. Between March 2001 and March 2007, Petters and PCI began providing purchase order financing to Costco's other diverting agents and brokers to enable them to obtain the brand name consumer goods that Costco desired to offer for sale to members of its wholesale warehouse club.

34. Between March 2001 and March 2007, Costco knowingly assisted Petters, by issuing Costco guaranty letters and otherwise, in the fraudulent inducement of purchase order financing loans to Petters' companies from entities owned or controlled by investment fund managers in order to enable PCI to obtain the money it needed to provide purchase order financing to Costco's other diverting agents and brokers.

35. The National Distributors purchase orders issued by Costco were used by PCI, with Costco's knowledge and assistance, to defraud lenders and were explicitly identified in numerous UCC-1 financing statements that were publicly filed with the Secretary of State of the State of Minnesota between 2001 and 2008.

36. The descriptions of National Distributors purchase orders as the collateral in numerous UCC-1 financing statements that were filed with the Secretary of State of Minnesota were used as part on an intentional scheme to defraud purchase order lenders and to corroborate Petters' false representations that PCI was actually engaged in the diverting business of buying hundreds of millions of dollars of brand name goods and re-selling those goods to National Distributors as set forth in the purchase orders described in UCC-1 financing statements, which included actual, valid National Distributors purchase order numbers. At the same time, those National Distributors purchase orders and UCC-1 financing statements were used by Petters and Costco to conceal the fact that after 2005, PCI was only providing purchase order financing for other Costco diverting agents and brokers and not actually buying any goods or selling any goods to National Distributors or Costco.

37. Upon information and belief, Costco and National Distributors assisted Petters and his co-conspirators in obtaining actual National Distributors purchase order numbers and other information about the goods that were purportedly being sold to PCI under the National Distributors purchase orders, which Petters used to fabricate his own versions of the National Distributors purchase orders that were used to fraudulently induce PCI's lenders to make purchase order financing loans to PCI and its affiliates.

B. *Costco Requires Petters' Support In Financing Third-Party Diverters.*

38. In addition to Costco's lucrative "direct" purchase of Sony televisions and other brand name consumer goods from Petters' companies, by at least 2002, Costco had come to rely on Petters and PCI to provide purchase order financing for other diverting agents and brokers that Costco used to acquire brand name goods in illegitimate transactions that violated the manufacturer's trademark and other rights.

39. While the other diverting agents and brokers were willing to procure the brand name goods that Costco desired, they typically did not have the capital or the access to conventional financing that was necessary to purchase to goods in the quantities desired by Costco. As a result, these diverting agents and brokers required Costco's assistance in obtaining the non-conventional purchase order financing that was needed to enable then to purchase the large quantities of those of the brand name consumer goods that were desired by Costco.

40. Based on Costco's long-standing relationship with Petters, Costco requested Petters to finance its other diverting agents and brokers to enable those agents and brokers to purchase the name brand consumer good that Costco was seeking to obtain for its wholesale warehouse club stores, without revealing that Costco was their undisclosed principal for these purchase.

41. BLS Sales Inc. ("BLS") was one of Costco's diverting brokers that sought and received purchase order financing from Petters, with Costco's knowing and substantial assistance, to enable BLS to purchase name brand consumer goods that Costco desired to sell in its wholesale warehouse club outlets including, without limitation, high-end handbags such as Burberry, Christian Dior, Prada, Fendi and Coach.

42. By requesting Petters to financing other diverting agents and brokers like BLS, Costco knew that Petters and PCI would have to borrow the funds PCI would be loaning to BLS from purchase order financing lenders to PCI or its affiliates.

43. Costco also knew that in order to obtain the purchase order financing it needed to obtain the funds to be re-loaned to BLS, PCI would intentionally misrepresent to its lender that a purchase order had been issued by National Distributors to PCI and that PCI was actually buying

the goods and re-selling the goods to Costco, instead of providing purchase order financing for BLS.

44. Costco also knew that in order to induce PCI's lenders to provide purchase order financing to PCI, PCI would promise to grant a security interest in the goods and the right to payment from National Distributors.

45. Costco also knew that PCI's purchase order lenders and their successors and assigns were relying on the misleading assurances set forth in the Costco guaranty letters, in agreeing to provide purchase order financing to PCI and its affiliates.

46. Costco knew that it would be very difficult for Petters to convince his lenders to advance loan proceeds to PCI to enable PCI to provide purchase order financing for Costco's other diverting agents or brokers, especially considering the inherent difficulty of determining which party or parties had rights in the goods sufficient to enable a security interest in favor of the lenders to attached to the goods and the related difficulty of determining the identity of the party that was actually selling the goods to National Distributors and/or Costco such that it had an enforceable right to payment from Costco pursuant to one or more of the purchase orders issued by National Distributors and/or Costco.

47. Costco realized that Petters' lenders could not or would not make loans to PCI for either "direct" sales to Costco or for the purpose of providing purchase order financing to Costco's other diverting agents or brokers without the comfort of receiving purchase orders issued by National Distributors and/or Costco in favor of a Petters-owned company like PCI or one of its affiliates.

48. As a result, in connection with Petters' corrupt agreement to finance other diverting agents or brokers Costco agreed to provide Petters with phony purchase orders issued

by National Distributors and/or Costco in favor of Petters, which Costco knew Petters intended to use and did use to fraudulently induce lenders into making purchase order financing loans to Petters' companies under the false belief that PCI or one of its affiliates was the actual purchaser and re-seller of those goods and was a party to a valid purchase order that had been issued by National distributors.

49. For example, in July 2002 BLS reached out to Petters to discuss BLS and Costco's request for purchase order financing from a Petters' company in order to finance BLS's purchase of Italian handbags for Costco. On July 5, 2002, Barry Smith, President of BLS, wrote an email to Petters to discuss BLS's request for financing. Barry Smith's email stated, in pertinent part, as follows:

We just received an excellent order from Costco for their Fall '02 Italian handbag program. I have been their exclusive vendor on this category for the last 3 years and their Fall order just doubled from last year. I was able to convince them to take their handbag category and put it in plastic "clamshell" packaging for pallet display. The order went from "big" to "thru the roof."

The size of the P.O. being written by National Distributors is [\$]3.4 million for which I must buy \$2.9 million in product from our long time San Francisco based supplier, Teo Tech, Inc. Deliveries will start in late August and run thru the last delivery date allowed by Costco of approx. Nov. 10th. I would very much to avail myself of your financing offer and, since we need to transfer fund to the supplier within the next 10 days or so I would like to speak to you so that we might quickly get our ducks in a row. National will open the P.O. to yourselves for collateral as usual upon my instructions so I hope we can avoid any delays which would translate into further delays in deliveries from Italy. Italy closes all the month on August so that it always a further challenge in our business cycle.

I am also pursuing three other categories with National which seem to be bearing some rather weighty fruit in the immediate future – power tools, automobile tires and furniture. Each category will be in the 7-figure range and also needing the financing that you can provide so that we can grow as our ability to satisfy the tribe in Issaquah [Costco] grows, too.

50. In response to Barry Smith's email of July 5, 2002, Petters agreed to provide the financing to BLS and on July 8, 2002, requested Barry Smith to proceed with the transaction and to issue the second fraudulent purchase order to Redtag (a Petters-controlled company) or to PCI.

51. Petters' direct diverting business and financing of third-party diverting agents and brokers enabled Costco to secretly acquire the name brand consumer goods that Costco offered for sale at wholesale prices to members at its wholesale warehouse clubs outlets.

52. The supply of diverted name brand goods provided by Petters generated enormous cash flow from the sale of Costco warehouse club memberships that were fueled by the prospect that warehouse club members would be able to buy brand name goods at a fraction of the ordinary retail price.

53. The fraudulent purchase order and diverting scheme used by Petters and Costco also enabled Costco to use diverting intermediaries to expand its business from one of many start-up wholesale warehouse clubs in the early 1990s to one of the top ten retailers in the United States by 2008 and to generate hundreds of millions of dollars in ill-gotten profits.

54. In return for Petters' assistance in supplying the name brand goods that fueled the growth and expansion of Costco's warehouse club membership base, and in furtherance of their corrupt agreement, Costco allowed Petters to use the Costco name and his long-standing relationship with Costco to create a false appearance of legitimacy and as wrongful means of fraudulently inducing lenders, including Ritchie, to lend billions of dollars to Petters and his entities.

55. Costco continued to provide Petters with guaranty letters through 2006 and 2007, long after Petters ceased making direct sales to Costco. A 2006 Guaranty letter, which was

signed by Costco's Senior Vice-President and Corporate Controller (David S. Petterson) states, as follows:

The undersigned, Costco Wholesale Corporation, does hereby guarantee payment of bona fide outstanding invoices from Petters Company, Inc. ("Vendor") for good ordered by, shipped to and payable by National Distributors, Inc. ("National"), a subsidiary of Costco Wholesale, after the date hereof.

Vendor agrees that this Guaranty does not apply to obligations arising after April 12, 2007. Costco Wholesale shall have all defenses, counterclaims, rights of set off and notice rights available to National.

Notwithstanding anything to the contrary contained herein, Costco Wholesale may revoke this Guaranty upon written notice to Vendor for all invoices received more than seven (7) days after the date of such revocation.

This guarantee is for disclosure to your lenders only and no other parties, and no third parties than your lenders should rely on this guarantee of payment.

56. By email dated February 14, 2007, PCI's general counsel (David Baer) wrote to Costco's general counsel, John Sullivan, and stated as follows:

John: I hope the new year is treating you well. It is time again to renew the Costco guaranty letter to Petters Company. I have prepared a draft of this document, which is the same as last year, with the date adjusted. Can you arrange for this to be put on Costco letterhead, executed and returned to me at the contact below.

(A copy of the email dated February 14, 2007, is attached as Exhibit C).

57. In response, on February 22, 2007, John Sullivan wrote to David Baer and stated as follows:

Is there any business done currently or anticipated that would give rise for a need for this now.

58. On March 16, 2007, David Baer followed up with John Sullivan and stated in his email, as follows:

John,

Sorry to bother you, but I have not heard anything from you on this. Can you please let me know if there are any issues or when we can get this letter.

59. On March 19, 21007, John Sullivan responded to David Baer's March 16 email, as follows:

Dave, are you doing any business with National to which the guaranty would apply?

60. David Baer responded to John Sullivan's questions, as follows:

I believe we are, that is why they need the letter. Do you have conflicting information?

61. John Sullivan then confirmed to David Baer, as follows:

There is no business going on and there has not been for almost three years.

62. In response, David Baer stated, as follows:

John,

As you may be aware from years past, in addition to doing our own deals, we underwrite and finance other deals. That is what this letter relates to and that is why we have had it in place for the past years, despite the lack of lack of direct deals.

63. On March 19 2007, Petters, following up on David Baer's email to John Sullivan, stated, in pertinent part, as follows:

John,

Nothing has changed for us. As David said we do a lot of financing for various diverters selling to National. I am writing this letter to refresh your memory that we suffered some significant losses in the past financing deals and this merely acts as additional comfort to our own internal capital group. As you know when push came to shove several years ago, we took the loss and never went back to Costco on a claim that involved fraud with "Barry Smith." Although, we sustained losses in the end that you may recall Barry Stuck admitted was Nationals error during all the legal

proceedings when we finally determined the people we were dealing with were entirely dishonest. I am making this statement because over the years, I t[h]ink yo[u] know when asked what decision to make? A right one or wrong one, we have always follow the path that protected our customer. In t[h]is case because of my long relationship with National, and Bob Pugmire, we chose to make the decision to not ask Costco to participate in the loss. We took it.

64. On March 21, 2007, John Sullivan, in response to Petters' email of March 19, 2007, stated as follows:

Understood. Please send (or resent) me a copy of the current form.

65. On March 21, 2007, David Baer provided John Sullivan with the form guaranty letter. Costco's Senior Vice-President and Corporate Controller (David S. Petterson) executed the Guarantee of Payment of National Distributor Obligations Effective March 21, 2007 (the "2007 Guaranty") and delivered it to Petters. The 2007 Guaranty stated, as follows:

The undersigned, Costco Wholesale Corporation, does hereby guarantee payment of bona fide outstanding invoices from Petters Company, Inc. ("Vendor") for good ordered by, shipped to and payable by National Distributors, Inc. ("National"), a subsidiary of Costco Wholesale, after the date hereof.

Vendor agrees that this Guaranty does not apply to obligations arising after March 31, 2008. Costco Wholesale shall have all defenses, counterclaims, rights of set off and notice rights available to National.

Notwithstanding anything to the contrary contained herein, Costco Wholesale may revoke this Guaranty upon written notice to Vendor for all invoices received more than seven (7) days after the date of such revocation.

This guarantee is for disclosure to your lenders only and no other parties, and no third parties [other] than your lenders should rely on this guarantee of payment.

66. After being informed that Costco employee, Erik Hulsey, had requested a list of the open purchase order that would be the subject of the Costco guaranty letter, Petters sent Erik

Hulsey an email on March 22, 2007 (which was copied to Costco's corporate counsel, John Sullivan), in which Petters reminded Mr. Hulsey and Mr. Sullivan of the agreement that had been made in October 2000, under which Costco had been relieved of any potential liability to GECC. (A copy of Erik Hulsey's email dated March 22, 2007, in response to Petters' email dated February 14, 2007, is attached as Exhibit C). Petters' email dated March 22, 2007, stated in pertinent part, as follows:

The issue is we finance many people from time to time in the business of diverting. If you are unaware of the issues of fraud in the past I would be happy to enlighten you directly. We suffered serious financial losses due to us taking the path that we would allow Costco to be relieved from damages they were actually liable for. You can discuss the details with John Sullivan if you are unaware.

To make a long story short, if you are not going to issue a mere guaranty letter to us, which allows us to have assurance that when we hold paper that is financing goods for National, simply tell us.

Beyond that, please give David Baer an answer today and we will act according to your decision. It is most troubling for us at this stage in a long relationship, that this letter is an issue.

(See Exhibit C).

67. Despite Costco's acknowledgment that Costco had not been conducting business with Petters for several years, Costco's general counsel (John Sullivan) provided Petters with the requested guaranty letter for the benefit of Petters' lenders. In fact, the 2006 Guaranty and 2007 Guaranty expressly provide that the guaranty letters are "for disclosure to [Petters'] lenders," and that "no third parties other than [Petters'] lenders should rely on this guarantee of payment."

68. Costco provided the 2007 Guaranty to Petters as a result of the lucrative and long-standing business relationship between Costco and Petters, and well as their shared knowledge of the GECC and other frauds perpetrated during their relationship. John Sullivan and Costco

recognized the tremendous benefits and value that Petters had provided to Costco for over a decade through their diverting business arrangement and Petters' financing of various diverting agents and brokers selling to Costco.

69. Between March 22, 2007 and March 21, 2008, Costco continued to perform as originally agreed under its corrupt October 2000 agreement with Petters and allowed Petters to hold his companies out as having a long-standing and substantial business relationship with Costco that involved Petters' companies routinely selling millions of dollars of consumer electronic goods to Costco, even though this was very far from the truth. Costco provided the 2007 Guaranty in favor of Petters pursuant to their corrupt agreements.

70. Based on the significant number of frauds that Costco and Petters orchestrated together in connection with their diverting business during the early and mid-2000s, and Costco's knowledge of Petters' propensity to use phony purchase orders and Costco's guaranty letters to defraud his lenders, Costco had actual knowledge that Petters used the 2006 Guaranty and 2007 Guaranty to provide "comfort" to his lenders that were fraudulently induced by Petters to loan substantial monies to Petters and his companies.

71. Costco had actual knowledge of Petters' use of the 2006 Guaranty and 2007 Guaranty to support Petters' false representations to his lenders that he and his companies were conducting substantial business with Costco, during years when Costco acknowledged there was no business activity between Costco and Petters.

C. Relying on False Representations Regarding Costco Related Purchase Orders, Ritchie Lenders Loan Petters \$31 million in March 2008.

72. On March 21, 2008, with the intent to induce Plaintiffs to make a \$31 million purchase order financing loan to Petters and PCI, Petters represented that PCI was engaged in the

lawful business of supplying Sony merchandise to Costco and that PCI had an opportunity to buy a large quantity of Sony Playstation video game consoles from one of its suppliers for \$52 million and re-sell them to Costco for approximately \$79 million. Unbeknownst to Plaintiffs, all of Petters' representations were false when they were made to Plaintiffs.

73. In reliance on Petters' representations regarding his long-standing and profitable relationship with Costco and his representation that the sale of the Sony Playstations to Costco would generate a gross profit of approximately \$27 million in 115 days, Plaintiffs agreed to loan \$31 million to Petters and PCI to enable PCI to pay the balance of the purchase price payable to the vendor that was purportedly selling the goods to PCI that would be resold to Costco.

74. During the period from 2000 through early 2008, Costco's issuance of the guaranty letters and other knowing and substantial assistance to PCI's fraudulent purchase-order loan scheme were a major reason that PCI's diverting business appeared to have achieved significant scale and success, and it was this scale and success, along with Petters' representations regarding the sale of Sony Playstations to Costco, that the Ritchie Lenders relied upon in determining to advance the \$31 million loan to PCI and Petters. Without the knowingly fraudulent conduct of Costco, PCI's diverting business could not have succeeded for almost a decade, during which time hundreds of millions of dollars of fraudulent transactions were conducted and hundreds of millions (including at least \$31 million of the Ritchie Lenders' money) were lost by lenders who relied upon PCI's purported (and fictitious) business relationship with Costco.

75. In or around March 21, 2008, the Ritchie Lenders were fraudulently induced to lend \$31 million to Petters and PCI in order to enable PCI to purchase 232,500 Sony Playstations that were (or so Ritchie was told) to be purchased by PCI, then sold to uBid (a Chicago-based

company in which Petters held a substantial ownership interest and which served as an on-line auctioneer of electronic merchandise) and then finally sold by uBid to Costco.

76. Petters and his associates provided Ritchie with a fraudulent purchase order and a related invoice for PCI's \$52 million purchase of the Sony Playstations from Nationwide International Resources ("Nationwide"), the shell company controlled by Larry Reynolds that was used for over a decade as part of Petters' fraud. uBid provided another purchase order corroborating Petters' false representation that uBid would then buy the Sony Playstations from PCI for over \$79 million in conjunction with the ultimate sale to Costco, purportedly generating a \$27 million profit.

77. As it turns out, there were no Sony Playstations and both the PCI and uBid purchase orders were fakes. Those documents had been prepared solely to induce the Ritchie Lenders to loan \$31 million to PCI and Petters and to convince the Ritchie Lenders (who with their affiliates had loaned over \$146 million to Petters and another of his entities) that Petters' businesses including PCI's diverting business were thriving and profitable. Under the terms of the executed transaction documents, PCI and Petters agreed that: (i) PCI would contribute \$21 million of the purchase price for the initial purchase of the Sony Playstations from Nationwide; (ii) all purchasers of the Playstations, including Costco, would be instructed to make their payments for the Playstations into a new, separate bank account (the "Playstations Account") at a mutually satisfactory bank ("Bank"); and (iii) PCI, the Ritchie Lenders and the Bank would enter into a customary deposit account control agreement pursuant to which the Playstations Account, and the funds contained therein, would be subject to a perfected security interest in favor of the Ritchie Lenders.

