

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	: GOVERNMENT’S MOTION
	: IN SUPPORT OF ITS PROPOSED
-v.-	: PRELIMINARY ORDER OF
	: FORFEITURE OF
MIGUEL MARTINEZ,	: <u>SUBSTITUTE ASSETS</u>
	:
Defendant.	: 09 Cr. 695 (PAC)
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The United States of America hereby moves pursuant to Rule 32.2(e) of the Federal Rules of Criminal Procedure and Title 21, United States Code, Section 853(p), for the entry of a Preliminary Order of Forfeiture of Substitute Assets to include certain property of Miguel Martinez, as a substitute asset, to be applied towards the forfeiture money judgment that was entered against him on or about December 15, 2009.

**I. Background**

On July 10, 2009, Miguel Martinez (the “defendant”) was charged in a three-count Information, 09 Cr. 695 (PAC) (the “Information”), with conspiracy to commit honest services mail fraud, in violation of 18 U.S.C. §§ 1341, 1346 and 1349 (Count One), with mail fraud, in violation of 18 U.S.C. § 1341 (Count Two), and with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count Three).

The Information included a forfeiture allegation requiring the defendant to forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, of all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offenses alleged in Counts One and Two of the Information, including but not limited to a sum of

\$106,000 in United States currency, representing the amount of proceeds obtained as a result of the offenses charged in Counts One and Two of the Information. The Information also included a substitute asset provision providing notice that if as a result of the defendant's actions or omissions forfeitable property is unable to be located or obtained the United States will seek, pursuant to 21 U.S.C. § 853(p), the forfeiture of any other property of the defendant.

On or about July 16, 2009, the defendant pled guilty to Counts One through Three of the Information pursuant to a plea agreement with the Government.

On December 15, 2009, the defendant was sentenced and ordered to forfeit a sum of money of \$106,000. On that day, the court issued a written Order of Forfeiture imposing a \$106,000 money judgment against the defendant (the "Money Judgment"), representing the amount of proceeds obtained as a result of the offenses charged in Counts One and Two of the Information.

## **II. The Location of Additional Assets**

As set forth in the Declaration of Forfeiture Support Associate Litigation Financial Analyst Steve Yagoda (the "Yagoda Declaration"), the United States has not been able to locate, obtain or collect the proceeds of the defendant's offenses.

However, the United States has located the following asset of the defendant:

Any and all funds, benefits, rights to disbursements, or other property held on behalf of, or distributed to, MIGUEL MARTINEZ, by the New York City Employee Retirement System, Membership Number 558851, and all property traceable thereto.

(the "Substitute Asset").<sup>1</sup> The United States is seeking to forfeit the defendant's interest in any payments or disbursements to the defendant from the Substitute Asset and to have these

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<sup>1</sup> The defendant is not yet eligible to collect payments from the Substitute Asset under the rules governing the Substitute Asset, but as a vested member of the New York City Employee Retirement System, the defendant has a

payments from the Substitute Asset, once forfeited, applied towards the defendant's outstanding Money Judgment. If the Money Judgment is ever fully satisfied, the United States will return all right, title, and interest in any remaining undistributed benefits, if any, from the Substitute Asset to the defendant.

For the following reasons, the Government respectfully requests that all of the defendant's right, title and interest in the Substitute Asset, including any benefits to be paid from the Substitute Asset, be forfeited to the United States and applied towards the Money Judgment.

### **III. Discussion**

Martinez is subject to a fully unsatisfied forfeiture money judgment and as a result, the United States is authorized to forfeit substitute assets, including New York City pension benefits held on his behalf. As a result of his conviction of Counts One and Two of the Information, Martinez is subject to a money judgment in the amount of \$106,000, imposed pursuant to Title 18, United States Code, Section 981(a)(1)(C). Section 981(a)(1)(C) requires the forfeiture of "all property, real and personal, which constitutes or is derived from proceeds traceable to" a qualifying offense. Section 981(a)(1)(C) is made applicable to criminal cases by Title 28, United States Code, Section 2461(c), which incorporates the procedures of Title 21, United States Code, Section 853.