78. Between October 2002 and March 2008, affiliates of Ritchie invested an aggregate of approximately \$75 million in Colossus Capital Fund, Ltd. and Lancelot Investors Fund, Ltd. (collectively, "Lancelot") which entities made hundreds of millions of dollars of purchase-order financing loans to companies owned or controlled by Petters including, but not limited to, Thousand Lakes, LLC ("Thousand Lakes").

79. During the years 2003 through March 2008, Petters continuously represented to the managers of Lancelot, and indirectly to Lancelot's investors including Ritchie and its affiliates, that Petters and his companies were engaged in considerable business with Costco and that Petters obtained millions of dollars of purchase order financing (secured by Costco purchase orders and accounts receivable) from Lancelot. Upon information and belief, on the same day that Costco executed and delivered the 2007 Guaranty to Petters, PCI's general counsel David Baer forwarded the 2007 Guaranty to Greg Bell, who used it to induce a credit insurance company with the intent to induce the credit insurance company to issue a policy to Thousand Lakes, LLC insuring Costco's credit in an amount of \$500 million and naming Lancelot as the loss payee. On further information and belief, from and after March 21, 2007, with the intent to induce Lancelot investors to refrain from making redemption requests, Greg Bell regularly and routinely represented to Lancelot investors that their investments were safe and sound and that the only risk was the credit risk that Costco would satisfy its obligations under the 2007 Guaranty and that that risk had been effectively mitigated by the credit insurance on Costco.

80. By October 2007, approximately 95% of the Petters purchase order financing loans made by Lancelot were secured by National Distributors purchase orders and from time to time before October 2007, Lancelot was loaning Petters-controlled companies between \$30 and \$40 million per week which Petters had represented would enable Thousand Lakes to purchase

consumer electronics for resale to National Distributors under purchase orders that were guaranteed by Costco. As an investor in Lancelot, Ritchie received and relied on copies of National Distributors purchase orders.

81. In loaning \$31 million to PCI and Petters on or about March 21, 2008, in connection with the Playstations purchase order financing transaction, the Ritchie Lenders reasonably relied on Petters' representations to Lancelot and Ritchie regarding his long-standing and profitable diverting business relationship with Costco. Ritchie relied on the materials it received from Lancelot in connection with its decision to provide loans to Petters and PCI. But for Costco's substantial assistance in furtherance of Petters' fraudulent scheme which allowed Petters to expand his criminal enterprise and induce more lenders to provide substantial loans to Petters' companies through 2008, the Ritchie Lenders would not have advanced the loans to PCI and Petters in March 2008.

B. *Petters' Diverting Business is Exposed as a Fraudulent Ponzi Scheme.*

82. On or about September 24, 2008, agents from the FBI, the IRS and other federal agencies, along with local law enforcement agencies, executed search warrants on the headquarters of PCI and on Petters' personal residence.

83. To obtain the search warrants, the FBI filed an affidavit ("FBI Affidavit") detailing the information that their then on-going investigation of Petters and the Conspirators had revealed. The FBI Affidavit revealed the following information:

- a. "PCI is the venture capital arm of numerous PETERS enterprises. The money raised by PETERS through PCI is used by PETERS for his other business ventures and to support his extravagant lifestyle." (FBI Affidavit, ¶ 7(a).)

- b. “PETTERS solicited investors to invest substantial sums in PCI. To induce investors to invest, the investors were advised funds would be secured by transactions (which were fictitious). Investors were then provided with false documents relating to purchase and resale of merchandise. The fraudulent documents purport to evidence PCI purchasing merchandise from vendors... Additional purchase orders falsely detail PCI’s sale of the same merchandise to [retail] stores...” (*Id.*, ¶ 7(c).)
- c. The purchase orders and other documents in support of the transactions are entirely fabricated. PCI does not buy any merchandise from [the vendors]. Nor does PCI sell merchandise as described in the purchase orders [to retailers]. PETTERS uses these documents to induce investors to invest money.” (*Id.*, ¶ 7(d).)

84. The FBI Affidavit also sets forth information gathered from recordings of conversations among the participants in Petters’ fraudulent scheme. “In September 2008, the government obtained consensually monitored conversations involving PETTERS, DEANNA COLEMAN, ROBERT WHITE ... and other persons.” (FBI Aff’d., ¶ 12.) As set forth below, those conversations revealed, among other things, that Petters was fully aware of, and was conducting, the fraud, and indicated an intent to flee the country if the fraud were revealed:

- a. “In these recordings, PETTERS readily admits executing he fraud scheme by providing fraudulent information to investors. PETTERS repeatedly discusses the stressed financial condition of the company, as well as the need for more capital. PETTERS continues to ask [COLEMAN] to

prepare false documents, noting that he doesn't know what choice they have. PETERS talks about fleeing the country and creating fabricated defenses if the fraud is discovered." (*Id.*, ¶ 12(a).)

- b. "PETERS states that [one Conspirator] told PETERS that they are 'a little paper manufacturing plant.' On one occasion, PETERS states that he and [that participant] would be jointly implicated in a scheme to defraud investors out of \$130 million." (*Id.*, ¶ 12(b).)
- c. Another participant "describes the scheme as a 'Ponzi scheme,' and estimates that at least \$100 million of PCI's debt is fraudulent." (*Id.*, ¶ 12(c).)
- d. A participant "asks that COLEMAN prepare purchase orders to be submitted to investors so that the investors will extend the due dates on debt." (*Id.*, ¶ 12(d).)
- e. A participant "admits that PETERS told him about the fake purchase orders, and that [the participant] has known about this for many years. [The participant] estimates the amount of the fraud as in excess of \$2 billion." (*Id.*, ¶12(f).)

85. Petters could not have perpetrated his multi-billion dollar fraudulent purchase order financing scheme for over a decade without Costco's knowing and substantial assistance and agreement to provide purchase order numbers and guaranty letters when requested by Petters to support his representations to lenders that he and his companies were conducting substantial diverting business with Costco. Many sophisticated commercial lenders including GECC,

Epsilon-Westford, Lancelot and Ritchie relied on Petters' representations that he had a long-standing business relationship with Costco.

86. From at least 1998, through 2004, Petters had a long-standing business relationship with Robert Pugmire ("Pugmire"), Executive Vice President and General Merchandise Manager of Costco. Pugmire often attended the annual Consumer Electronics Show ("CES") in Las Vegas, Nevada and would spend substantial time with Petters at the CES where he would visit Petters' hospitality suite.

87. Pugmire knew that Petters was making representations to GECC and other lenders that he was doing millions of dollars worth of diverting business with Costco. By early March 1998, Costco relied on Petters to obtain access to certain brand name consumer electronics from manufacturers and/or suppliers that would not normally sell their products to discount warehouse retailers like Costco.

88. Despite having the opportunity to reveal Petters' fraudulent scheme to GECC and other lenders that were relying on Petters' representations, Costco agreed, in consideration for being relieved of contingent liability of almost \$50 million that may have been asserted by GECC against Costco as the guarantor of National Distributor's obligations under those purchase orders, not to respond truthfully to GECC's October 23, 2000 request for accounts receivable verification.

89. Despite gaining actual knowledge of Petters' fraud scheme in October 2000, while knowing that it was doing minimal business with Petters, Costco continued for at least seven (7) years after its discovery of the fraud to issue guaranty letters and allowed Petters to use the Costco name and Petters' long-standing relationship with Costco and National Distributors as

wrongful means of fraudulently inducing lenders, including Lancelot, to lend billions of dollars to Petters and his entities.

90. But for Costco's decision to enter into a corrupt agreement with Petters and Costco's agreement to provide guaranty letters to perpetuate his criminal enterprise, when Costco knew that Petters was exaggerating and/or fabricating the amount of business that PCI was doing with Costco, Petters would not have been able to exponentially expand his fraud and money-laundering scheme.

91. Costco's motive for engaging in this illicit behavior was transparent. First, Petters' scheme gave Costco access to goods it could not acquire legitimately, and without expensive trademark and other litigation, which in turn drove Costco's explosive growth and success. Second, Costco gained access to capital to finance the illegitimate transactions it structured and participated in that Costco could not have otherwise raised. To hide its involvement in the fraud, Costco utilized a "front" company (National Distributors), assembled a nefarious group of diverting agents and brokers (including Petters), issued false purchase orders and guarantees for the benefit of Petters' lenders, took kickbacks, failed to disclose the fraud when GECC told it about it in 2001, "washed" title to goods, and deliberately concealed its knowledge and involvement over the next seven (7) years.

92. As a proximate consequence of Costco's aiding and abetting and its substantial assistance in furtherance of Petters' fraudulent scheme, Plaintiffs have suffered substantial damages in excess of \$31 million.

COUNT I
(Aiding and Abetting Fraud)

93. Plaintiffs restate each and every allegation set forth in the preceding paragraphs, and hereby incorporate same by reference, as if all were set forth fully herein.

94. By October 2000, Costco was well aware of Petters' fraudulent purchase-order financing scheme. Specifically, Costco had actual knowledge that Petters was representing to lenders that he and his companies were conducting many millions of dollars of business with Costco, contrary to the reality that Costco had conducted a total of only approximately \$80,000 of business with Petters in 2000. Costco also knew that Petters needed to make these false representations to those lenders that agreed to provide Petters with the financing necessary to repay amounts owed under Petters Capital's \$50 million credit line with GECC.

95. In fact, when Costco told Petters on October 24, 2000, that GECC had contacted Costco to verify Costco's purchase orders to PCI, Petters admitted that the purchase orders were phony and requested Costco to stand down and to allow Petters to address the purchase order issues directly with GECC. In consideration for receiving a secret letter from Petters acknowledging that those purchase orders did not exist, Costco granted Petters' request not to respond to GECC's letter and allowed Petters to communicate directly with GECC in order to deceive GECC as to the facts regarding Petters Capital's purported right to receive payment from Costco under certain outstanding National Distributors purchase orders.

96. Rather than exposing the fraudulent purchase-order financing scheme, Costco provided substantial assistance in the advancement and achievement of the fraud. To assist Petters with obtaining loans to refinance Petters Capital's debts to GECC, Costco agreed to issue guaranty letters to certain lenders at the request of Petters and/or his companies. For example, in 2001, Costco issued a guaranty letter to Epsilon-Westford to induce it to loan money to Petters so that he could use those funds to repay the \$50 million credit line to GECC. Costco continued to issue guaranty letters to various lenders at least through 2007, to support Petters' nefarious conduct with respect to his lenders and to induce those lenders to provide financing to Petters.

97. During the period from 2000 through early 2008, Costco's issuance of the guaranty letters including, without limitation, the 2006 Guaranty and 2007 Guaranty, and other knowing and substantial assistance to PCI's fraudulent purchase-order loan scheme were a major reason that PCI's purported diverting business appeared to have achieved significant scale and success, and it was this scale and success, along with Petters' representations regarding the sale of Sony Playstations to Costco, that the Ritchie Lenders relied upon in determining to advance the \$31 million loan to PCI and Petters.

98. Costco had actual knowledge that at time Costco issued the 2006 Guaranty and 2007 Guaranty, Costco was not conducting any legitimate business with Petters and PCI. In fact, John Sullivan of Costco confirmed in an email dated March 19, 2007, to David Baer of PCI, that Costco had not conducted any business with Petters and PCI for almost three (3) years. Notwithstanding Costco's knowledge that it had no legitimate business with Petters and PCI in 2006 and 2007, Costco issued the guaranty letters requested by Petters to provide "comfort" to his lenders. The 2006 Guaranty and 2007 Guaranty specifically state that the purpose of the guaranty letters is for "disclosure" to Petters' lenders and that Petters' lenders could rely on the guaranty letters.

99. Costco had actual knowledge that Petters used the guaranty letters to perpetrate a fraud on his lenders. Indeed, Costco had knowledge that Petters was defrauding his lenders each time Costco issued phony purchase orders to Petters to raise capital to finance third-party diverting agents and brokers which were important to Costco's ability to acquire name brand consumer goods for its stores.

100. Based on the significant number of frauds that Costco and Petters orchestrated together in connection with their diverting business during the early and mid-2000s, and

Costco's knowledge of Petters' repeated use of phony purchase orders and Costco's guaranty letters to defraud his lenders, Costco had actual knowledge that Petters used the 2006 Guaranty and 2007 Guaranty to provide "comfort" to his lenders that were fraudulently induced by Petters to loan substantial monies to Petters and his companies. Costco had actual knowledge of Petters' use of the 2006 Guaranty and 2007 Guaranty to support Petters' false representations to his lenders that he and his companies were conducting substantial business with Costco, during years when Costco acknowledged there was no business activity between Costco and Petters.

101. Without the knowingly fraudulent conduct of Costco, PCI's diverting business could not have succeeded for almost a decade, during which time hundreds of millions of dollars of fraudulent transactions were conducted and hundreds of millions (including at least \$31 million of the Ritchie Lenders' money) were lost by unknowing and unsuspecting lenders who relied upon PCI's purported (and fictitious) business relationship with Costco.

102. As a proximate cause of Costco's aiding and abetting of Petters' fraudulent scheme, Plaintiffs suffered damages in excess of \$31 million.

COUNT II
(Civil Conspiracy)

103. Plaintiffs restate each and every allegation set forth in the preceding paragraphs, and hereby incorporate same by reference, as if all were set forth fully herein.

104. Petters and PCI knowingly communicated false and fraudulent information to Plaintiffs to induce them to fund loans to Petters and PCI. These fraudulent representations, including that Petters' diverting business was a lawful and profitable enterprise which conducted substantial diverting business with Costco, were made to Plaintiffs in March 2008 in connection with the \$31 million loan transaction.

105. To persuade the Ritchie Lenders to provide \$31 million in financing to Petters and PCI, Petters further represented to Plaintiffs that PCI would use the loan proceeds, together with \$21 million of its own money, to purchase 232,500 Sony Playstations that would (or so Plaintiffs were told) then be sold to uBid, and then finally sold by uBid to Costco as part of a diverting business transaction.

106. By early 2000, Costco and Petters had a diverting business relationship which was mutually beneficial and profitable to both parties. Pursuant to the parties' agreement, Petters agreed to acquire and deliver to Costco certain consumer electronics requested by Costco which it could not obtain from manufacturers and suppliers.

107. Upon information and belief, Costco often provided a "shopping list" to Petters of those products (and the number of units) that Costco could not directly obtain from manufacturers and/or suppliers. Costco agreed to pay Petters a negotiated price for those products that Petters acquired from manufacturers and/or suppliers to deliver to Costco. In the ordinary course of its diverting business activity, Costco used a wholly owned affiliate known as National Distributors, to issue the purchase orders to Petters.

108. By October 2000, Costco was well aware that Petters was representing to lenders that he and his companies were conducting substantial business in excess of \$47 million with Costco during the year 2000, contrary to the reality that Costco had conducted a total of approximately \$80,000 of business with Petters in 2000. Costco knew that Petters needed to make these representations to those lenders that agreed to provide the financing to enable Petters to repay amounts owed under Petters Capital's \$50 million credit line with GECC.

109. In fact, when Costco told Petters on October 24, 2000 that GECC had contacted Costco to verify Costco's purchase orders to PCI, Petters admitted that the purchase orders were

phony and requested Costco to stand down and to allow Petters to address the purchase order issues directly with GECC. In consideration for receiving a secret letter from Petters acknowledging that those purchase orders did not exist, Costco granted Petters' request not to respond to GECC's letter and allowed Petters to communicate directly with GECC in order to deceive GECC as to the facts regarding Petters Capital's purported right to receive payment from Costco under certain outstanding National Distributors purchase orders.

110. To further advance the parties' agreement and diverting business relationship, and to assist Petters with obtaining loans to refinance Petters Capital's debts to GECC, Costco agreed that it would issue guaranty letters to certain lenders at the request of Petters and/or his companies. For example, in 2001, Costco issued a guaranty letter to Epsilon-Westford to induce it to loan money to Petters so that he could use those funds to repay the \$50 million credit line to GECC. Costco continued to issue guaranty letter to various lenders at least through 2007, to support Petters' nefarious conduct with respect to his lenders and to induce those lenders to provide financing to Petters.

111. In addition, Costco had actual knowledge of Petters' use of the 2006 Guaranty and 2007 Guaranty to support Petters' false representations to his lenders that he and his companies were conducting substantial business with Costco, during years when Costco acknowledged there was no business activity between Costco and Petters.

112. Despite the lack of any business activity in 2006, 2007, and 2008, Costco provided the 2006 Guaranty and 2007 Guaranty to Petters pursuant to their corrupt agreements which generated a lucrative and long-standing business relationship between Costco and Petters through their diverting business arrangement and Petters' financing of various diverting agents and brokers selling to Costco, and allowed Costco to transform from one of many start-up

wholesale warehouse clubs in the early 1990s to one of the top ten retailers in the United States by 2008.

113. At the time Costco issued the 2006 Guaranty and 2007 Guaranty to Petters, Costco knew that Petters required the guaranty letters to continue his fraud scheme against his lenders that were advancing substantial monies to Petters and his companies.

114. Upon information and belief, in consideration for Costco's agreement to issue guaranty letters and other accommodations and favors requested by Petters to support his fraud scheme, Petters made substantial cash payments to senior purchasing agents who siphoned money for their own personal benefit.

115. As a result of the conspiracy perpetrated by Petters and Costco, and the overt acts committed by Costco in furtherance of the conspiracy, Plaintiffs suffered damages in excess of \$31 million.

116. After joining the conspiracy to commit fraud in October 2000, Costco failed to withdraw or abandon, or take any actions to disavow or defeat the conspiratorial objectives.

WHEREFORE, Plaintiffs request that this Court enter judgment against defendant Costco Wholesale Corporation, on the First and Second Counts, as follows:

- a. That the Court award Plaintiffs compensatory and consequential damages in an amount to be established at trial;
- b. That the Court award Plaintiffs punitive damages in an amount to be determined at trial;
- c. That the Court award Plaintiffs their attorneys' fees and costs incurred in connection with this action; and

- d. For such other and further relief as the Court deems just and equitable under the circumstances.

DATED: New York, New York
October 17, 2014

Respectfully submitted,

COLE, SCHOTZ, MEISEL
FORMAN & LEONARD, P.A.

By: s/ Leo V. Leyva

Leo V. Leyva, Esq.

James T. Kim, Esq.

Attorneys for Plaintiffs,
RITCHIE CAPITAL MANAGEMENT, L.L.C.,
RITCHIE CAPITAL MANAGEMENT, LTD.
and RITCHIE SPECIAL CREDIT
INVESTMENTS, LTD.

900 Third Avenue, 16th Floor

New York, NY 10022-4728

Telephone: (212) 752-8000

Fax: (212) 752-8393

EXHIBIT A

A-57



GE Capital

October 23, 2000

Commercial Finance
A unit of General Electric Capital Corporation
10 S. LaSalle Street, Suite 2800, Chicago, IL 60603
312 419-0988

Bob Pugmire
Executive Vice President - GMM
National Distributors - Corcoo Companies, Inc.
999 Lake Drive
Issaquah, WA 98027

Dear Mr. Pugmire:

For auditing purposes, please advise whether the items listed below, sold to you by Petters Company, Inc./Petters Capital, Inc. are currently unpaid in your accounts payable systems. If any of the items have been settled either partially or fully as of October 23, 2000, please note the date of settlement, the amount of the settlement and the nature of the settlement (whether by check/wire transfer, credit memo, etc.) under the Remarks section below.

When complete, please sign and return promptly via fax to (312) 419-5957.

Purchase Order Number	Purchase Order Date	Invoice Date	Invoice Due Date	Invoice Amount	Remarks
00-198017	6/1/00	6/19/00	8/19/00	\$6,476,883.00	
00-198143	6/2/00	6/28/00	8/28/00	4,976,000.00	
00-198166	6/2/00	6/28/00	8/28/00	3,827,882.00	
00-198210	6/3/00	6/28/00	8/28/00	4,092,135.33	
00-198211	6/3/00	6/28/00	8/28/00	2,481,198.43	
00-198418	6/14/00	7/4/00	9/4/00	2,154,282.00	
00-199303	7/24/00	8/13/00	10/13/00	2,701,627.20	
00-199193	7/18/00	8/9/00	10/9/00	2,807,382.00	
00-199301	7/24/00	8/13/00	10/13/00	6,637,659.00	
00-199392	7/26/00	8/17/00	10/17/00	6,206,200.00	
00-199603	7/26/00	8/23/00	10/23/00	6,249,683.20	
00-199801	8/7/00	8/11/00	10/11/00	1,431,828.00	
00-198842	8/6/00	8/18/00	10/18/00	7,428,740.88	
00-199917	8/9/00	8/18/00	10/18/00	2,149,337.00	

The information above agrees with National Distributors - Corcoo Companies, Inc.'s records as of October 23, 2000, unless otherwise noted.

Signed By: _____ Title: _____ Date: _____

If you have any questions, feel free to call Jack Morrone at (312) 419-5578.

Thank you for your assistance.

Regards,


Jack F. Morrone
Associate
GE Capital Commercial Finance, Inc.

EXHIBIT B

A-59

10:24:00 10:37 FAX 6129347564 REDTAG



THE PETTERS COMPANIES

7505 Euclid Ohio
 Euclid, OH 44134
 800-666-2642
 DIVISION OF U.S.A. & I. 217849918
 Fax 912-730-7150

October 24, 2000

From: Maggibloom
 Costco/National
 999 Lake Drive
 Issaquah, WA 98027

Dear Scott:

The Purchase Orders listed below. I realize were never issued to Petters Company from you or from Costco/National:

- 00-198017
- 00-198143
- 00-198166
- 00-198210
- 00-198211
- 00-198618
- 00-199505
- 00-199193
- 00-199501
- 00-199592
- 00-199603
- 00-199801
- 00-199982
- 00-199917

I deeply apologize Scott that this happened.

Sincerely,

 William J. Adams
 President/CEO

GOVERNMENT
 EXHIBIT
 299
 08cr364(RJK/AJB)

11/1 left 11-17

read very petters

Cl. Bk

② when it was made in house

letter on Fred's 11/3

11/2 per Tom? for with 1999 11/3 11/3

A-60

EXHIBIT C

A-61

From: Petters, Tom
Sent: Thu, 22 Mar 2007 17:22:31 GMT
To: Baer, David; 'ehulsey@costco.com'
CC: Munson, Deanna; 'JSullivan@costco.com'
Subject: Re: guaranty letter

Erik,
We have no open purchase orders with National, only Costco Canada and Mexico and that is through a company we own "Polaroid which is independent" from this business.

The issue is we finance many people from time to time in the business of diverting. If you are unaware of the issues of fraud in the past I would be happy to enlighten you directly. We suffered serious financial losses due to us taking the path that we would allow Costco to be relieved from damages they were actually liable for. You can discuss the details on this with John Sullivan if you are unaware.

To make a long story short, if you are not going to issue us a mere guaranty letter to us, which allows us to have some assurance that when we hold paper that is financing goods for National, simply tell us.

If you are asking for disclosure of deals we are directly holding, "non-existent" however through our lending agreements with others in the case of a default, we are able to use this guaranty as a safety mechanism.

Beyond that, please give David Baer an answer today and we will act according to your decision. Its most troubling for us at this stage in a long relationship, that this letter is an issue.

Thank you for your time.

Tom Petters

----- Original Message -----

From: Baer, David
To: 'Erik Hulsey' <ehulsey@costco.com>
Cc: Petters, Tom; Munson, Deanna; John Sullivan (JSullivan@costco.com) <JSullivan@costco.com>
Sent: Thu Mar 22 11:09:54 2007
Subject: RE: guaranty letter

Erik:

Please see attached email correspondence for an explanation.

Is there a problem? We really need to get this squared away ASAP.

Thanks very much.

Dave

----- Original Message -----

From: Erik Hulsey (mailto:ehulsey@costco.com)
Sent: Thursday, March 22, 2007 10:54 AM
To: Baer, David
Subject: guaranty letter

David:

1208665 03/22/2007 17:22:31 (GMT -06.00)



Y0027.0001

A-62

Case 1:14-cv-04819-VSB Document 19-3 Filed 10/17/14 Page 3 of 3

I don't see any open orders for Peters. Please provide me with a list of the open purchase orders.

Thanks

Erik Hulsey
Manager - National/CWC
Ph 425-313-6372 / Fax 425-313-2806

-----Original Message-----

From: Beer, David
Sent: Wednesday, February 14, 2007 1:14 PM
To: John Sullivan (JSullivan@costco.com)
Cc: Peters, Tom; Munson, Deanna
Subject: Costco Guaranty Letter

John:

I hope the new year is treating you well. It is time again to renew the Costco guaranty letter to Peters Company. We have prepared a draft of this document, which is the same as the one executed last year, with the date adjusted for this year.

Can you please arrange for this to be put on Costco letterhead, executed and returned to me at the contact information below.

Please let me know if you have any questions or comments.

Thanks,

Dave

David Beer
Chief Legal Officer
Peters Group Worldwide
4400 Baker Road
Minnetonka, MN 55343
Email: david.beer@petersgroup.com

Erik Hulsey
Manager - National/CWC
Ph 425-313-6372 / Fax 425-313-2806

Y0027.0002

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON LLP
Gregg L. Weiner
Adam M. Harris
One New York Plaza
New York, New York 10004-1980
(212) 859-8000

Attorneys for Defendant

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

RITCHIE CAPITAL MANAGEMENT, L.L.C.,
RITCHIECAPITAL MANAGEMENT, LTD., and
RITCHIE SPECIAL CREDIT INVESTMENTS, LTD.,

Plaintiffs,

- against -

COSTCO WHOLESALE CORPORATION,
Defendant.

14-cv-4819 (VSB)

**DECLARATION OF
ADAM M. HARRIS IN
SUPPORT OF
COSTCO WHOLESALE
CORPORATION'S
MOTION TO DISMISS THE
FIRST AMENDED
COMPLAINT**

ADAM M. HARRIS declares pursuant to 28 U.S.C. § 1746 as follows:

1. I am a member of the Bar of this Court and am associated with the law firm Fried, Frank, Harris, Shriver & Jacobson LLP, attorneys for defendant Costco Wholesale Corporation (“Costco”) in the above-captioned action.
2. I submit this declaration in support of Costco’s motion to dismiss the First Amended Complaint.
3. Attached as **Exhibit A** is a true and correct copy of an Order dated April 23, 2014 entered in *Ritchie Capital Management, L.L.C. v. Fredrickson & Byron P.A.*, Case No. 13 L 10488 (Ill. Cir. Ct. Cook County).

4. Attached as **Exhibit B** is a true and correct copy of the transcript of a hearing held April 23, 2014 in *Ritchie Capital Management, L.L.C. v. Fredrickson & Byron P.A.*, Case No. 13 L 10488 (Ill. Cir. Ct. Cook County).

5. Attached as **Exhibit C** is a true and correct copy of a complaint dated September 18, 2013 filed in *Ritchie Capital Management, L.L.C. v. Fredrickson & Byron P.A.*, Case No. 13 L 10488 (Ill. Cir. Ct. Cook County).

6. Attached as **Exhibit D** is a true and correct copy of an Illinois Secretary of State LLC File Detail Report for Ritchie Capital Management, L.L.C., with a file date of November 17, 1998, which was obtained on November 11, 2014.

7. Attached as **Exhibit E** is a true and correct copy of a complaint dated February 1, 2012 filed in *Ritchie Capital Management, L.L.C. v. Coleman*, No. 12 Civ. 270 (D. Minn).

8. Attached as **Exhibit F** is a true and correct copy of an article from Minnesota Public Radio News, entitled *Warrant Alleges Fraud by Petters*, dated Sept. 26, 2008.

9. Attached as **Exhibit G** is a true and correct copy of an article from St. Paul Pioneer Press, entitled *Petters Warrant Alleges Investor Fraud: \$100M Scammed on False Documents, Purchase Orders*, dated Sept. 27, 2008.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
November 13, 2014

Adam M. Harris
adam.harris@friedfrank.com

EXHIBIT A

A-66

#26 XDS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

RITCHIE CAPITAL MGMT)
vs.)
FREDRIKSON & BYRON)
et al.)

No. 13 L 10488

CASE MANAGEMENT ORDER

on the motions to dismiss under § 2-619 and 2-615

This case is before the court for ~~initial~~ subsequent status, or motion, counsel for ~~plaintiff~~ defendant, ~~third party defendant~~ present, it is hereby ordered ~~of defendant Fredrikson & Byron, Koneck and Root.~~

- 4296 1. Non-opinion written discovery to be completed by _____
 - 4218 2. Non-opinion oral discovery to be completed by _____
 - 4296 3. _____ shall complete outstanding written discovery by _____
 - 4218 4. _____ shall be presented for deposition by _____
 - 4253 5. Plaintiff shall serve Rule 213 f (2) and (3) disclosures by _____
 - 4253 6. Defendant shall serve Rule 213 f (2) and (3) disclosures by _____
 - 4218 7. Plaintiff's 213 f (2) and (3) witnesses to be deposed by _____
 - 4218 8. Defendant's 213 f (2) and (3) witnesses to be deposed by _____
 - 4295 9. All discovery to be completed by _____
 - 4231 10. All dispositive motions shall be filed and noticed no later than _____
 - 4619 11. This matter is continued to _____ at _____ for:
(check one or more)
- | | | |
|--|--|---|
| <input type="checkbox"/> Service Status | <input type="checkbox"/> Pleadings Status | <input type="checkbox"/> Written Discovery Status |
| <input type="checkbox"/> Compliance Status | <input type="checkbox"/> Settlement Status | <input type="checkbox"/> Oral Discovery Status |
| <input type="checkbox"/> Default/ Prove Up | <input type="checkbox"/> Final Pretrial | <input type="checkbox"/> Expert Discovery Status |
| <input type="checkbox"/> Pretrial (parties must be present unless excused by order of Court) | | |
| <input type="checkbox"/> Other _____ | | |
- 4482 12. Jury/Bench trial is set to begin on _____ at 10:30 a.m.

It is further ordered: ~~52711~~ The motion to dismiss under § 2-619 is granted for the reasons given in the transcript of today's hearing, which is hereby incorporated by reference. This ruling renders the motion under § 2-615 moot. Defendants Fredrikson & Byron, Root & Koneck are dismissed with prejudice.

is denied as

ENTERED
4226 DKS
JUDGE SANJAY TAILOR -1870
APR 23 2014 KS
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Atty No. 21092
Atty Name: Galland
Attorney for: F&B, Koneck, Root
Address: 14 W Erie
City: Chicago, IL 60654
Phone: 312-751-1170

Enter: _____
Judge Sanjay T. Tailor No. 1870

EXHIBIT B

Hearing

April 23, 2014

1

STATE OF ILLINOIS)

) SS.

COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, LAW DIVISION

RITCHIE CAPITAL MANAGEMENT, L.L.C.,)

RITCHIE CAPITAL MANAGEMENT, LTD.;)

and RITCHIE SPECIAL CREDIT)

INVESTMENTS, LTD.,)

Plaintiffs,)

vs.) No. 13 L 10488

FREDRIKSON & BYRON, P.A., a)

Minnesota Professional Association;)

SIMON ROOT, an individual; JOHN)

KONECK, an individual; TIMOTHY E.)

TAKESUE, an individual; and MIGUEL A.)

MARTINEZ, JR., an individual,)

Defendants.)

ORIGINAL

aw

Report of proceedings had at the hearing in the above-entitled cause before the HONORABLE SANJAY T. TAILOR, Judge of said Court, commencing at 10:00 a.m. on the 23rd day of April, A.D., 2014.

Hearing

April 23, 2014

2

1 APPEARANCES:

2

3 SWANSON, MARTIN & BELL, LLP, by

4 MR. THOMAS J. VERTICCHIO

5 MR. JAMES KIM

6 On behalf of the Plaintiffs;

7

8 MINER, BARNHILL & GALLAND, P.C., by

9 MR. GEORGE F. GALLAND, JR.

10 On behalf of the Defendants Fredrikson &

11 Byron, Simon Root, and John Koneck;

12

13 WILLIAMS & CONNOLLY, LLP, by

14 MR. CRAIG D. SINGER

15 MR. ADAM D. HARBER

16 On behalf of the Defendants Fredrikson &

17 Byron, Simon Root, and John Koneck;

18

19 POLLICK & SCHMAHL, LLC, by

20 MR. MICHAEL M. SCHMAHL

21 On behalf of the Defendant Timothy E. Takesue;

22

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Hearing

April 23, 2014

3

1 APPEARANCES:

2

3 MR. MIGUEL A. MARTINEZ, JR.

4 Appearing pro se.

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Hearing

April 23, 2014

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1 THE COURT: We have two court reporters.

2 MR. VERTICCHIO: Looks like we do, your Honor.

3 Good morning, your Honor. Thomas Verticchio and James
4 Kim for the plaintiffs.

5 THE COURT: Before we're on the record -- Well,
6 we're on the record but before you enter your
7 appearances, is it necessary to have two court
8 reporters?

9 MR. VERTICCHIO: I don't know why, Judge.

10 THE COURT: There can be a conflict between what
11 they transcribe.

12 MR. SINGER: It's not necessary. We didn't
13 coordinate.

14 THE COURT: Not that I don't want them to be fully
15 employed. I have seen it happen before. How do you
16 want to do this. Whose motion is it?

17 MR. VERTICCHIO: Defendant's motion.

18 THE COURT: Why don't we stick with the defendant's
19 court reporter, whoever that is. My apologies.

20 MR. VERTICCHIO: Let's take the five, so they can
21 flip-flop.

22 (A short recess was had.)

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Hearing

April 23, 2014

5

1 THE COURT: Good morning. Want to put your
2 appearances on the record.

3 MR. VERTICCHIO: Good morning, your Honor, Thomas
4 Verticchio and James Kim for the plaintiffs.

5 MR. SINGER: Morning. For the Fredrikson & Byron
6 defendants, Craig Singer and George Galland and Adam
7 Harber.

8 MR. SCHMAHL: For the record, Michael Schmahl on
9 behalf of Tim Takesue.

10 MR. MARTINEZ: Miguel Martinez.

11 THE COURT: This is here on Fredrikson & Byron's
12 motion to dismiss, which is under 2-619.1. The 619
13 aspect of it is the statute of limitations and then 615
14 challenges the factual sufficiency of the complaint. I
15 have read the papers. It strikes me that the -- under
16 the supreme court's recent decision in the Evanston case
17 that it's clear to me that the two-year statute of
18 limitations applies to the allegations in the complaint.

19 I'll entertain your arguments on that but
20 that's my impression. What I'd like you to focus on,
21 though, is when the causes of action occurred for
22 purposes of the discovery rule, whether this case is the

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Hearing

April 23, 2014

6

1 type of case that fits within the -- what I perceive as
2 an exception to the general rule, that the discovery
3 rule does not wait for the plaintiff to identify a
4 culpable party. And it seems -- As somewhat of an
5 outlying sense that it seems to acknowledge there maybe
6 occasions when the discovery rule may wait and then --
7 There was one other thing that I wanted to hear some
8 argument on and I don't recall what it is right now but
9 I'm sure I'll remember in the course of the argument.

10 It's your motion, so why don't why we start
11 with you.

12 MR. SINGER: Thank you, your Honor. I was going to
13 start certainly with the statute of limitations piece of
14 it. We do also have a motion to dismiss on the merits.
15 I was going to give a little background on what the case
16 is about. It sounds like your Honor may not need it. I
17 know you've read the papers but I'm happy to go ahead
18 just to give a timeline.

19 THE COURT: I'm familiar with it. I have read
20 everything. Put it that way.

21 MR. SINGER: The dates that matter here are the
22 transaction occurred in March of 2008, the Petters Ponzi

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Hearing

April 23, 2014

7

1 Scheme that became publicly known and certainly known to
2 Ritchie and these plaintiffs that is in the fall
3 of 2008. There's absolutely no dispute.

4 THE COURT: Do you acknowledge that?

5 MR. KIM: The FBI raid did occur in the fall
6 of 2008. That's correct, you Honor. It was an FBI raid
7 of Petters, not F & B.

8 MR. SINGER: There's really no dispute that as of
9 the fall of 2008, and frankly the evidence if it were
10 disputed --

11 THE COURT: Let me ask you this because as a matter
12 of common sense I might assume that this is all public
13 knowledge, particularly in the Minnesota area. The
14 complaint doesn't so much go into that. It says in
15 Paragraph 58 that the FBI raided Petters' residence and
16 PCI. It doesn't say anything beyond that. It doesn't
17 say anything -- It doesn't say that, for example, it was
18 a subject of public knowledge, it was disseminated in
19 the media. So what I'm trying to determine whether I
20 can decide from the face of the pleading that the
21 defendant -- the plaintiff knew of its injury and its
22 wrongful cause and I don't have those facts. It

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Hearing

April 23, 2014

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1 requires me to make an assumption, which I'm not
2 comfortable doing on a 619 because the appellate court
3 will just throw it back.