The forfeiture of substitute assets is authorized by Title 21, United States Code, Section 853(p), which provides that, if any forfeited property "(A) cannot be located upon the exercise of due diligence; (B) has been transferred, sold to or deposited with a third party; (C) has been placed beyond jurisdiction of the Court; (D) has been substantially diminished in value; or (E) has been commingled with other property which cannot be divided without difficulty," as a result

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property interest in the Substitute Asset in that he will become eligible for benefits from the Substitute Asset upon reaching the age of 57. He is currently 43 years old.

of the defendant's own actions or omissions, 21 U.S.C. § 853(p)(1), the "court shall order the forfeiture of any other property of the defendant, up to the value of property" so transferred or moved by the defendant, § 853(p)(2).

Additionally, Rule 32.2(e)(1) of the Federal Rules of Criminal Procedure further provides that-

[o]n the government's motion, the court may at any time enter an order of forfeiture or amend an existing order of forfeiture to include property that:

...

(B) is a substitute property that qualifies for forfeiture under an applicable statute.

Fed. R. Crim. P. 32.2(e)(1) (emphasis added).

Thus, the court must order the forfeiture of substitute assets to satisfy a money judgment where, as a result of the defendant's actions or omissions, the United States is unable to locate or obtain the specific proceeds. *See* Fed. R. Crim. P. 32.2(e)(2)(A) ("If the government shows that the property is subject to forfeiture under Rule 32.2(e)(1), the court *must* . . . enter an order forfeiting that property, or amend an existing preliminary order of forfeiture to include it . . . ." (emphasis added)); Fed. R. Crim. P. 32.2(e)(1)(B) (designating as subject to forfeiture "substitute property that qualifies for forfeiture under an applicable statute"); *United States v. Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006) ("Section 853(p) is not discretionary . . . . When the Government cannot reach the property initially subject to forfeiture, federal law requires a court to substitute assets for the unavailable tainted property"); *United States v. Capoccia*, No. 03 Cr. 35, 2009 WL 273301, at \*2 (D. Vt. Feb. 4, 2009) (citing *id.*). The Indictment makes clear that the diversion of funds from the City and other victims to third parties, *see, e.g.*, Information ¶ 25, was done as a result of acts or omissions of the defendant, authorizing forfeiture of substitute

assets under Section 853(p). *See* § 853(p) (authorizing forfeiture of substitute assets when forfeitable property, inter alia, “as a result of any act or omission of the defendant— (A) cannot be located upon the exercise of due diligence; (B) has been transferred or sold to, or deposited with, a third party”).<sup>2</sup>

If there are other persons who claim an interest in the Substitute Asset, they will have an opportunity to challenge the Government's entitlement to the Substitute Asset in the ancillary hearing phase of these proceedings. *See* 21 U.S.C. § 853(n); Fed. R. Crim. P. 32.2(c). Under Section 853(n) and Rule 32.2(e)(2), the government must provide notice of its intent to dispose of the property to known interested parties. Persons alleging an interest in the forfeited property then have 30 days, from the date of last publication or actual notice, within which to petition this Court for a hearing to determine the validity of their claims. 21 U.S.C. § 853(n)(2). If there are no petitions filed or a petition is denied, the Court will enter a final order forfeiting the substitute property to the United States. The property will not be disposed of by the Government until all third party claims are resolved by the Court.