4 MR. SINGER: We do have those facts, your Honor.
5 Let me give you a chapter and verse of what's already in
6 the record and it would be very easy for us to
7 supplement if we needed to but I don't think we need to.

8 The amended complaint that was filed recently
9 by the plaintiffs attaches a motion as Exhibit 2 of the
10 amended complaint, it attaches a motion from Petters'
11 trustee to approve a settlement. This is the entire
12 basis of the amended complaint. If you look at the
13 Exhibit 2 to that motion -- I can pass your Honor a copy
14 of the complaint.

15 THE COURT: I was looking at it yesterday but I
16 don't -- Hold on. This is the amended -- motion for
17 leave to file the amended complaint?

18 MR. SINGER: This is -- Let's see. The amended
19 motion --

20 THE COURT: Is this what you're referring to that
21 you want me to look at? This is Exhibit 2.

22 MR. SINGER: Yes, your Honor. Thank you. Take a

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Hearing

April 23, 2014

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1 look at Paragraph 4. This is what Petters' trustee
2 filed in the Minnesota bankruptcy court. It says -- The
3 entity at issue here is Petters Company, Inc., PCI, and
4 it says in Paragraph 4 that the Petters Company, Inc.,
5 not only were they raided, they filed a Chapter 11
6 petition on October 11, 2008. So that's public.

7 Mr. Petters -- If you look at Paragraph 10,
8 Mr. Petters himself was arrested on October 3rd, 2008,
9 and he was indicted -- if you look at Paragraph 17, he
10 was indicted on December, the 1st, of 2008. He was then
11 convicted after a jury trial. If you look at
12 Paragraph 19, he was convicted after a jury trial on
13 December, the 2nd, of 2009, and sentenced to 50 years in
14 prison.

15 I have something else you can look at, which
16 is something we submitted. If you look at the
17 opposition to that same motion that the F & B defendants
18 filed, we attached a copy of these plaintiff's complaint
19 in Minnesota Federal Court against us. This is a prior
20 complaint that they filed. This is attached to our
21 motion and it says even more than that. I'm looking
22 at --

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Hearing

April 23, 2014

10

1 MR. KIM: One point of clarification. Are we
2 addressing the motion for leave to amend at this point?

3 THE COURT: No, we're not. I don't know what's
4 attached to the opposition to the motion for leave to
5 amend but I don't think it's attached in support of your
6 motion to dismiss the complaint.

7 MR. SINGER: All of this is in response to the
8 motion to dismiss the complaint. This is all about the
9 same complaint.

10 THE COURT: It's not just to throw everything into
11 the mix and then -- There's a procedure by which these
12 things are addressed. Go ahead.

13 MR. SINGER: In any event, your Honor, this is a
14 publicly filed document and you can take judicial notice
15 of it. It's not something we needed to submit.

16 THE COURT: When you say "this," you're referring
17 to --

18 MR. SINGER: I'm referring to their complaints
19 filed publicly in Minnesota Federal Court against
20 Fredrikson & Byron and it's attached to our opposition
21 to their motion. By the way, none of this has ever in
22 been in dispute, the fact they knew about the Petters

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Hearing

April 23, 2014

11

1 fraud in the fall of 2008. I'm just giving you --

2 THE COURT: I know, but you have the burden in the
3 619 motion.

4 MR. SINGER: Actually, the burden is on the
5 plaintiff to establish when -- they are basing this on
6 discoverable --

7 THE COURT: They can rely on their allegations,
8 which I have to accept as true for purposes of the 619
9 motion. They allege in the complaint, at least in their
10 proposed amended complaint, that they didn't learn about
11 the defendants' wrongful conduct until sometime in 2012.

12 MR. KIM: We submitted an affidavit on that issue
13 as well, your Honor, under 2-619(c).

14 MR. SINGER: They don't allege anything about when
15 they learned about Petters' misconduct. That's
16 undisputed. All the conduct in the original complaint
17 ends in 2008. Nothing is alleged to have happened after
18 2008. The burden is on them to show that the discovery
19 rule extends anytime past that.

20 The statute of limitations is two years.
21 Unless they can show the discovery -- they can show the
22 discovery rule takes them into 2011, past March of 2011,

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Hearing

April 23, 2014

12

1 the statute bars this lawsuit. That's their burden.

2 Not ours.

3 I'm giving you belt and suspenders, your
4 Honor, as to how you can establish that all the Petters
5 stuff is public but it's their burden to show it's not
6 public and they are conceding it is public. They are
7 not arguing here that they didn't know about the Petters
8 fraud.

9 In fact, they sought a receiver for Petters,
10 which is what I was about to tell you. They allege
11 that -- That's also public, by the way. It was in this
12 courthouse.

13 THE COURT: I think you did have a burden to come
14 forward with some evidence about the Petters case being
15 public knowledge. You didn't quite do that but I don't
16 think you're disputing it, correct, for purposes of the
17 motion?

18 MR. KIM: No.

19 THE COURT: You acknowledge, and we can agree, that
20 the plaintiffs had knowledge and knew that Petters had
21 been raided, that him and/or his companies had filed
22 bankruptcy, that he was indicted in no later than

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1 December 2008.

2 MR. KIM: That's correct, your Honor.

3 THE COURT: So you acknowledge that?

4 MR. KIM: Yes.

5 THE COURT: We're beyond that issue now.

6 MR. SINGER: Your Honor, then the question is: How
7 can they possibly get the statute of limitations?
8 That's two years. How can they get the discovery rule
9 to take them past March of 2011?

10 THE COURT: We know that the law is that for
11 purposes of the discovery rule the cause of action
12 accrues at the time the defendants -- the plaintiffs
13 knew of its injury. And certainly you knew of your
14 injury no later than -- Do you acknowledge you knew of
15 your injury no later than December 2008?

16 MR. KIM: Yes.

17 THE COURT: Then the second aspect of it is when
18 the defendant knew or reasonably knew that the injury
19 was wrongfully caused. So then the question becomes
20 whether in making this determination the general rule is
21 you need not -- the discovery rule does not wait for the
22 plaintiff to identify the identity of the wrongdoer.

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1 That's generally the law. Then we have this Mitsias
2 case, which I mentioned at the beginning.

3 M I T S I A S. That's the case involving --

4 MR. KIM: Shoulder pump.

5 THE COURT: Is it the shoulder pump?

6 MR. KIM: Yes.

7 THE COURT: The court there held that the discovery
8 rule did not -- the cause of action did not accrue under
9 the discovery rule as it relates to the manufacturer of
10 the shoulder pump because it was inherently unknowable,
11 correct?

12 MR. SINGER: Right.

13 MR. KIM: I would disagree with inherently
14 unknowable. I think the case says with respect to
15 wrongful cause, it's when plaintiff is or should be
16 aware of some possible fault on part of the other
17 defendant. That, I believe, is the key and critical
18 issue that's set forth in Mitsias.

19 THE COURT: In that case I think the court really
20 focuses on the fact that the science had not advanced
21 far enough in that case to allow the plaintiff to know
22 that the pump was defective.

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1 Would you agree with that?

2 MR. KIM: Generally speaking, the court does get
3 into a scientific discussion. But, again, I'd like to
4 go back and address the specific hold in the case, which
5 is that mere speculation on the part of a codefendant or
6 coparty is not sufficient. The court is very specific.

7 THE COURT: That's right. That's well established.
8 Right.

9 MR. KIM: This was a 2011 First District case and
10 we believe, we submit respectfully, that it's absolutely
11 instructive here because it does specifically say it's
12 not when you think you have a speculation as to another
13 party's involvement but it's when you know and you're
14 aware of that codefendant's possible fault. Now, Judge,
15 we concede that the FBI raided Petters in September 2008
16 but --

17 THE COURT: Let me cut to the chase. Here's the
18 way I'm looking at this and you tell me if I'm wrong.
19 In Mitsias it was not knowable that the pump was
20 defective because there's no science that existed at the
21 time on the question -- on whether the pump was
22 defective.

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1 MR. KIM: Judge, I have a hard time believing that
2 that's what the case says. I don't think the case says
3 that. I think the case says the science had not been
4 fully developed. Clearly the plaintiff in that case
5 knew that the pump was installed.

6 THE COURT: Hold on. Let's assume I'm right just
7 for sake of argument.

8 MR. KIM: Sure. I apologize, Judge.

9 THE COURT: I'm just asking you to assume.

10 MR. KIM: Yes.

11 THE COURT: The rationale of the case really
12 focuses on the fact that it was just not knowable, the
13 plaintiff could not have known about the other wrongful
14 cause, okay, at the time. He could only know about it
15 when the science had advanced to the point -- to a
16 certain point. The attorney-client relationship is one
17 that's necessarily cloaked in secrecy.

18 MR. KIM: That's correct.

19 THE COURT: By virtue of our notions of privilege,
20 and rightly so. Is there an analogy that you're drawing
21 here, is this where this is going?

22 MR. KIM: That's exactly where I'm going, Judge.

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1 First of all, I do agree with your Honor in the general
2 principal and concept of Mitsias; however, I find it
3 hard to believe that the plaintiff in that case, the
4 party that underwent the surgery, didn't know that a
5 pump was installed in the person's shoulder. Clearly
6 the person was on notice that some external device had
7 been installed into that person's shoulder. So when you
8 say --

9 THE COURT: The records would assume that.

10 MR. KIM: Right. So when you say "unknown," I
11 don't think the case says it was unknown to the
12 plaintiff at the time.

13 THE COURT: I don't think it was unknown that the
14 pump was installed. What I'm saying is the case -- the
15 court seems to focus on the fact there was no science to
16 support the notion that the pump was defective.

17 MR. KIM: Or to develop it. I think the analogy
18 here, your Honor, is exactly what your Honor pointed out
19 is that the F & B law firm was Petters' attorney. In
20 fact, Judge, I think it would have been absolutely
21 reckless for Ritchie or any other plaintiff to simply
22 point the finger at F & B when the FBI raided Petters'

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1 offices. The FBI raided Petters. They didn't raid
2 F & B. There was nothing in the FBI raiding that would
3 have put the world on notice that the law firm, the
4 lawyers at F & B, were orchestrating and advancing the
5 Ponzi scheme, and specifically with our case, the Sony
6 PlayStations.

7 As your Honor pointed out, the attorney-client
8 relationship is cloaked in secrecy. It's no different
9 than a co-conspiracy where the courts recognize that the
10 very nature of co-conspiracy is shrouded in mystery.
11 There was nothing public that Ritchie or any other
12 plaintiffs could have been aware of F & B's role in
13 facilitating, in orchestrating, and advancing the Sony
14 PlayStation Ponzi Scheme.

15 It wasn't until the bankruptcy trustee
16 conducted a confidential and secret investigation that
17 was not known to us, and that's addressed in the
18 trustee's motion to enforce the settlement. It was a
19 confidential secret investigation that was conducted by
20 the trustee and in May 2012 the trustee filed a motion
21 to confirm a settlement where F & B agreed to pay \$13
22 and a half million as a result of the potential claims

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1 that the trustee had against F & B. That's when Ritchie
2 was on notice that F & B, as the lawyers of Petters, had
3 some fault.

4 And when you look at the language in Mitsias,
5 you talk where it specifically addresses the statute of
6 limitations starts to run when you know -- sorry -- when
7 you're aware of possible fault of a codefendant. It was
8 not until May 2012 that Ritchie became aware of a
9 possible fault by F & B. I think it would have been --

10 THE COURT: The court uses the word a source
11 distinguished between one source and another source.
12 Are we to read from that -- Are we to equate source with
13 identity of the potential defendant?

14 MR. KIM: Yes. The court specifically says --

15 THE COURT: Or is it more appropriate to consider
16 it in the context of different causes of injury?

17 MR. KIM: I don't think it's sources, Judge.

18 THE COURT: The court says source.

19 MR. KIM: It also says it still requires that the
20 plaintiff -- I'm reading right from the decision on
21 page 74. However, it still requires that plaintiff is
22 or should be aware of some possible fault on the part of

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1 the defendant. Courts have -- it's -- Courts have held
2 that reasonable knowledge of wrongful cause requires
3 more than a mere suspicion that wrongdoing might have
4 occurred if that suspicion is not yet supported by facts
5 known to the plaintiff.

6 So while Ritchie recognizes that Petters was
7 raided by the FBI, that didn't put us on notice their
8 law firm was orchestrating and advancing the Ponzi
9 scheme. It would have been reckless for us to accuse
10 F & B --

11 THE COURT: At best it's a fact question.

12 MR. KIM: Absolutely, you Honor. Also, one more
13 thing is that we did submit an affidavit on this
14 particular issue. The defendants here did not. Under
15 2-619(c) where there is a material or genuine disputed
16 question of fact and the plaintiffs have requested a
17 jury trial, the Court must deny the motion.

18 THE COURT: I know.

19 MR. SINGER: I have a lot of things to say about
20 this both on the law and the facts. First of all, if
21 you read Mitsias the way he is suggesting, you are
22 reading it to overrule decades of precedent, including

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1 by the Illinois Supreme Court, which says you do not
2 have to know the identity of the defendant. It's what
3 Mitsias is, as your Honor suggested.

4 THE COURT: It's somewhat an exception, right.

5 MR. SINGER: It's an extreme case, yes, where
6 there's a separate cause that could not have been known.
7 It was not discoverable. The court relies on the --

8 THE COURT: Isn't that what they are alleging, that
9 there's a separate cause, the first cause being that
10 Petters and his company defrauded us and then the other
11 cause being that Petters' law firm conspired with
12 Petters to defraud us.

13 MR. SINGER: Not at all. That's the same cause,
14 your Honor. That's a conspiracy or aiding and abetting
15 of the exact same fraud. It's not a situation where one
16 defendant does one thing that hurts the plaintiff,
17 another plaintiff does a separate thing.

18 THE COURT: Are all the claims for aiding and
19 abetting?

20 MR. KIM: It's aiding and abetting fraud, aiding
21 and abetting breach of fiduciary duty, and civil
22 conspiracy charge.

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1 MR. SINGER: It all about the Petters fraud, it's
2 all about a single transaction, the PlayStation
3 transaction, in March of 2008. There is no case in the
4 history of Illinois that we're aware of --

5 THE COURT: Do you agree it's a single cause?

6 MR. KIM: No, I don't. I think it's a separate
7 cause of action. Petters breached his agreements with
8 us. Petters defrauded us. That's a different cause of
9 action than a law firm assisting, participating,
10 advancing a fraudulent scheme.

11 THE COURT: Petters did more than breach his
12 agreement, he defrauded you guys.

13 MR. KIM: Yes, that's correct.

14 THE COURT: You've alleged that the law firm aided
15 and abetted Petters in defrauding you?

16 MR. KIM: That's correct.

17 MR. SINGER: It's another defendant -- where
18 another defendant was alleged to have been responsible
19 for causing the exact same injury to collaborate with
20 allegedly Petters to cause the exact same injury.

21 In the history of Illinois there is no case
22 that we're aware of that applies -- that excuses the

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1 discovery rule in that situation. The discovery rule is
2 black-letter law, at least since Nolan in the Illinois
3 Supreme Court, you do not have to know the identity of
4 the defendant. You have to know your injury was
5 wrongfully caused, then you are on notice and you have a
6 duty to investigate.

7 THE COURT: You're on inquiry notice.

8 MR. SINGER: You're on inquiry notice. And you
9 have two years under the statute to investigate. They
10 had two years after the fall of 2008 to find out who
11 else might have been responsible with Petters. They
12 did. They brought all kinds of claims. They sued --
13 I'll get to this in a minute. They sued Fredrikson &
14 Byron in 2012 supposedly before the trustee settlement
15 that gave them the aha moment. They had already sued
16 us.

17 I'll get into the particular facts about
18 Fredrikson but let me start about the law again. If you
19 were to adopt a rule that the attorney-client
20 relationship is somehow different and gives an excuse to
21 the discovery rule, you will be creating a brand new
22 enormous loophole in the discovery rule for every case

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1 involving attorney and client, when someone is suing
2 about something relating to the attorney-client
3 relationship. There is no such rule. That would also
4 create an enormous hole in the rule that the 800 South
5 Wells Court and the Evanston Court just clarified with
6 respect to the statute of limitations. It only applies
7 to lawyers. This is a statute of limitations that
8 applies to lawyers, it has a discovery rule. There
9 can't be some special exception to the discovery rule
10 when you're talking about the attorney-client
11 relationship.

12 THE COURT: The period proposed is six years?

13 MR. SINGER: Six years proposed, two years statute
14 of limitations.

15 THE COURT: So it's within the proposed period?

16 MR. KIM: Yes.

17 MR. SINGER: Yes. The law is absolutely on our
18 side with regard to the discovery rule. With regard to
19 the facts, let's assume -- I'm not for a second
20 conceding this but let's assume it somehow did matter
21 when the plaintiffs knew or should have known about
22 F & B in particular, okay, when F & B supposedly was

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1 part of the wrongful conduct. That also happened years
2 ago.

3 They knew from day one, 2008, that F & B
4 represented Petters in the PlayStation transaction.
5 F & B interacted with Ritchie and Ritchie's counsel in
6 connection with the PlayStation transactions. Every
7 document and every fact that is alleged in their
8 complaint and their amended complaint was known to them
9 years ago.

10 The key documents they cite are e-mails
11 between F & B and Ritchie's counsel, so they had those.
12 The one exception is an e-mail from Petters' in-house
13 counsel to F & B, which we have shown; and by the way,
14 we did submit an affidavit in opposition -- in support
15 of our motion to dismiss. We've shown Ritchie had that
16 document no later than 2010. That's attached to our
17 reply brief.

18 The only thing the plaintiffs now say -- And
19 this is the their amended complaint. The only thing
20 they now say they learned about F & B in particular
21 within the two years that mattered, the two years before
22 they filed this case, so starting March 2011, the only

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1 things they learned is F & B entered into a settlement
2 with the Petters trustee but that settlement didn't
3 reveal any fact. There is no fact that has ended up in
4 their amended complaint about what F & B did that wasn't
5 in there before. In fact, the trustee's filing in
6 connection with the settlement, the one thing you don't
7 see in their papers about what the trustee's filing
8 said, it says that Petters' trustee had not found any
9 evidence that F & B lawyers had actual knowledge of
10 Petters Ponzi Scheme. They had not found that out yet.

11 So it's directly inconsistent with Ritchie's
12 complaint in this case. It's ridiculous to say they
13 somehow learned there was an aiding and abetting and
14 conspiracy claim against F & B from a pleading that said
15 there's no actual knowledge -- there's no evidence of
16 actual knowledge.

17 Anyway, another point, it's ridiculous to say
18 Ritchie somehow found out that F & B was at fault in mid
19 2012 because of the trustee's settlement. Ritchie had
20 already sued -- several months earlier, he had already
21 sued F & B in Minnesota Federal Court and alleged F & B
22 was complicit in Petters' Ponzi scheme.

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1 THE COURT: When was it?

2 MR. SINGER: That was in February 2012, so before
3 the trustee settlement. That complaint is attached to
4 our opposition.

5 THE COURT: What is -- What do the plaintiffs
6 allege in that complaint?

7 MR. SINGER: They allege -- I'll get you the exact.

8 THE COURT: Just the standing allegation.

9 MR. SINGER: They allege that Petters and his
10 associates, including F & B, operated a Ponzi scheme
11 based on false electronic and other product invoices,
12 that F & B provided professional legal services to
13 Petters and his organizations over the same ten-year
14 period that materially aided Petters' criminal
15 enterprise. That's a quote. And F & B substantially
16 assisted or encouraged defendants Petters, Coleman,
17 Behr -- these are defendants in the Minnesota case -- in
18 achieving the objectives of their fraud. Those
19 citations are at pages 6 to 7 of our oppositions to the
20 amended motion to amend the complaint. You can find
21 them easily there. The Minnesota complaint itself is
22 attached to that brief.

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1 The idea -- Even if there were somehow a rule
2 that they needed to be on notice -- you know, an inquiry
3 notice of F & B's wrongful conduct before 2012, they
4 obviously had that information. There's just no
5 reasonable dispute about that. It's simply not a basis
6 to sustain the complaint here. This is the clearest
7 case -- I maybe naive, your Honor, you have seen a lot
8 more cases than I have, but this is the clearest case of
9 a claim being filed outside the statute of limitations
10 that I can remember.

11 THE COURT: What about the notion -- the analogy I
12 drew earlier that because the attorney-client
13 relationship is so cloaked in privacy and secrecy
14 that -- would Mitsias also apply in that context?

15 MR. SINGER: As a matter of law, no; as a matter of
16 fact, no. I'll give you two answers -- two-part answer.
17 As a matter of law, no, because Mitsias is about
18 independent causes that were not discoverable. If you
19 were to read it that broadly to talk about aiders and
20 abettors, whose conduct for one reason or another was
21 not discoverable, you'll be reading it extremely broadly
22 and you'll be overruling a lot of past precedence.

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1 THE COURT: So your view is if it created an
2 exception, it's for independent causes and this is not a
3 case of independent causes.

4 MR. SINGER: That, and also the exception is for
5 independent causes that are not discovery. Even
6 independent causes. If you look at the Hoffman case,
7 that's a very similar case where you have medical
8 malpractice and a separate product liability claim. The
9 product liability claim was barred in that case because
10 the court held -- That's the First District, by the way.
11 The court held it didn't matter it was a separate cause.
12 The discovery rule still applies because it's the same
13 injury. They were on notice, the plaintiff was, and
14 should have done an investigation and discovered what
15 they needed to discover.

16 Mitsias is really an outlier and it's really a
17 very specific situation where not only is it a separate
18 cause, it's one that medical science did not permit the
19 plaintiff to discover within the original limitations
20 period. It's an extremely narrow exception and it needs
21 to be because the law leading up to that is so clear in
22 Illinois and the Illinois Supreme Court has spoken to it

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1 directly.

2 THE COURT: That's the legal aspect.

3 MR. SINGER: That's the legal aspect. The factual
4 aspect, there's nothing in their complaint that they've
5 learned in the last two years that was supposedly
6 cloaked in secrecy by the attorney-client relationship
7 that's now been revealed. No new fact is in their
8 complaint, except the fact F & B settled with the
9 Petters' trustee in a settlement, by the way, where the
10 trustee said F & B had no actual knowledge of the fraud.

11 All of the actual facts about what F & B
12 supposedly did that are in the complaint have not
13 changed in the amended complaint, have not been learned
14 since 2011. There's no new document that they didn't
15 have before 2011 that they have now. Even if you --

16 THE COURT: Rather than focus on what they learned
17 in 2011 or afterwards -- And you use 2011 because the
18 complaint was filed in 2013?

19 MR. SINGER: Correct.

20 THE COURT: What do they know prior to 2011 such
21 that they knew their injury was wrongfully caused?

22 MR. SINGER: They knew everything they know today

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1 that's in the complaint. They knew that Petters had run
2 a big Ponzi scheme, the PlayStation transaction that
3 injured them, they are claiming injury for in this case
4 was part of that Ponzi scheme. We talked about this
5 earlier. I said they knew they were wrongfully injured
6 by the Petters Ponzi scheme and they admit that.

7 What they say they didn't know was F & B was
8 involved. All the facts about F & B's involvement that
9 are alleged in the complaint are documents they had in
10 their hands before -- way before March of 2011. They
11 had them in 2008, they had them in 2009. There's just
12 nothing.

13 THE COURT: Did Petters -- Sorry. Did plaintiff
14 here ever file anything prior to 2011 in any court or
15 any other -- in bankruptcy court or any other proceeding
16 in which they make allegations against the defendant
17 here Fredrikson & Byron?

18 MR. SINGER: I'm not aware of allegations they
19 specifically made prior to 2011, but they made many
20 allegations against Petters and against other Petters
21 associates. They have been extraordinarily litigious.
22 They filed lawsuits from day one, including the original

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1 lawsuit.

2 THE COURT: I'm just focusing on prior to 2011.
3 Basically your point is everything they have alleged in
4 the complaint say this settlement between the trustee
5 and Fredrikson & Byron and say in the e-mail between --
6 who is --

7 MR. SINGER: The e-mail was known to them before
8 2011. That's between an insider Mr. Behr at Petters.

9 THE COURT: Insider from the plaintiff?

10 MR. SINGER: No. It's an e-mail from Mr. Behr at
11 Petters to a lawyer at Fredrikson & Byron. That's the
12 one I mentioned. That was known to them in, like, 2009.

13 THE COURT: How was that known to them in 2009?

14 MR. SINGER: It was submitted to them in another
15 case they filed. This is -- One of the earliest things
16 Ritchie did was to file a claim in one of the Petters
17 bankruptcies. The trustee --

18 THE COURT: How do we know they had that e-mail in
19 2009?

20 MR. SINGER: We've attached it as an exhibit to our
21 response to our motion where the Petters -- the Polaroid
22 trustee attached that very e-mail to a pleading against

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1 Ritchie in that case in 2009. It's crystal clear.

2 THE COURT: That pleading was filed when?

3 MR. SINGER: 2009.

4 THE COURT: On that basis they had --

5 MR. SINGER: Yes, they had it. The only thing they
6 claim they have learned since 2011 is the fact of the
7 settlement with the Petters trustee. The fact of the
8 settlement has taught them nothing about what F & B
9 actually did. In fact, if they read it, it would have
10 taught them that F & B had no actual knowledge, which is
11 the essential thing they would need to show to recover
12 in this case.

13 THE COURT: Anything else before I turn back to the
14 plaintiff?

15 MR. SINGER: No, your Honor.

16 MR. KIM: Let me start with that e-mail. That
17 e-mail is attached to a summary judgment motion with
18 over 84 exhibits and that e-mail, which was provided in
19 2009 as an exhibit to a motion, simply says, Simon --
20 Again, this is an e-mail where we're not a party to the
21 e-mail or communication that we're involved in. It's
22 from David Behr to Simon Root. Simon, can you please

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1 talk with Dina and walk Ken through this today? Not
2 sure how much or what we want to tell them but I am sure
3 you two will figure it out. Thanks. Stuck on Tarmac on
4 delay.

5 Judge, that was 2009. That e-mail wasn't
6 sufficient to put us on notice.

7 THE COURT: It was nocuous is your position?

8 MR. KIM: Yes. Let me go back to the most
9 important issue.

10 MR. SINGER: That's the basis for their complaint,
11 your Honor.

12 THE COURT: It is somewhat nocuous and it can cut
13 both ways in a sense. I don't know what that e-mail is
14 referring to.

15 MR. SINGER: I agree, your Honor. If it's not --

16 MR. KIM: Mr. Singer said there's no Illinois case
17 that adopted or applied Mitsias. That's not correct.

18 MJK Partners, a recognized -- it's a federal court
19 decision.

20 THE COURT: Is that cited in your briefs.

21 MR. KIM: Yes. It's a July 2012 decision from
22 Judge Kennelly from the Northern District of Illinois

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1 where Judge Kennelly states as follows. He expanded
2 Mitsias to an investment manager known as Husman. I
3 recognize it was not an attorney-client type case but it
4 was an investor scam case. In that case Judge Kennelly
5 states on page 609 that under Illinois, however the
6 limitations period for a claim against the defendant
7 does not begin to run because the plaintiff knows has
8 been injured by another individual. Judge Kennelly
9 cites specifically to Mitsias. In that case, again an
10 investor scam case -- This case is also an investor
11 related Ponzi scheme case.

12 Judge Kennelly stated at follows: Plaintiffs
13 have presented evidence from which a reasonable jury can
14 conclude.

15 THE COURT: Do you have a cite on that?

16 MR. KIM: It's page 609.

17 THE COURT: The full cite.

18 MR. KIM: The full cite is 877 F. Supp. 2d 596.

19 I'm specifically referring to page 609. It's a
20 July 2012 decision. Where Judge Kennelly -- Again, this
21 was an investment manager that was known to the
22 plaintiffs from day one. Plaintiffs have presented

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1 evidence from which a reasonable jury can conclude that
2 they could not have discovered they were injured and
3 that the injury was wrongfully caused by Husman until
4 after 2005 because Husman was concealing information
5 from them. Page 609, Judge.

6 Hold on. I let you --

7 THE COURT: Don't talk to each other. Proceed in a
8 manner which I feel is appropriate. I'm going to give
9 you the floor now and I'll get back to you.

10 MR. KIM: When the defendants claim Mitsias is very
11 limited, we disagree. This court adopted Mitsias,
12 applied it to an investment scam related case, and
13 specifically applied it to an investment manager who was
14 known to plaintiffs from day one.

15 THE COURT: MJK Partners, is that a case about
16 fraudulent concealment, though, fraud concealment
17 statute?

18 MR. KIM: It was for breach of fiduciary duty and
19 RICO, Judge. I think the case is important because it
20 did adopt Mitsias and apply it to a defendant that was
21 not in the medical malpractice case, accepted it and
22 adopted it for a case that was not a scientific case,

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1 and, in fact, applied it to a case involving plaintiffs
2 that were investors in an investment scheme.

3 THE COURT: What about Mr. Singer's argument that
4 Mitsias is really discussing separate independent causes
5 that are not discoverable and that this case is not a
6 separate independent cause, it's simply one cause.

7 MR. KIM: I don't view it as the same causes,
8 Judge. They are different parties and different claims.

9 THE COURT: Different parties no doubt but --

10 MR. KIM: It arises from the same transaction.
11 That I think I can agree to. It arises out from a Sony
12 PlayStation transaction.

13 THE COURT: The Ponzi scheme.

14 MR. KIM: Like the MJK case, those facts between
15 the law firm --

16 THE COURT: It's not like a separate fraud you're
17 alleging here; in other words, you're not alleging that
18 Petters defrauded you in one manner and that the
19 Fredrikson & Byron law firm defrauded you in another
20 manner, both of which contributed to your injuries.
21 What you're alleging here is that the Fredrikson law
22 firm aided and abetted and conspired with Petters to

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1 defraud you in connection with these -- this PlayStation
2 investment.

3 MR. KIM: That's correct. And that we did not know
4 of F & B's possible fault in that transaction, which is
5 what Mitsias says, until sometime in 2012. Then
6 applying MJK because those facts were cloaked in secrecy
7 and because they were absolutely confidential to the
8 world, we could not have known in 2008, '09 or '10,
9 Judge. In fact, they have nothing in the record to show
10 we should have known about F & B's fault or
11 participation or orchestration of a Ponzi scheme prior
12 to March of 2011, and they have the burden of proof on
13 the issue.

14 THE COURT: What about Mr. Singer's argument that
15 everything you have alleged in the complaint about your
16 knowledge of Fredrikson & Byron's role you knew about
17 prior to 2011?

18 MR. KIM: Absolutely false. Our complaint alleges
19 specifically --

20 THE COURT: Give me some examples.

21 MR. KIM: Like, for example, in our complaint we
22 specifically allege that F & B knew that uBid, which was

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1 going to be a middleman buyer in the transaction, also
2 an F & B client, lacked the ability to close a
3 \$79-million transaction. That was a fact not known to
4 us in 2008, '09, or '10.

5 PCI, their client, did not have the financial
6 wherewith all to purchase \$31 million worth of Sony
7 PlayStations.

8 THE COURT: Sorry. Who did not?

9 MR. KIM: PCI. PCI was the Petters company that
10 was going to buy the Sony PlayStations for --

11 THE COURT: You're saying your client did not
12 know -- Plaintiff did not know PCI lacked the ability to
13 close a \$31-million transaction.

14 MR. KIM: Yes. Sorry. \$52-million transaction.
15 They were going to buy it for \$52 million and sell it to
16 uBid and ultimately to Costco for \$79 million. We have
17 very detailed facts in paragraphs 54, 55 talking about
18 F & B's knowledge that they knew Costco -- There was no
19 arrangement whatsoever for Costco to be the end
20 purchaser of these units. Simon Root is representing to
21 our client that Costco is going to be the end buyer,
22 Costco is not going to provide a purchase order until

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1 our transaction closes. They new at that time that
2 Costco didn't exist, that Costco was not going to be the
3 end purchaser, that Petters never had any intention of
4 purchasing Sony PlayStations to sell it to Costco.
5 There's nothing in 2008, '09, or '10 that would have led
6 our plaintiffs to believe that the F & B law firm
7 orchestrated that. Again, those relationships are
8 confidential and secret to the world.

9 It wasn't until the trustee made it publicly
10 known that there were major red flags in that the F & B
11 law firm had major red flags in that they knew or should
12 have known that Petters was running a Ponzi scheme.
13 That's when it became public, Judge, and that's when
14 we --

15 THE COURT: You say you have an affidavit from your
16 client in which your client defers the date he acquired
17 knowledge.

18 MR. KIM: That was specifically provided under
19 2-619(c).

20 THE COURT: That was when?

21 MR. KIM: In paragraph 10 of our affidavit our
22 client specifically states that we learned of F & B --

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1 that Ritchie for the first time became aware of certain
2 factual information, potentially supporting claims that
3 F & B arising out of the Sony PlayStation transaction.

4 THE COURT: Which was when?

5 MR. KIM: May 2012. That affidavit was provided
6 under 2619.

7 THE COURT: Mr. Singer tells me that in
8 February 2012 Ritchie sued F & B.

9 MR. KIM: I was going to address that, Judge. That
10 was for a different transaction. We did another
11 transaction with Petters for something known as
12 Polaroid, the Polaroid company. Petters was involved in
13 Polaroid, we provided financing in connection with
14 Polaroid, and that complaint was specifically related to
15 obtaining security interests in Polaroid assets and
16 F & B law firm was involved in that.

17 THE COURT: It had nothing to do with the
18 PlayStation --

19 MR. KIM: Had nothing to do with Sony PlayStation.
20 Judge, even if you accept their date as true,
21 February 2012, it's still within the timely period.
22 Remember, they have the burden of proving we knew of

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1 F & B's fault prior to March 2011.

2 THE COURT: Anything else?

3 MR. KIM: One point, and I'll be very, very short
4 and I'll conclude on this, your Honor. I know your
5 Honor started at the outset talking about Evanston and
6 essentially applying it retroactively. We respectfully
7 submit that at the time we filed, it was five years.
8 Ganci was the law. Even Evanston court recognized the
9 appellate division, First Division in Evanston adopted
10 Ganci.

11 THE COURT: What about 800 South Wells?

12 MR. KIM: The final decision -- report decision
13 came out six days after we filed our complaint. While
14 we had a very lengthy discussion this morning --

15 THE COURT: It was issued six days after you --

16 MR. KIM: The final decision after rehearing was
17 issued September 25th, 2013, six days after we filed our
18 complaint on September 19th.

19 THE COURT: A decision on a petition for rehearing?

20 MR. KIM: Yes. Let's keep in mind Evanston, also
21 first department, came out and sided with Ganci and
22 recognized there's a number of federal court cases,

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1 including Willowborn (phonetic) and Cotton that all
2 adopted Ganci.

3 So under the Evanston case, Judge, we
4 respectfully submit that the (inaudible) case which came
5 out six months after we filed this complaint should be
6 applied prospectively because to apply retroactively
7 would be extremely harsh and essentially potentially
8 deprive our clients of any remedy here. I would
9 conclude on that.

10 THE COURT: Okay. I don't think you folks had an
11 opportunity to address that aspect of the plaintiff's
12 argument in your papers.

13 MR. SINGER: We did, your Honor.

14 THE COURT: There was a sur reply. Was there a sur
15 sur reply?

16 MR. SINGER: What we did was we responded. When we
17 responded to the amended motion to file an amended
18 complaint, we also responded to all of the arguments in
19 the sur reply and motion to amend.

20 THE COURT: I haven't so much focused on that, so
21 why don't you tell me a little bit about that.

22 MR. SINGER: I will talk about retroactively. Can

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1 I talk about the MJK Partners case first?

2 THE COURT: Yes.

3 MR. SINGER: Your Honor, I think that's been
4 entirely misconstrued here. That case involved two
5 entirely separate injuries. It's even more extreme in
6 that sense than the Mitsias case. It's not just two
7 separate causes of the same injury, one of which was not
8 discovered and not discoverable, which was Mitsias.

9 In MJK Partners it's two different defendants
10 who did two different frauds and caused two different
11 injuries, and knowledge of one did not mean knowledge of
12 the other. Now, Judge, this is a federal case, it's not
13 binding on the court, but it's also entirely besides the
14 point here.

15 On the retroactivity point, the argument is a
16 complete nonstarter under retroactivity law. As your
17 Honor, I think, noted, 800 South Wells was already the
18 law in this district before Evanston was decided
19 certainly and even before the plaintiff submitted his
20 complaint.

21 Applying Evanston retroactively doesn't change
22 anything. You would end up with 800 South Wells, which

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1 was already the law in this district. In any event,
2 court decisions are presumed to apply retroactively.
3 It's only in very extreme cases that courts do not or
4 have not applied certain decisions retroactively. They
5 are few and far between.

6 In those cases it's a situation where there's
7 a clear test. The court has to have announced a brand
8 new rule of law that overrules prior settled law and
9 surprises everyone. If that condition is met, then the
10 court has to find that applying the law prospectively
11 only won't do violence to the rule and that equity
12 favors not applying the rule retroactively. So none of
13 that is true here.