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<sup>2</sup> The fact that the Substitute Asset consists of pension funds does not affect its forfeitability under Section 853(p). As part of a governmental plan, the Substitute Asset is not covered by ERISA. *See* 29 U.S.C. §§ 1002(32), 1003(b)(1). Any protections potentially applicable under state law, *see* N.Y. Const. art. V § 7; N.Y.C. Admin. Code § 13-181, are preempted by federal law from interfering with forfeiture under Section 853(p). *See, e.g., United States v. Lot 5, Fox Grove, Alachua County, Fla.*, 23 F.3d 359, 363 (11th Cir. 1994) (finding that civil forfeiture statute preempts Florida law preventing homes from forced sale); *United States v. Peterson*, 821 F. Supp. 2d 576, 588 (S.D.N.Y. 2011) (citing *id.*); *United States v. Galante*, No. 06 Cr. 161 (EBB), 2006 WL 3826701, at \*2 (D. Conn. Nov. 28, 2006) (finding state law would be preempted to the extent it required modification of restraining order and diminution in value of assets for which forfeiture was sought); *United States v. One Household Finance Check*, 769 F. Supp. 69, 73 (D. Conn. 1991) (preempting Connecticut law, allowing forfeiture of funds represented by check); *United States v. Speed Joyeros, S.A.*, 410 F. Supp. 2d 121, 125 (E.D.N.Y. 2006) (“This result under applicable federal conflicts of law principles is consistent with the general federal practice in forfeiture matters of referring to the law of the jurisdiction that created the property right to determine the petitioner’s legal interest. The effect of that property interest—i.e., whether it satisfies the requirements of the federal forfeiture statute—is necessarily a matter of federal law.”).

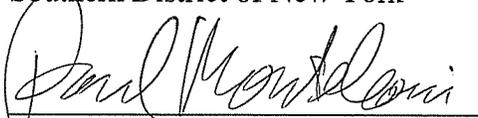
**IV. Conclusion**

The United States accordingly requests that its motion for forfeiture of substitute property be granted and that an order be entered forfeiting all of the defendant's right, title and interest in the Substitute Asset, including any benefits to be paid from the Substitute Asset.

Dated: New York, New York  
December 17, 2013

PREET BHARARA  
United States Attorney for the  
Southern District of New York

By:



PAUL M. MONTELEONI  
One St. Andrew's Plaza  
New York, New York 10007  
(212) 637-2219

# Exhibit A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- v. -

MIGUEL MARTINEZ,

Defendant.

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:  
: **DECLARATION OF FORFEITURE**  
: **SUPPORT ASSOCIATE**  
: **FINANCIAL ANALYST**  
: **STEVEN YAGODA**  
: 09 Cr. 695 (PAC)

STATE OF NEW YORK )  
COUNTY OF NEW YORK : ss.:  
SOUTHERN DISTRICT OF NEW YORK )

STEVEN YAGODA, under penalty of perjury, declares:

1. I am a Litigation Financial Analyst with Forfeiture Support Associates and work as a contractor for the United States Attorney’s Office, Southern District of New York (“USAO-SDNY”). I am assigned to the Asset Forfeiture Unit, where I provide financial analyst support for the Office’s criminal and civil asset forfeiture investigations and cases. Prior to my employment as a contractor for the USAO-SDNY, I was a Special Agent with the United States Customs Service and the Department of Homeland Security, Immigration and Customs Enforcement, for approximately 31 years. As a Special Agent, I conducted investigations involving money laundering, narcotics trafficking, terrorist financing, and customs fraud offenses, among others. I also participated in asset forfeiture investigations and asset tracing.

2. I respectfully make this declaration in connection with the Government’s application for a Substitute Asset Order of Forfeiture as to the following property: any and all funds, benefits, rights to disbursements, or other property held on behalf of, or distributed to, MIGUEL MARTINEZ, by the New York City Employee Retirement System, Membership Number 558851, and all property traceable thereto. From my review of the case file, I am

familiar with the facts and circumstances of this forfeiture case. Because this declaration is being submitted for a limited purpose, I have not included in it everything I know about this forfeiture case. Where the contents of documents and the actions, conversations, and statements of others are related herein, they are related in substance and in part.

### **Background**

3. On July 10, 2009, MIGUEL MARTINEZ (the “defendant”) was charged in a three-count Information, 09 Cr. 695 (PAC) (the “Information”), with conspiracy to commit honest services mail fraud, in violation of 18 U.S.C. §§ 1341, 1346 and 1349 (Count One), with mail fraud, in violation of 18 U.S.C. § 1341 (Count Two), and with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count Three).