14 Just to start whether this is a new rule of
15 law, the plain language of the statute had been on the
16 books since 1991. Evanston and 800 South Wells both
17 found the plain language of the statute means what it
18 says. That's what's going on here. In Evanston and
19 800 South Wells didn't change --

20 THE COURT: The statute says any lawyer sued in
21 contract, tort, or otherwise.

22 MR. SINGER: Right. It doesn't say by the client,

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1 it doesn't say for legal malpractice. It obviously
2 means what it says. The only contrary case in Illinois
3 that -- in Illinois state court that the plaintiff
4 points to is the Ganci case from the Fourth District, it
5 was obviously an outlier, and anyone reading it and the
6 other case law in the statute at the time would have
7 known that. It contains no reasoning. There were other
8 cases which were cited in Evanston, including the Polsky
9 case in the Second District, which interpreted an
10 identical statute involving accountants, statute of
11 limitations for accountants. It interpreted it the same
12 way 800 South Wells did and Evanston did.

13 There are lots of other cases, as Evanston
14 points out that interpreted statutes with the same
15 language. So that threshold condition of a brand new
16 surprising rule of law is not met. Even if it were,
17 applying it prospectively only would actually frustrate
18 the will of the legislature, as expressed through the
19 plain language of the statute. You can't choose not to
20 apply the plain language of the statute I would submit,
21 your Honor.

22 Equity here certainly doesn't favor the

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1 plaintiffs, especially since this is their second
2 lawsuit against the F & B defendants and they've known
3 of their injury since 2008. And we do lay that out --
4 these arguments out in detail to our response to amended
5 motion to amend. I refer the court to that.

6 Finally, just to respond to the point about
7 the facts that they supposedly knew or didn't know about
8 F & B and, again, I would submit it's utterly irrelevant
9 because what matters is that they knew their injury was
10 wrongfully caused. But if the facts about F & B when
11 they knew them mattered, everything you've heard from
12 them is a conclusion.

13 What my adversary pointed out a few minutes
14 ago is a conclusion. He hasn't told you anything about,
15 yes, once we supposedly discovered and had this aha
16 moment in March or May of 2012 when the trustee
17 announced a settlement with Fredrikson & Byron, we went
18 out and investigated and here's what we found, here's
19 evidence that we found we didn't have before, here's
20 knowledge we obtained that we didn't have before. I
21 haven't heard a single specific. The reason is all of
22 the specifics in their complaint of which there are few,

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1 and that goes to the merits of the complaint, were known
2 to them long before. I know we have gone over your
3 Honor's time.

4 THE COURT: We haven't gotten to 2-615 but give me
5 a moment.

6 (A short recess was had.)

7 THE COURT: I'm going to grant the motion to
8 dismiss the case under Section 2-619. I believe that
9 the claims are time barred. The general rule is that
10 the discovery rule does not wait for the plaintiff to
11 ascertain the identity of the wrongdoer. The discovery
12 rule waits for the plaintiff to determine that he was
13 injured and the plaintiff concedes that his injury
14 occurred no later than December 2008 by which point the
15 FBI had raided Mr. Petters and his firm PCI, PCI and/or
16 Petters had filed bankruptcy, and Mr. Petters had been
17 indicted.

18 The plaintiff also concedes that by that point
19 he knew -- it knew that its injury was wrongfully caused
20 at least as it relates to the fraud and Ponzi scheme
21 orchestrated by PCI and Mr. Petters. The plaintiff's
22 position is that however it could not have known and did.

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1 not know of the role that Fredrikson & Byron law firm
2 played in the Ponzi scheme, that the Petters firm
3 orchestrating.

4 As I read and understand Mitsias, it's really
5 talking about separate and independent causes that are
6 not discoverable. In Mitsias it was something that
7 medical science had not yet discovered. This case,
8 though, it's not one where plaintiff is alleging
9 separate and independent causes. Rather this is a case
10 of collateral liability or derivative liability, I
11 should say. These claims are for aiding and abetting.
12 I don't read Mitsias to go that far and I believe the
13 default rule, the general rule, would apply plaintiff
14 was on inquiry notice no later than December 2008 to
15 ascertain the identity of culpable parties.

16 Because I am granting the 619 motion, I don't
17 need to address the 615 motion. I'll deny that as moot.
18 I'm going to deny leave to file the amended complaint.
19 I don't think you can -- As I read the amended
20 complaint, the interlineations, I don't think that
21 avoids the statute of limitations defense, so I'll deny
22 leave to file the amended complaint.

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1 And that at least as to the defendant
2 Fredrikson & Byron disposes of the case here in the
3 trial court. There are motions before me brought by
4 Martinez and Takesue, which I think having briefed.

5 MR. KIM: They have been briefed.

6 MR. SINGER: Just to clarify, when you say the
7 defendants Fredrikson & Byron, that also includes
8 Mr. Koneck and Mr. Root, the individual attorneys of
9 Fredrikson and Byron?

10 THE COURT: That's correct.

11 So they are briefed?

12 MR. KIM: Yes.

13 THE COURT: Are there hearing dates on that?

14 MR. SCHMAHL: Your Honor, we were hoping to do that
15 today.

16 THE COURT: So Susan will -- Get a hearing date
17 from the clerk and I'll see you all, I suppose, in a few
18 weeks.

19 (Which were all of the proceedings in
20 the above-entitled cause.)

21

22

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Ritchie Captial Management, et al vs. Frederickson & Byron
Hearing - 04/23/2014

1 STATE OF ILLINOIS)
2) SS.
3 COUNTY OF COOK)
4

5 Kristi Landolina, being first duly sworn, on
6 oath says that she is a Certified Shorthand Reporter and
7 a Registered Professional Reporter doing business in the
8 City of Chicago, County of Cook and the State of
9 Illinois;

10 That she reported in shorthand the proceedings
11 had at the foregoing hearing;

12 And that the foregoing is a true and correct
13 transcript of her shorthand notes so taken as aforesaid
14 and contains all the proceedings had at the said
15 hearing.

16 *Kristi Landolina*
17

18 KRISTI LANDOLINA, CSR, RPR

19 CSR No. 084-004611

20 SUBSCRIBED AND SWORN TO
21 before me this 28th day of
22 April, A.D., 2014.

23 *Laura Davis*



24
25 NOTARY PUBLIC

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CERTIFICATE OF SERVICE

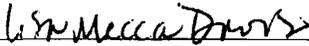
Lisa Mecca Davis certifies that she caused a copy of the attached Notice and Report to be served upon the parties listed below, by first-class mail, proper postage prepaid, this 16th day of May, 2014.

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A-131

EXHIBIT C

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT LAW DIVISION

RITCHIE CAPITAL MANAGEMENT, L.L.C.;)
RITCHIE CAPITAL MANAGEMENT, LTD.; and)
RITCHIE SPECIAL CREDIT INVESTMENTS, LTD.,)

Plaintiffs,)

v.)

FREDRIKSON & BYRON P.A., a Minnesota)
Professional Association; SIMON ROOT, an individual;)
JOHN KONECK, an individual; TIMOTHY E.)
TAKESUE, an individual; and MIGUEL A.)
MARTINEZ, JR., an individual,)

Defendants.)

Case No. _____

FILED LAW DIVISION
2015 SEP 19 PM 2:13
CLERK OF COOK COUNTY

JURY TRIAL DEMANDED
2013LO10488
CALENDAR/ROOM W
TIME 00:00
Other Com Litigation

COMPLAINT

Plaintiffs, Ritchie Capital Management, L.L.C. ("RCM LLC"), Ritchie Capital Management, Ltd. ("RCM Ltd."), and Ritchie Special Credit Investments, Ltd. ("RSCI" and collectively with RCM Ltd., the "Ritchie Lenders," and collectively with RCM LLC and RCM Ltd., the "Plaintiffs"), by and through their attorneys, complain against Defendants as follows:

Introduction

1. Plaintiffs bring this action against: (a) Fredrikson & Byron, P.A. ("F&B"); (b) Simon Root ("Root") and John Koneck ("Koneck") (F&B, Root and Koneck are collectively referred to as the "F&B Defendants"); and (c) Miguel A. Martinez, Jr. ("Martinez") and Timothy E. Takesue ("Takesue") (Martinez, Takesue, and the F&B Defendants are collectively referred to as the "Defendants"), individuals who, at all relevant times, were executive officers of a company then known as uBid.com Holdings, Inc. ("UBID"), for damages arising from the roles the Defendants played in the breaches of fiduciary duty and fraud committed by convicted felon

Thomas Petters ("Petters") and entities he controlled, including Petters Company, Inc. ("PCI"), against Plaintiffs.

2. Petters and his criminal associates, including Deanna Coleman ("Coleman"), Larry Reynolds (whose real name is Larry Reservitz, "Reynolds") and Robert White ("White")¹, operated one of the largest Ponzi schemes in history, spanning more than a decade and costing lenders and investors over \$3 billion. Like many Ponzi schemes, the Petters' operation offered substantial returns not from profits Petters made, but from money Petters raised by defrauding newer investors. Along the way, Petters and his accomplices siphoned tens of millions of dollars for themselves.

3. F&B served as Petters' outside legal counsel during the commission of Petters and his companies' fraudulent and criminal activities. Without Defendants' substantial and knowing assistance, Petters and his cohorts would not have been able to continue to execute their fraudulent scheme aimed at bilking investors, such as Plaintiffs, out of millions of dollars through fake merchandise finance transactions.

4. Specifically, F&B represented Petters and PCI in connection with a joint venture transaction in which the Ritchie Lenders participated. Through that transaction, Petters and PCI defrauded Plaintiffs out of \$31 million in connection with the purported purchase of 232,350 Sony PlayStations (the "PlayStation Transaction"). After representing Petters and his affiliated companies in previous fraudulent and criminal activities, F&B knew its clients well enough to recognize it was aiding and abetting the wrongdoing of Petters and his accomplices in connection with the PlayStation Transaction.

¹ Petters was convicted of multiple counts of money laundering and related conspiracy charges and was sentenced to fifty years in prison. Coleman, Reynolds, and White pled guilty to conspiracy charges and were sentenced to various prison terms.

5. Despite its knowledge, F&B, as well as Koneck and Root, knowingly and substantially assisted Petters' continuing frauds including, but not limited to, his scheme of forging purchase orders by which large retailers, most prominently Costco Wholesale Corporation ("Costco"), were supposedly purchasing large volumes of consumer electronics and other merchandise from PCI. The phony invoices prepared by Petters and his accomplices suggested that hundreds of millions of dollars in inventory was routinely purchased and shipped by him and his companies. The F&B Defendants knew that Petters' operations, and the operations of the purported warehouse middlemen he engaged to accomplish his scheme, were wholly inadequate to handle such volumes of inventory. The F&B Defendants also knew that the legal structure and documents they created were wholly inadequate to protect the interests of Petters' victims, who they repeatedly misled and lulled through numerous misrepresentations.

6. Each F&B Defendant had a continuing role in Petters' broader Ponzi scheme as well as a specific role in the PlayStation Transaction. Without the F&B Defendants' knowing and substantial assistance, the Ponzi scheme would have collapsed years earlier, and Petters and PCI could not have swindled Plaintiffs out of \$31 million through the PlayStation Transaction.

7. F&B represented Petters and PCI in the PlayStation Transaction. Through that representation, F&B assisted Petters and PCI in purposefully withholding material information from Plaintiffs, while at the same time knowing the materiality of the information as it related to Plaintiffs' decision to enter into the PlayStation Transaction. Instead of alerting Plaintiffs to what it knew, or withdrawing from its representation of Petters and PCI, F&B knowingly and substantially assisted Petters and PCI to complete the fraudulent transaction. Had it not been for the statements and representations made and provided by the F&B Defendants to Plaintiffs, Plaintiffs would not have been defrauded out of \$31 million through the PlayStation Transaction.

8. Martinez, Takesue, and UBID also were willing tools through which Petters and PCI operated the fraudulent and wrongful PlayStation Transaction. When called upon, they acted in concert with Petters and PCI by, among other things, providing the phony UBID purchase order at the core of the fraud.

9. The PlayStation Transaction followed the formula Petters used for dozens, if not hundreds, of previous frauds, with the exception that the PlayStation Transaction was the first to involve UBID as a purported middleman between PCI and Costco. On information and belief, the reason UBID was included in the PlayStation Transaction is because White, who has admitted to forging the Costco purchase orders used in previous frauds, was at the time refusing to create more fake purchase orders. As a result, Petters and Coleman involved UBID because Martinez and Takesue agreed to create the UBID purchase order supporting this particular fraudulent scheme.

10. As described in more detail below, Petters and PCI approached Plaintiffs with a proposal that Plaintiffs join PCI in buying 232,500 Sony PlayStations, which Petters and PCI represented they had presold to UBID for resale to Costco. They – along with their legal counsel, the F&B Defendants – persuaded Plaintiffs to provide approximately 55% of the funds needed to buy these goods, with the understanding that Petters and PCI would supply the remainder of the purchase price. Once the invested amounts were repaid with interest, Petters and the Ritchie Lenders would supposedly split the additional profits. To lull Plaintiffs into participating in the PlayStation Transaction after Plaintiffs voiced concerns about UBID's financial capacity, Root represented to Plaintiffs that Costco, not UBID, was going to be the direct purchaser of the PlayStations. Without this representation, Plaintiffs would not have entered the PlayStation Transaction.

11. As explained below, Petters had previously employed this merchandise-financing and “big-box retailer as end-purchaser” structure for many of his Ponzi scheme transactions. Upon information and belief, the F&B Defendants were involved with most if not all of these transactions, including one previous, substantial transaction which threatened to unravel the Ponzi scheme. Some years before the PlayStation Transaction, General Electric Capital Corporation (“GECC”) learned from representatives of Costco that its loans to PCI were secured by bogus Costco purchase orders and fabricated invoices. Petters, with F&B’s substantial assistance, wrote a letter to GECC acknowledging that the Costco receivables pledged to GECC did not exist and bought GECC’s silence by repaying its advances with money fraudulently borrowed from other Ponzi scheme victims. Upon information and belief, the F&B Defendants knew the PlayStation Transaction was a repeat of the GECC fraud, except that this time PCI and Petters were defrauding their joint venture partner, Plaintiffs.

Jurisdiction and Venue

12. This Court has personal jurisdiction over the F&B Defendants pursuant to the Illinois Long Arm Statute, ILCS 5/2-209(1) and (2), because they transacted business within Illinois by dealing with Plaintiffs in Illinois on behalf of Petters and PCI and documenting the transaction through which Plaintiffs were bilked out of \$31 million.

13. Specifically, the F&B Defendants affirmatively and purposefully reached out to Plaintiffs in Illinois through a series of emails, correspondence and/or telephone calls to Plaintiffs’ representatives, who the F&B Defendants knew were located in Illinois, to negotiate and execute the PlayStation Transaction. Moreover, the Note Purchase Agreement and the two promissory notes governing the PlayStation Transaction, all drafted by the F&B Defendants, each expressly state the agreements are governed by Illinois law.

14. This Court has personal jurisdiction over Martinez and Takesue because both individuals reside in Illinois.

15. Venue is proper in this county pursuant to ILCS 5/2-101 because one or more of the events that gave rise to the claims set forth herein occurred in Cook County and because, at all relevant times, Martinez has resided in Cook County.

Parties

16. Plaintiff RCM LLC is a Delaware limited liability company with its principal place of business in Wheaton, Illinois. RCM LLC is the investment adviser to RSCI. RCM LLC negotiated all aspects of the PlayStation Transaction from its offices in Illinois and was to indirectly share in the profits and losses from the PlayStation Transaction.

17. Plaintiff RCM Ltd. is a Cayman Island exempted company.

18. Plaintiff RSCI is a Cayman Island exempted company that invests in securities of companies operating in the United States and abroad. RSCI appointed RCM Ltd. as its administrative agent in connection with the PlayStation Transaction.

19. F&B is a law firm with offices in Minnesota, Iowa, North Dakota, South Dakota, Mexico, and China. Attorneys with F&B, including Root and Koneck, provide legal services as agents of the firm. From approximately 1994 through 2008, F&B's attorneys provided professional legal services as counsel for Petters and his entities, including UBID and PCI.

20. Upon information and belief, for a substantial portion of this period, F&B acted as outside general counsel to Petters, PCI, and UBID and provided a range of legal services to them, including litigation, corporate representation, and regulatory advice. Upon information and belief, F&B earned millions of dollars in fees from Petters and his affiliates over the course of its representations.

21. Root is a member of F&B and, upon information and belief, oversaw a significant portion of Petters' legal work, including legal work for his companies' transactions and corporate work. Root participated in and provided substantial assistance to Petters, PCI, UBID, Martinez, and Takesue in connection with the PlayStation Transaction by, among other things, negotiating and preparing the fraudulent transaction documents and providing credibility to Petters by, among other things, explaining the structure of the PlayStation Transaction, as well as misrepresenting to Plaintiffs key facts regarding the roles of UBID and Costco. Root also insisted the UBID and Costco purchase orders could not be attached to any public filing. F&B and Root made other misrepresentations of fact to Plaintiffs and generally assisted Petters in concealing the wrongdoing, fraud, and breaches of fiduciary duty.

22. Koneck is also a member of F&B, its president, a member of its Executive Committee and Board of Directors, and, upon information and belief, the attorney with overall responsibility for the relationship with Petters. Over the years, Koneck represented Petters and/or his affiliated companies in connection with multiple fraudulent transactions. During that time period, Koneck continuously provided advice to Petters to allow Petters' fraudulent schemes to continue undetected and provided a veil of legitimacy to Petters' operations, when Koneck knew that such transactions and operations were fraudulent.

23. Koneck and Root provided substantial and knowing assistance to Petters and PCI in connection with the fraudulent PlayStation Transaction and knew facts which plainly showed that Petters and PCI were simultaneously defrauding Plaintiffs as well as breaching their fiduciary duty to them.

24. Defendant Martinez is an individual who, upon information and belief, resides in Cook County, Illinois. At all relevant times, Martinez served as the Secretary and Chief

Financial Officer for UBID. Upon information and belief, Martinez personally created the fraudulent UBID purchase order which Petters and the F&B Defendants represented was a necessary part of the PlayStation Transaction.

25. Defendant Takesue is an individual who, on information and belief, resides in Kane County, Illinois. At all relevant times, Takesue served as the Executive Vice President, Merchandising for UBID. Upon information and belief, Takesue knew about and/or participated in the creation of the UBID purchase order which Petters and the F&B Defendants represented was a necessary part of the PlayStation Transaction.

Background Allegations

A. F&B's Representation of Petters and His Companies Began in 1994.

26. Upon information and belief, F&B first represented Petters and his businesses starting in 1994 when Petters retained F&B in connection with litigation against Digi-Tel Holdings, Inc. concerning Petters' alleged purchase of thousands of cellular telephones. F&B charged and collected hundreds of thousands of dollars in fees in connection with the matter.

27. By 1998, F&B became Petters' and PCI's principal outside counsel. One of F&B's engagements during that time was defending Petters against fraud charges brought by an investor, Richard Hettler ("Hettler"), who claimed Petters swindled him out of \$700,000.