4. The Information included a forfeiture allegation requiring the defendant to forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, of all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offenses alleged in Counts One and Two of the Information, including but not limited to a sum of \$106,000 in United States currency, representing the amount of proceeds obtained as a result of the offenses charged in Counts One and Two of the Information.

5. The Information also included a substitute asset provision providing notice that if as a result of the defendant's actions or omissions forfeitable property is unable to be located or obtained the United States will seek, pursuant to 21 U.S.C. § 853(p), the forfeiture of any other property of the defendant.

6. On or about July 16, 2009, the defendant pled guilty to Counts One through Three of the Information pursuant to a plea agreement with the Government.

**The Order of Forfeiture and the Substitute Asset**

7. On December 15, 2009, the defendant was sentenced and ordered to forfeit a sum of money of \$106,000. On that day, the court issued a written Order of Forfeiture imposing a \$106,000 money judgment against the defendant (the “Money Judgment”), representing the amount of proceeds obtained as a result of the offenses charged in Counts One and Two of the Information.

8. Since the date of the entry of the Order of Forfeiture, despite the exercise of due diligence in investigating the assets of the defendant, the Government has been unable to locate the proceeds of the defendant’s offenses.

9. I have conducted an investigation into any other assets that the defendant might have to satisfy the Money Judgment against him. To date, the Government has located the following asset of the defendant:

Any and all funds, benefits, rights to disbursements, or other property held on behalf of, or distributed to, MIGUEL MARTINEZ, by the New York City Employee Retirement System, Membership Number 558851, and all property traceable thereto (the “Substitute Asset”).<sup>1</sup>

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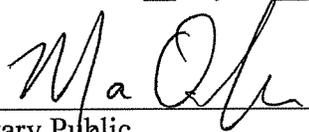
<sup>1</sup> The defendant is not yet eligible to collect payments from the Substitute Asset under the rules governing the Substitute Asset, but as a vested member of the New York City Employee Retirement System, the defendant has a property interest in the Substitute Asset in that he will become eligible for benefits from the Substitute Asset upon reaching the age of 57. He is currently 43 years old.

I declare under penalties of perjury that the foregoing is true and correct, pursuant to 28 U.S.C. § 1746.

Dated: New York, New York  
December 16, 2013

  
\_\_\_\_\_  
STEVEN YAGODA  
Financial Analyst  
United States Attorney's Office,  
Southern District of New York

Sworn to or subscribed  
before me this 16<sup>th</sup> day of December 2013

  
\_\_\_\_\_  
Notary Public

MARCO DASILVA  
Notary Public, State of New York  
No. 01DA6145603  
Qualified in Nassau County  
My Commission Expires May 8, 2014

# Exhibit B

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:
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-v.-	:
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MIGUEL MARTINEZ,	:
	:
Defendant.	:
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WHEREAS, on July 10, 2009, MIGUEL MARTINEZ (the “defendant”) was charged in a three-count Information, 09 Cr. 695 (PAC) (the “Information”), with conspiracy to commit honest services mail fraud, in violation of 18 U.S.C. §§ 1341, 1346 and 1349 (Count One), with mail fraud, in violation of 18 U.S.C. § 1341 (Count Two), and with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count Three);

WHEREAS, the Information included a forfeiture allegation requiring the defendant to forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461, of all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of the offenses alleged in Counts One and Two of the Information, including but not limited to a sum of \$106,000 in United States currency, representing the amount of proceeds obtained as a result of the offenses charged in Counts One and Two of the Information;

WHEREAS, the Information also included a substitute asset provision providing notice that if as a result of the defendant’s actions or omissions forfeitable property is unable to be located or obtained the United States will seek, pursuant to 21 U.S.C. § 853(p), the forfeiture of any other property of the defendant;

WHEREAS, on July 16, 2009, the defendant pled guilty to Counts One, Two, and Three of the Information;