28. In that same year, Petters and PCI retained F&B to represent them in a large financing transaction with GECC. Through that transaction, GECC agreed to make up to \$50 million available for Petters and his affiliates to finance the purchase of large amounts of consumer goods. Upon information and belief, GECC's advances under the loan facility were purportedly used to purchase electronics equipment. PCI would present GECC with a purchase order from a large reputable retailer, which was usually, if not always, Costco. Based upon the

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strength of the purchase order, and a security interest in the proceeds associated with such purchase order, GECC would advance the purchase price so that PCI could acquire the merchandise from its supplier for resale to Costco.

29. By October 2000, PCI owed GECC well over \$50 million, all of which was supposedly secured by PCI receivables from Costco. When several of PCI's invoices to Costco were not paid on time, alarms went off at GECC. On or about October 23, 2000, GECC contacted Costco directly to verify that PCI had outstanding and unpaid invoices with Costco. GECC learned from Costco that there were no outstanding PCI invoices and that Costco did not owe PCI any money. F&B represented Petters and his affiliates in making certain that the resolution of the GECC matter was quietly effectuated. Had F&B then alerted the authorities or publicly revealed the GECC fraud, the Ponzi scheme would have likely been exposed and Petters would not have been able to keep the scheme afloat for eight more years. During that time period, Petters raised monies from others whom he persuaded to invest in his Ponzi scheme and repaid GECC tens of millions.

30. F&B also represented Petters in other matters in which it would have been obvious that its client had committed fraud. In or around February 1999, for example, Premier Bank ("Premier") sought to attach a \$1.2 million PCI promissory note that PCI issued to Hettler. Hettler subsequently transferred the note to one of Premier's borrowers, Ruth Kahn ("Kahn"). After Kahn invoked her Fifth Amendment privilege against self-incrimination, Petters ultimately paid substantial sums to settle the Premier matter, but not before the Sheriff of Hennepin County, Minnesota formally seized the original promissory note from Koneck's desk at F&B. By July 1999, Premier was convinced that the PCI note was fraudulent and reported that fact to the federal authorities.

31. In early 2004, F&B learned Petters had been accused of perpetrating financial crimes. In June of that year, an investor in another private equity fund (referred to as "Lancelot"), which had a large investment with PCI, hired an investigation firm, Back Track Reports ("Back Track"), to perform due diligence on Petters and his companies. Back Track discovered Petters had been twice convicted for passing fraudulent checks, once in Colorado and once in Minnesota. When Lancelot representatives confronted Petters with this information, Petters called upon Koneck at F&B to manage the response.

32. Upon information and belief, Koneck wrote Lancelot's Greg Bell ("Bell") a letter denying Petters had a criminal record. Although Petters' convictions had by that time been sealed from the public, they were surely not erased from the memories of F&B's attorneys.

33. By 2008, Petters' efforts to keep his Ponzi scheme afloat required Petters to call upon F&B with some regularity. In February and May of that year, F&B represented Petters and Petters Group Worldwide, LLC ("PGW") in drafting and negotiating a series of documents pursuant to which the Ritchie Lenders and their affiliates loaned Petters and PGW an aggregate of \$158 million (the "PGW Loans"). The PGW Loans were to be secured by a pledge of the stock of Polaroid Corporation ("Polaroid"), an indirect wholly owned subsidiary of PGW. However, the pledge of stock was never made.²

34. During the course of these PGW transactions, F&B and Root knowingly or recklessly made misstatements of fact which served to aid and abet this separate Petters' fraud. Among other things, while working on completing the PGW loan transaction with Plaintiffs,

² RCM LLC, RSCI, and related investment funds (the "PGW Lenders") previously brought a RICO action against F&B and other defendants in the District Court for the District of Minnesota. That case was dismissed without prejudice until after the validity of the PGW Lenders' security interests in Polaroid has been adjudicated in unrelated bankruptcy adversary proceedings. Plaintiffs reserve the right to amend this Complaint at a future date to include the PGW Loans.

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Petters, with F&B's assistance, tried to raise funds from another entity to be secured by the same collateral promised to Plaintiffs and their affiliates by Petters.

35. At the time of these transactions, the F&B Defendants knew of Petters' desperate need for money and of his misrepresentations to Plaintiffs concerning his companies' financial condition in an effort to attract additional capital. By the time of the PlayStation Transaction, F&B had even greater reason to question Petters' integrity.

B. The PlayStation Transaction

36. By March 2008, unbeknown to Plaintiffs, Petters' more than decade long Ponzi scheme was soon to unravel. With the substantial assistance of the Defendants, however, Petters was able to close the PlayStation Transaction to keep the scheme alive a bit longer.

37. In March 2008, Petters first approached Plaintiffs' representatives with a proposal. As Petters and the F&B Defendants represented to Plaintiffs, Petters and/or PCI purportedly had the ability to buy 232,350 Sony PlayStations for approximately \$52 million, but needed between \$31 and \$35 million to close the proposed transaction. Petters and the F&B Defendants represented that the PlayStations were effectively pre-sold for \$79 million and that whoever partnered with PCI on the deal would not only be repaid in approximately ninety (90) days with interest, but would also partner with PCI in sharing the approximately \$27 million in anticipated profits from the deal.

38. The transaction was documented by a series of fraudulent purchase orders, pursuant to which PCI was to purchase the units from a company called Nationwide International Resources Inc. ("Nationwide"). Plaintiffs did not know Nationwide was a Petters' front corporation nominally controlled by Reynolds (who later plead guilty to conspiracy to commit money laundering in connection with Petters' related fraudulent schemes) and, upon information

and belief, Nationwide had played a similar role in most, if not all, of Petters' prior merchandise financing frauds.

39. As Petters and the F&B Defendants explained to Plaintiffs, once the units were "acquired" from Nationwide, PCI would sell them to UBID under a \$79 million purchase order issued by UBID, for a profit of \$27 million, and then UBID would ultimately resell those units for \$79 million to Costco. Root sent copies of the PCI and UBID purchase orders to Plaintiffs, copies of which are attached as Exhibit 1. At that time, Root represented the Costco purchase order would not be available until after closing. At the time, UBID was a public corporation, F&B served as its legal counsel, and Takesue and Martinez were officers and employees of UBID.

40. Martinez and Takesue, long-time business associates of Petters and his companies, knew others would rely on the UBID purchase order and knew the PlayStation Transaction was fraudulent. Nonetheless, Martinez and Takesue provided the purchase order to PCI to support the PlayStation Transaction, knowing UBID lacked the financial wherewithal to support the claimed purchase.

41. Martinez and Takesue created and issued the fraudulent purchase order knowing full well that UBID could never pay the \$79 million it had agreed to pay for the PlayStations. Based on their prior relationship with Petters, and Petters' involvement in UBID, Martinez and Takesue had to have been aware of their roles as part of the fraudulent scheme orchestrated by Petters.

42. Root explained to Plaintiffs and their counsel the structure of the PlayStation Transaction, which was implemented through three key documents. First, PCI and Petters issued promissory notes to the Ritchie Lenders. Second, there was a "Note Purchase Agreement" which

governed repayment and other issues relating to the promissory notes. Third there was a letter agreement, drafted by Root, which provided that after all expenses of the PlayStation Transaction (including loans by the noteholders and advances by PCI and/or its affiliates, in each case together with interest thereon) had been paid in full, the Ritchie Lenders and PCI would equally share in the remaining profits.³ Each of these documents expressly states it is governed by Illinois state law.

43. As explained to Plaintiffs by the F&B Defendants, the total purchase price of the PlayStation merchandise to be acquired was \$52 million, with the Ritchie Lenders to provide the financing for a significant portion of the purchase price for the transaction. Ultimately, it was proposed that the Ritchie Lenders would loan \$31 million to PCI and Petters towards the total purchase price for the merchandise, and PCI and/or Petters would advance the remaining \$21 million. The Ritchie Lenders' loans were to receive repayment priority, would be repaid with interest, and would be secured by the purchase order from UBID. After the Ritchie Lenders' loans were repaid, PCI's and Petters' advance and their expenses would be repaid with interest at the same interest rate paid to the Ritchie Lenders.

44. In performing diligence on whether to invest in the PlayStation Transaction, Plaintiffs and their representatives expressed to the F&B Defendants specific concerns about the structure of the PlayStation Transaction, how the advances would be collateralized, and how UBID would pay for the merchandise. Plaintiffs have since learned that these questions precipitated a scramble on how to best respond or, more appropriately, who would be the best

³ The letter agreement states that it "memorializes the agreement between Petters Company, Inc. ('PCI') and Ritchie Capital Management, Ltd. ('Ritchie') regarding the PlayStation 3s . . . subject to the purchase order . . . issued by UBID, Inc.[.]" (emphasis added).

person to convincingly mislead Plaintiffs into investing. Petters and PCI decided that F&B and Root would be the candidates best suited for that role and F&B actively took on that role.

45. On March 20, 2008, Plaintiff's counsel, Kenneth Rosenblum ("Rosenblum"), wrote an email to Petters' representative David Baer ("Baer"), stating: "I remain slightly confused as to the exact steps in the process. Can you pls very briefly give me a roadmap as to what happens once Ritchie loans \$ to PCI (eg, role of Ubid, etc.). Thanks."

46. The following morning, Baer forwarded Rosenblum's email to Root: "Simon, Can you please talk with Deana and walk Ken through this today. Not sure how much or what we want to tell them, but I am sure you two will figure it out."

47. Later on the morning of March 21, 2008, Rosenblum wrote to Root: "As we understand it, the transactions are as follows: 1. Ritchie lends 37M to PCI. 2. PCI Buys 232,500 Playstations from Nationwide. Ritchie takes security interest in this PO. 3. Petters sells as PS to uBid under second PO. 4. uBid sells to Costco." Rosenblum then explained the issues raised by this structure: "1. Seems to us we need a security interest in the second PO (the uBid PO)...2. We need to connect the Costco payment to uBid to PCI's obligations to Ritchie- where is the obligation of uBid to pay over to PCI the proceeds received from Costco?"

48. Minutes later, Rosenblum sent an additional email to Root as follows: "also, what is troubling, is that uBid doesnt appear to have the financial wherewithal to buy the PS from PCI. If the unexpected happens, Ritchie could be left with a worthless receivable from uBid, which also exposes Ritchie."

49. Instead of responding to Rosenblum's reasonable requests with a clear explanation of a supposedly legitimate transaction, Root immediately forwarded Rosenblum's email to Coleman with "High" urgency.

50. Coleman responded to Root later that day with an explanation that should have made no sense to Root: "Petters Company will be selling the Playstations to Costco not uBid. When we receive the PO from Costco, Ubid will reissue there [sic] PO."

51. Instead of notifying Rosenblum there was no way the Ritchie Lenders' \$31 million was going to be used to purchase PlayStations for resale to Costco, F&B and Root continued to mislead Plaintiffs about the proposed transaction and do whatever was necessary to convince the Ritchie Lenders to advance their share of the financing needed to acquire the PlayStation merchandise from Nationwide.

52. F&B wore multiple hats in connection with the PlayStation Transaction. First, it acted as counsel to PCI and Petters. Second, it drafted and edited the letter agreement that established the joint venture for the PlayStation Transaction. Third, at Petters' request, it explained to Plaintiffs how the PlayStation Transaction would work, how their loans would be secured, how their loans would be repaid, and how they would thereafter profit from participating in the joint venture. Fourth, it knowingly helped conceal Petters' and PCI's breaches of fiduciary duty in addition to their fraud by representing – after Plaintiffs' counsel questioned Root about UBID's finances - that Costco (and not UBID) would be acquiring the PlayStations from PCI, notwithstanding their earlier representations that UBID would be the initial purchaser.

53. In addition to its professional responsibilities to avoid assisting a client by drafting or delivering documents that it knows or should know are fraudulent, and to not aid and abet the concealment of a fraud, F&B knew that PCI was forming a joint venture with the Ritchie Lenders in which PCI would be entrusted with the joint venture's property.

54. As counsel to PCI, a partner in the PlayStation Transaction with the Ritchie Lenders, F&B was charged with special obligations in dealing with Plaintiffs. F&B had, at a minimum, a duty of candor and full disclosure to Plaintiffs in addition to a responsibility not to mislead Plaintiffs. These duties should have resulted in F&B disclosing to Plaintiffs the following information:

- a. The fact that UBID, also a client of F&B, lacked the ability to fund or close a \$79 million transaction;⁴
- b. The fact that UBID had never previously been involved in a Petters merchandise financing;
- c. The fact that UBID was controlled by Petters and the sale to UBID was not an arm's length transaction;
- d. The fact that PCI did not have the funds it represented it was committing to the PlayStation Transaction and had not in fact wired any funds to support the purchase of the PlayStations; and
- e. The fact that Petters had previously been involved in transactions where he had forged Costco purchase orders, which was particularly pertinent because of Root's eleventh hour disclosure that Costco, and not UBID, would be the direct purchaser of the PlayStations.

55. F&B also knew and/or recklessly disregarded the truth about the following:

- a. The PlayStation Transaction was fictitious and was part of Petters' long-running Ponzi scheme;

⁴ F&B had represented UBID since at least early 2005 when it assisted Petters in merging UBID into a publicly-traded shell company. The Form 10-K of UBID for the year ended December 31, 2007 shows that UBID had total assets of only \$15.5 million, including cash and cash equivalents of only \$7.7 million, total revenue of \$43 million, and a net loss of \$7 million.

- b. No arrangements had been made with Costco to purchase the PlayStations;
- c. Petters never intended to cause PCI to use the Ritchie Lenders' funds to buy the PlayStations from Nationwide; instead, the money was to be, and was, diverted to support Petters' collapsing empire and to line his own pockets;
- d. Petters never intended for UBID to purchase the PlayStations;
- e. Notwithstanding the UBID purchase order that they created, Takesue and Martinez never intended to cause UBID to pay \$79 million for the PlayStations;
- f. UBID did not have the financial wherewithal to purchase the PlayStations for \$79 million;
- g. PCI and Petters had no intention of investing \$21 million of their own funds to purchase the PlayStations and in fact made no contributions to the PlayStation Transaction; and
- h. PCI and Petters did not have the \$21 million needed to contribute to the PlayStation Transaction to enable PCI to buy the PlayStations.

56. Plaintiffs reasonably relied on PCI and Root's story about Costco being the direct purchaser and about PCI's false promise to contribute \$21 million when they provided \$31 million to finance the PlayStation Transaction on or about March 21, 2008.

57. Subsequent to the execution of the PlayStation Transaction documents, the F&B Defendants engaged in further communications with Plaintiffs concerning the PlayStation Transaction, the PlayStation merchandise, and the joint venture relating to the PlayStation Transaction. Such communications included, among other things, e-mails relating to the negotiation of the account control agreement supporting the PlayStation Transaction that would provide the Plaintiffs with a security interest in the bank account into which payment for the

PlayStations was to be made. At no time during such communications did the F&B Defendants disclose or correct their misrepresentations to Plaintiffs or otherwise reveal the truth about Petters' and PCI's fraudulent activity and violations of the fiduciary duties owed to Plaintiffs.

C. Post-PlayStation Transaction Disclosures as to Defendants' Knowledge and Participation

58. On or about September 24, 2008, agents from the FBI, the IRS, and other federal agencies, along with local law enforcement agencies, executed search warrants on the headquarters of PCI and Petters' personal residence.

59. To obtain the search warrants, the FBI filed an affidavit ("FBI Affidavit") detailing information from their on-going investigation of Petters and his cohorts. The FBI Affidavit contained the following statements:

a. "PCI is the venture capital arm of numerous PETERS enterprises. The money raised by PETERS through PCI is used by PETERS for his other business ventures and to support his extravagant lifestyle." (FBI Affidavit at ¶ 7(a).)

b. "PETERS solicited investors to invest substantial sums in PCI. To induce investors to invest, the investors were advised funds would be secured by transactions (which were fictitious). Investors were then provided with false documents relating to purchase and resale of merchandise. The fraudulent documents purport to evidence PCI purchasing merchandise from vendors . . . Additional purchase orders falsely detail PCI's sale of the same merchandise to [retail] stores[.]" (*Id.* at ¶ 7(c).)

c. The purchase orders and other documents in support of the transactions are entirely fabricated. PCI does not buy any merchandise from [the vendors]. Nor does

PCI sell merchandise as described in the purchase orders [to retailers]. PETERS uses these documents to induce investors to invest money.” (*Id.* at ¶ 7(d).)

60. The FBI Affidavit also set forth information gathered from recordings of conversations among the participants in Petters’ fraudulent scheme. “In September 2008, the government obtained consensually monitored conversations involving PETERS, DEANNA COLEMAN, ROBERT WHITE . . . and other persons.” (FBI Affidavit at ¶ 12.) As set forth below, those conversations revealed, among other things, that Petters was fully aware of, and was conducting, the fraud and indicated he intended to flee the country if the fraud were revealed:

a. “In these recordings, PETERS readily admits executing the fraud scheme by providing fraudulent information to investors. PETERS repeatedly discusses the stressed financial condition of the company, as well as the need for more capital. PETERS continues to ask [COLEMAN] to prepare false documents, noting that he doesn’t know what choice they have. PETERS talks about fleeing the country and creating fabricated defenses if the fraud is discovered.” (*Id.* at ¶ 12(a).)

b. “PETERS states that [one Conspirator] told PETERS that they are ‘a little paper manufacturing plant.’ On one occasion, PETERS states that he and [that participant] would be jointly implicated in a scheme to defraud investors out of \$130 million.” (*Id.* at ¶ 12(b).)

c. Another participant “describes the scheme as a ‘Ponzi scheme,’ and estimates that at least \$100 million of PCI’s debt is fraudulent.” (*Id.* at ¶ 12(c).)

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d. A participant “asks that COLEMAN prepare purchase orders to be submitted to investors so that the investors will extend the due dates on debt.” (*Id.* at ¶ 12(d).)

e. A participant “admits that PETTERS told him about the fake purchase orders, and that [the participant] has known about this for many years. [The participant] estimates the amount of the fraud as in excess of \$2 billion.” (*Id.* at ¶ 12(f).)

61. On September 8, 2008, in a recorded conversation between Petters and his co-conspirator Coleman, Petters disclosed Koneck’s knowledge and direct involvement in the conspiracy to defraud Plaintiffs. Petters even explicitly acknowledged F&B’s role:

Coleman: So what did John Koneck say about?

Petters: About what?

Coleman: About Bob then?

Petters: Oh, that was awhile ago.

Petters: He said you and Deanna should talk to each other. I don't trust Bob White. Neither does Dave Marshall [another F&B partner]. And I said why. And he goes because he'd throw you guys under the bus if something was ever wrong. He'd throw you and Deanna under the bus and say it was all your fault. He's done it before to others and you know he's done it to you and I said that's all he said.