WHEREAS, on December 15, 2009, the defendant was sentenced and ordered to forfeit a sum of money of \$106,000, and on that day, the court issued a written Order of Forfeiture imposing a \$106,000 money judgment against the defendant (the "Money Judgment"), representing the amount of proceeds obtained as a result of the offenses charged in Counts One and Two of the Information;

WHEREAS, the Money Judgment against the defendant remains fully unpaid;

WHEREAS, as a result of acts and omissions of the defendant, the Government, despite its exercise of due diligence, has been unable to locate or obtain the full proceeds of the offenses of the defendant's conviction;

WHEREAS, the Government has identified the following specific asset in which the defendant has an ownership interest:

Any and all funds, benefits, rights to disbursements, or other property held on behalf of, or distributed to, MIGUEL MARTINEZ, by the New York City Employee Retirement System, Membership Number 558851, and all property traceable thereto.

(the "Substitute Asset"); and

WHEREAS, the United States is authorized, pursuant to Rule 32.2 of the Federal Rules of Criminal Procedure and 21 U.S.C. § 853(p), to seek forfeiture of All of the defendant's rights, title and interest in the Substitute Asset, including any benefits to be paid from the Substitute Asset, as assets of Miguel Martinez to be applied in partial satisfaction of the money judgment against him;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. All of the defendant's right, title and interest in the Substitute Asset, including any benefits to be paid from the Substitute Asset ("Forfeited Property") is hereby forfeited to and vested in the United States of America, as substitute assets, pursuant to 18 U.S.C. § 981(a)(1)(C), 21 U.S.C. § 853(p), and 28 U.S.C. § 2461, subject to the provisions of 21 U.S.C. § 853(n).

2. Any funds or payments subsequently seized from the Substitute Asset shall be applied to the satisfaction of the Money Judgment entered against the defendant, and in the event the Money Judgment is fully satisfied, the United States shall thereafter return all right, title, and interest in any remaining undistributed benefits (if any) from Substitute Asset to the defendant.

3. The United States is hereby authorized to take possession of the Forfeited Property and to hold such Forfeited Property in its secure custody and control.

4. All financial institutions having notice of this Preliminary Order of Forfeiture of Substitute Assets shall cooperate with the United States or its designee in turning over the Forfeited Property pursuant to this Preliminary Order of Forfeiture of Substitute Assets.

5. Pursuant to 21 U.S.C. § 853(n)(1), the United States Marshals Service forthwith shall publish at least once for three successive weeks, in a newspaper of general circulation, notice of this Preliminary Order of Forfeiture of Substitute Assets, notice of the United States' intent to dispose of the Forfeited Property in such manner as the United States may direct, and notice that any person, other than the defendant, having or claiming a legal interest in the above listed Forfeited Property must file a petition with the Court within 30 days of the final publication of notice or of receipt of actual notice, whichever is earlier.

6. This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the Forfeited Property, shall be signed by the petitioner under penalty of perjury, and shall set forth the nature and extent of the petitioner's right, title or interest in the Forfeited Property and any additional facts supporting the petitioner's claim and the relief sought.

7. The United States may also, to the extent practicable, provide direct written notice to any person known to have an alleged interest in the Forfeited Property that is the subject of this Preliminary Order of Forfeiture of Substitute Assets, as a substitute for published notice as to those persons so notified.

8. Pursuant to Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, upon entry of Preliminary Order of Forfeiture of Substitute Assets, the United States Attorney's Office is authorized to conduct any discovery needed to identify, locate or dispose of the property, including depositions, interrogatories, requests for production of documents and to issue subpoenas, pursuant to Rule 45 of the Federal Rules of Civil Procedure.

9. Upon adjudication of all third-party interests, this Court will enter a final order of forfeiture pursuant to 21 U.S.C. § 853(n)(7) and Fed. R. Crim. P. 32.2(c)(2), in which all interests will be addressed.

Dated: New York, New York  
\_\_\_\_\_, 2013

SO ORDERED:

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HONORABLE PAUL A. CROTTY  
UNITED STATES DISTRICT JUDGE