* * *

Petters: Well John [Koneck] said your defense claim, if you ever had a problem, is you guys are just the buyer of paper. The only ones you have risk on are like the PlayStation or you said you did it yourself. And the other one where you said you did it yourself, you know when you said you did it, the TVs[.]

62. As these government taped recordings demonstrate, F&B (specifically Koneck) had knowledge of and facilitated Petters’ conspiracy by providing material advice to assist

Petters in defrauding Plaintiffs (and other lenders) out of tens of millions in loans to Petters and his criminal entities.

63. With the Ponzi scheme's end just days in the future, on or around September 22, 2008, Petters made a series of phone calls to Koneck regarding the increasingly serious problems he was facing.

64. In a recorded conversation with Coleman on September 22, 2008, Petters told Coleman that he "just got done talking with John Koneck, who is a really good friend of ours." Petters explained that after Koneck had asked him if he was ok, Petters responded "we got problems, John, and I'm just kinda here to tell you that the problems are, you know, big."

65. An hour later, in a recorded conversation with co-conspirator White, Petters told White there was only one way that he knew to get out. Petters had "a meeting with John Koneck and David Baer . . . cuz they've been wanting to meet with [me] for two months because of what [their] risks are." Petters told Koneck that their risks were "high."

66. Koneck then advised Petters that "at some point, you gotta tell the U.S. Attorney if we can't do something so that we can get them working with us, not against us. Ya know, like the hedge funds, blame it on them."

67. These conversations, secretly taped by the government and admitted into evidence against Petters and others in their criminal trials, demonstrate that Koneck conspired to assist Petters and was regularly aware of his role as part of Petters' overall fraudulent activities at the time he provided legal counsel to Petters and PCI, and specifically, he knowingly and substantially assisted the fraudulent PlayStation transaction, through his role as Petters' counsel.

Count I

(Aiding and Abetting Breach of Fiduciary Duty Against the F&B Defendants)

68. Plaintiffs repeat and reallege each and every allegation set forth above as if fully set forth herein.

69. Through their various wrongful actions detailed above, Petters and PCI defrauded, and breached their fiduciary duty to, Plaintiffs, which caused substantial harm to Plaintiffs.

70. The F&B Defendants had more than a decade long relationship with Petters and his companies. Through this long-term and in-depth relationship, the F&B Defendants gained, among other things, actual or constructive knowledge of Petters' and PCI's fraudulent conduct and other wrongdoings.

71. In this case, the F&B Defendants were regularly aware of their roles as part of the overall scheme orchestrated by Petters and PCI to defraud Plaintiffs and which resulted in breaches of their fiduciary duties to Plaintiffs.

72. Specifically, upon information and belief, the F&B Defendants gained specific knowledge through their long personal and professional relationships with Petters that Petters had committed similar frauds in the past, that he was in desperate financial straits at the time of the PlayStation Transaction, that UBID could not possibly acquire the PlayStations, and that Petters was employing them to overcome Plaintiffs' misgivings about the transaction to ensure that the phony UBID and Costco purchase orders, the proceeds of which were to secure Plaintiffs' advances, would not be publicly disclosed by means of a publicly-filed UCC financing statement.

73. The F&B Defendants knowingly provided substantial assistance to Petters' and PCI's wrongdoing through their drafting, advice, negotiation, and efforts to persuade Plaintiffs to enter into the PlayStation Transaction.

74. By reason of the foregoing, the F&B Defendants are jointly and severally liable for aiding and abetting Petters' and PCI's breaches of fiduciary duties to Plaintiffs, and therefore, are liable for the resulting damages suffered by Plaintiffs from those breaches in an amount of not less than \$31 million.

75. The F&B Defendants' conduct in aiding and abetting Petters and PCI in their breach of fiduciary duty to Plaintiffs was, at all times, undertaken in a purposeful way, displaying utter indifference to Plaintiffs' known rights, thereby justifying the recovery of punitive damages.

WHEREFORE, Plaintiffs Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., and Ritchie Special Credit Investments, Ltd. demand judgment against Defendants Fredrikson & Byron P.A., Simon Root, and John Koneck for compensatory damages, consequential damages, punitive damages in an amount sufficient to punish the Defendants for their willful acts and to deter others from committing such acts, interest, attorneys' fees and costs, and such other and further relief as the court deems just and equitable.

Count II

(Aiding and Abetting Breach of Fiduciary Duty Against Martinez and Takesue)

76. Plaintiffs repeat and reallege each and every allegation set forth above as if fully set forth herein.

77. Through their various wrongful actions detailed above, Petters and PCI defrauded, and breached their fiduciary duty to, Plaintiffs, which caused substantial harm to Plaintiffs.

78. Martinez and Takesue were long time associates of Petters and his companies. Since approximately 2003, Petters had effective control over UBID. Martinez and Takesue knew that the PlayStation Transaction was fraudulent and that Plaintiffs were entering into the PlayStation Transaction in reliance on the UBID purchase order.

79. By creating and issuing the fraudulent purchase order knowing full well that UBID had never before been a participant in a Petters merchandise financing transaction and that UBID could never pay the \$79 million it had agreed to pay for the PlayStations, Martinez and Takesue aided and abetted PCI's and Petters' fraud and breach of fiduciary duty by knowingly providing substantial assistance and encouragement to Petters and PCI.

80. Martinez and Takesue had to have been aware of their roles as part of the fraudulent scheme orchestrated by Petters and PCI to defraud Plaintiffs and which resulted in breaches of their fiduciary duties to Plaintiffs.

81. By reason of the foregoing, Martinez and Takesue are jointly and severally liable for aiding and abetting Petters' and PCI's breaches of fiduciary duties to Plaintiffs, and therefore, are liable for the resulting damages suffered by Plaintiffs from those breaches in an amount of not less than \$31 million.

82. Martinez and Takesue's conduct in aiding and abetting Petters and PCI in their breach of fiduciary duty to Plaintiffs was, at all times, undertaken in a purposeful way, displaying utter indifference to Plaintiffs' known rights, thereby justifying the recovery of punitive damages.

WHEREFORE, Plaintiffs Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., and Ritchie Special Credit Investments, Ltd. demand judgment against Defendants Timothy E. Takesue, and Miguel A Martinez, Jr. for compensatory damages, consequential damages, punitive damages in an amount sufficient to punish the Defendants for their willful acts and to deter others from committing such acts, interest, attorneys' fees and costs, and such other and further relief as the court deems just and equitable.

Count III
(Conspiracy to Commit Fraud Against All Defendants)

83. Plaintiffs re-allege each and every allegation set forth above as if fully set forth herein.

84. An agreement existed between and among each of the Defendants to defraud Plaintiffs out of millions of dollars through the PlayStation Transaction.

85. The Defendants unlawfully participated in and assisted Petters and PCI in connection with the PlayStation Transaction, which was a scheme designed to defraud Plaintiffs.

86. Specifically, at all relevant times, the Defendants knew that Petters and PCI acted fraudulently and knew, or acted in reckless disregard of the truth, that they were, in fact, engaged in a massive Ponzi scheme that swindled lenders and investors such as Plaintiffs. They also knew or acted in reckless disregard of the truth that monies advanced to Petters and PCI would never be repaid.

87. Although the Defendants may have learned of the criminal activity through attorney-client communications, such communications were not privileged because of the crime-fraud exception to the attorney-client privilege.

88. Had F&B refused to assist Petters and PCI in connection with the PlayStation Transaction, Plaintiffs would have become aware that they should not participate in the PlayStation Transaction and would never have suffered these substantial losses.

89. While they were engaged in assisting Petters and PCI as part of their fraudulent schemes, the Defendants made false statements of material fact to Plaintiffs and/or concealed material facts about Petters' on-going criminal conduct that were required to be disclosed in order to make other statements made by Petters and his criminal associates to Plaintiffs in connection with the PlayStation Transaction not misleading, upon which Plaintiffs relied.

90. The Defendants' assistance of Petters and his criminal associates involved at least one overt act in furtherance of the fraudulent scheme, rendering the Defendants jointly and severally liable for all damages to Plaintiffs arising from such illegal conduct.

91. As a result of the Defendants' conspiracy to defraud Plaintiffs through the PlayStation Transaction, Plaintiffs suffered monetary damages in an amount of not less than \$31 million.

92. By reason of the foregoing, the Defendants are jointly and severally liable for conspiracy to defraud Plaintiffs, and consequently, are liable for the damages suffered by Plaintiffs as a result of that conspiracy in an amount of not less than \$31 million.

93. The Defendants' conduct in their conspiracy with Petters and PCI to defraud Plaintiffs was, at all times, undertaken in a purposeful way, displaying utter indifference to Plaintiffs' known rights, thereby justifying the recovery of punitive damages.

WHEREFORE, Plaintiffs Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., and Ritchie Special Credit Investments, Ltd. demand judgment against Defendants Fredrikson & Byron P.A., Simon Root, John Koneck, Timothy E. Takesue, and Miguel A Martinez, Jr. for compensatory damages in the minimum amount of \$31 million, consequential damages, punitive damages in an amount sufficient to punish the Defendants for their willful acts and to deter others from committing such acts, interest, attorneys' fees and costs, and such other and further relief as the court deems just and equitable.

Count IV
(Aiding and Abetting Fraud Against All Defendants)

94. Plaintiffs re-allege each and every allegation set forth above as if fully set forth herein.

95. During the course of the conduct described herein, Petters, PCI, and their criminal associates made misrepresentations of material fact to Plaintiffs concerning the PlayStation Transaction, including, without limitation that: (i) the funds advanced by Plaintiffs would be used to purchase the PlayStations; (ii) PCI would invest \$21 million of its own capital in the transaction; (iii) UBID would purchase the PlayStations for the sum of \$79 million; and (iv) Costco would ultimately acquire the PlayStations for the amount paid by UBID for the PlayStations.

96. Specifically, Petters, PCI, and their criminal associates falsified purchase orders, and misrepresented the course of payments in respect thereof, in order to deceive Plaintiffs that Petters' businesses were thriving. Such acts constituted fraud by Petters, PCI, and their criminal associates against Plaintiffs.

97. The F&B Defendants knew or acted in reckless disregard of the truth that Petters, PCI, and their criminal associates acted fraudulently in connection with the PlayStation Transaction.

98. Specifically, the F&B Defendants knew or acted in reckless disregard of the truth that the PlayStation Transaction was a fraud, much like the forged Costco purchase orders given to GECC years earlier.

99. Despite having such knowledge, or in reckless disregard of the truth, the F&B Defendants knowingly and substantially assisted or encouraged Petters, PCI, and their criminal associates in achieving the fraud in the PlayStation Transaction. At the time of their assistance, the F&B Defendants were regularly aware of their role in Petters and PCI's wrongful, tortious and fraudulent conduct.

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100. Martinez and Takesue similarly knowingly and substantially assisted Petters' and PCI's fraud. While UBID had neither the intention nor the ability to acquire the PlayStations for \$79 million, Martinez and Takesue nonetheless created the unreliable UBID purchase order to induce Plaintiffs to advance \$31 million for the PlayStation Transaction. At the time of Martinez's and Takesue's assistance, they were regularly aware of their roles in Petters' and PCI's wrongful, tortious, and fraudulent conduct.

101. By reason of the foregoing, the Defendants are jointly and severally liable for aiding and abetting the fraud committed by Petters and PCI against Plaintiffs and, consequently, are liable for the damages resulting to the Defendants from that fraudulent conduct in an amount of not less than \$31 million.

102. The Defendants' conduct in aiding and abetting Petters and PCI in their fraud upon Plaintiffs was, at all times, undertaken in a purposeful way, displaying utter indifference to Plaintiffs' known rights, thereby justifying the recovery of punitive damages.

WHEREFORE, Plaintiffs Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., and Ritchie Special Credit Investments, Ltd. demand judgment against Defendants Fredrikson & Byron P.A., Simon Root, John Koneck, Timothy E. Takesue, and Miguel A Martinez, Jr. for compensatory damages in the minimum amount of \$31 million, consequential damages, punitive damages in an amount sufficient to punish the Defendants for their willful acts and to deter others from committing such acts, interest, attorneys' fees and costs, and such other and further relief as the court deems just and equitable.

**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT LAW DIVISION**

RITCHIE CAPITAL MANAGEMENT, L.L.C.;)
RITCHIE CAPITAL MANAGEMENT, LTD.; and)
RITCHIE SPECIAL CREDIT INVESTMENTS, LTD.,)

Plaintiffs,)

v.)

Case No. _____)

FREDRIKSON & BYRON P.A., a Minnesota)
Professional Association; SIMON ROOT, an individual;)
JOHN KONECK, an individual; TIMOTHY E.)
TAKESUE, an individual; and MIGUEL A.)
MARTINEZ, JR., an individual,)

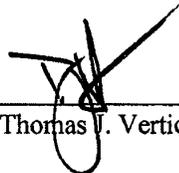
JURY TRIAL DEMANDED

Defendants.)

**ILLINOIS SUPREME COURT RULE 222
AFFIDAVIT REGARDING DAMAGES SOUGHT**

Pursuant to Illinois Supreme Court Rule 222(b) the plaintiffs in this action, Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., and Ritchie Special Credit Investments, Ltd., hereby state that they seek money damages in an amount in excess of \$50,000.

Under penalties of perjury as provided by law by Section 1-109 of the Illinois Code of Civil Procedure, the undersigned hereby certifies that the statements set forth in this instrument are true and correct.



Thomas V. Verticchio, counsel for plaintiffs

Dated: September 18, 2013

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PETTERS COMPANY, INC.

4400 BAKER ROAD, SUITE 200, MINNETONKA, MN 55343
 PHONE 952-934-9918 FAX 952-975-2295

PURCHASE ORDER

TO: NATIONWIDE INT'L RESOURCES SHIP TO: WILL ADVISE
 2346 WESTWOOD BLVD.
 LOS ANGELES, CA 90046

ORDERED BY:	TOM PETTERS	PURCHASE ORDER NUMBER:	49237
DATE:	3-19-08	SHIP VIA:	BEST WAY
PAYMENT TERMS:	WIRE	F.O.B. POINT	CA

ITEM NO.	DESCRIPTION	UNIT	QTY.	UNIT COST	TOTAL AMOUNT
98006	SONY PLAYSTATION 3 40GB SYSTEM		232,350	\$223.80	\$51,999,930.00
	\$15,000,000 3/19/08 - Ref #4215				
SUBTOTAL					\$51,999,930.00
Shipping charges					
Handling charges					
Insurance					
Tax rate <input style="width: 50px;" type="text"/> % Tax					\$0.00
TOTAL DUE					\$51,999,930.00

Your receipt and acceptance of this purchase price for the inventory which is the subject of this purchase order shall be deemed acknowledgment of the following: (i) all such inventory is being held by you solely for our account and subject to our instructions, with due care; (ii) you have no further rights in such inventory and will defend title to such inventory on our behalf as well as our successors and assigns; and (iii) all such inventory shall be specifically excluded from any and all liens and security interest in favor of your creditors.

EXHIBIT

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INVOICE

Date: 3/19/2008 INV. # 17327

From: NATIONWIDE INTL RESOURCES, INC.
 2346 WESTWOOD BLVD., SUITE 6
 LOS ANGELES, CA 90084
 310-470-3910 PHONE
 310-470-3970 FAX

To: PETERS COMPANY, INC.	
TOM PETERS	
4400 BAKER ROAD	
MINNETONKA, MN 55343	

REQUISITIONED BY	DELIVERY DATE REQUESTED	SHIP VIA	FOB POINT	TERMS	
	ASAP	BEST WAY	CA	WIRED FUNDS	
Item Number or SKU	Product Description	Quantity Ordered	Unit Cost	Extended Cost	
98006	SONY PLAYSTATION 3	232350	\$223.80	\$ 51,999,930.00	

Ship To:

Name	WILL ADVISE
Address	
City, State	
Phone #	
Fax #	

Sub Total:	
Freight Allowance	
Defective Allowance	
Total	\$ 51,999,930.00

COMMENTS WIRE \$15,000,000 BY 3-19-08 REMAINING DUE NO LATER THAN 3-21-08

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Mar 20 08 12:07p

p. 1

Page 1 of 1



where you set the price
8725 West Higgins Rd.
9th Floor
Chicago, IL 60631

773-272-5000

UBID REQUIREMENTS:

1. PO# must be on all shipping labels otherwise ship. int will be refused.
2. A packing slip with a PO# must be sent to WMS scheduling department before appointment will be accepted.
3. Packing slips must be included with all shipments.
4. Signed BOL will not be accepted as Proof of Delivery for quantity disputes without packing slips at time of shipment.
5. Merchandise must be palletized, all non-palletized shipments will be refused.
6. Ubid will not pay receiving discrepancies reported after 90 days.

Purchase Order

PO # : 104639	
Due Date : 4/3/2008	Buyer : Michael M
Payment Terms : TBD	
Revenue Share: TBD	
Ship Method : Ground	F.O.B. : Minnetonka, MN

Vendor Name : Petters Company		Vendor ID : 81857	
Contact :			
Address : 4400 Baker Rd.			
City : Minnetonka		State : MN	Zip : 55343
Phone : 952-974-8251		Fax : 952-975-4068	

Send Invoice To : uBid Inc. 8725 West Higgins Rd. 9th Floor Chicago, IL 60631	Ship To: (Appointment: Call 630-416-5300) uBid Inc 1835 Ferry Rd Naperville, IL 60563
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Ln	Vendor #	uBid Sku #	Description	Qty	Cost	Ext Cost	Cond.
1	98006	250066-81857-104639	Playstation 3 40GB	232500	\$340.00	\$79,050,000.00	New
2							
3							
4							
5							
6							
7							
8							
9							
10							
Total PO Cost :						\$79,050,000.00	

Comments :

Approved By : _____
SY AS 18-715499

Signature : _____

1910 - No Fee Paid

1919 - Fee Paid

Jury Demand

CCG N067-10M-6/09/04 ()

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

RITCHIE CAPITAL MANAGEMENT, L.L.C.; RITCHIE CAPITAL MANAGEMENT, LTD.; and RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., Plaintiffs

v.

FREDRIKSON & BYRON P.A., a Minnesota Professional Association; SIMON ROOT, an individual; JOHN KONECK, an individual; TIMOTHY E. TAKESUE, an individual; and MIGUEL A. MARTINEZ, JR., an individual, Defendants

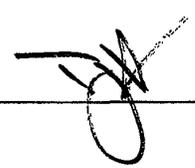
No. _____

2013LO10488
CALENDAR/ROOM #
TIME 00:00
Other Court Initiation

2013 SEP 19 10 21 13

JURY DEMAND

The undersigned demands a jury trial.



(Signature)

Dated: September 19, 2013

Atty. No.: 29558

Name: Thomas J. Verticchio; Swanson, Martin & Bell

Atty. for: Plaintiff

Address: 330 North Wabash Avenue, Suite 3300

City/State/Zip: Chicago, Illinois 60611

Telephone: (312) 321-9100

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS