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United States of America

11 UNITED STATES DISTRICT COURT  
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
13 WESTERN DIVISION

14 UNITED STATES OF AMERICA, ) NO. CV 09-2398 RGK (RZx)  
15 )  
Plaintiff, ) PLAINTIFF'S RESPONSE TO  
16 ) "STATEMENT OF POSITION" FILED  
v. ) BY JUAN CARLOS LEYVA AND FOUR  
17 ) OTHER VICTIMS (DOCKET NO. 27)  
\$6,874,561.25 IN FUNDS FROM SIX) REGARDING MOTION FOR  
18 WELLS FARGO BANK ACCOUNTS, et ) APPOINTMENT OF A SPECIAL  
al., ) MASTER; DECLARATIONS AND  
19 ) EXHIBITS IN SUPPORT  
Defendants. )  
20 )

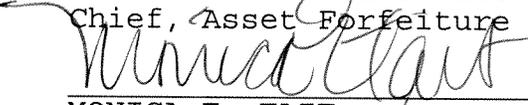
21 DATE: January 25, 2010  
22 TIME: 9:00 A.M.  
PLACE: ROYBAL 850

23  
24 Plaintiff United States of America, by and through its  
25 counsel, the United States Attorneys Office, hereby files its  
26 attached memorandum, declarations, and exhibits in response to  
27 the "Statement of Position" filed as document number 27 by Juan  
28 Carlos Levya, Ruby Dominguez, Pastor Juventino Hernandez, Bonnie

1 Barraza, and Rosa Anglade regarding plaintiff's motion to appoint  
2 a Special Master.

3 DATE: January 15, 2010 Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The government has seized millions of dollars that are traceable to the Best Diamond Funding fraud scheme, and it seeks to distribute the funds to victims via this forfeiture action. The government has asked the court to appoint a Special Master to oversee an orderly claims process which the government believes is designed to minimize litigation and delay in facilitating a fair distribution from these seized assets. The government, rather than the Special Master, will then notify each victim individually of the loss amount, and invite each victim individually to either (1) accept a pro-rata share of the assets based on the Special Master's loss amount, or (2) come to court to litigate their claimed loss.

The use of a Special Master will offer the victims a concrete, neutrally-calculated "no litigation" option for determining their losses. As described at length in its Motion, the government's hope and expectation is that the overwhelming majority of the victims will accept this calculation, which will speed recovery to the group of victims as a whole.

II. NOTIFICATION TO THE KNOWN VICTIMS REGARDING THE MOTION, AND SUMMARY OF RESPONSES

The government has mailed notices to approximately 2,500 known potential victims of the fraud scheme. Declaration of Jeff Alabaso ("Alabaso Decl."), ¶¶ 1-2 and Ex. 1-2. The government also posted its Motion, supporting exhibits, and the proposed order on the United States Attorneys Office's ("USAO") Internet website. Declaration of Monica E. Tait ("Tait Decl.") ¶ 9. The

1 USAO directly received five written responses (reproduced in  
2 whole or in substance at Alabaso Decl., Exhibits 3-6)<sup>1</sup>. Although  
3 the government prepared copies of the moving papers for mailing  
4 to those investors who so requested, as of the date this  
5 memorandum was filed, no investors have requested a copy.  
6 Alabaso Decl., ¶ 4. However, there have been approximately 500  
7 viewings on the Internet page on which the moving papers were  
8 posted. Tait Decl., ¶ 9.

9 Juan Carlos Leyva and four others (the "Leyva investors")  
10 filed a written response with the court ("Response").<sup>2</sup> The  
11 government recommends that the court exercise its discretion to  
12 consider the Response as an amicus brief, because the Levya  
13 investors are as yet non-parties (as explained in Section VI  
14 below). The Leyva investors heartily support the appointment of  
15 a Special Master to perform the loss calculations, and agree that  
16 the loss formula that the government has proposed makes sense.  
17 However, the Levya investors argue that the taxpayers should bear  
18 the costs and expenses of the Special Master, rather than paying  
19 for these amounts from the seized funds under the court's  
20 control.<sup>3</sup>

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21  
22 <sup>1</sup> The government will file under separate cover an English  
23 translation of the Spanish-language letter set forth at Exhibit  
24 3.

25 <sup>2</sup> Although they claim to represent unnamed others as well,  
26 there appears to be no basis to permit a person to appear in a  
27 representative capacity in an *in rem* civil forfeiture action.  
28 Rule G(5)(a)(i) (requiring individualized claims).

<sup>3</sup> The written responses the government directly received  
from other victims also objected to the payment of the Special  
Master's costs and expenses from the seized funds.

1 III. COSTS AND EXPENSES OF THE SPECIAL MASTER SHOULD BE PAID FROM  
2 THE SEIZED ASSETS, AND SHOULD NOT BE BORNE BY THE TAXPAYERS

3 The Leyva investors' demand that the Special Master's costs  
4 and expenses be paid by the taxpayers is not supported by case  
5 authority, citation to any statute or waiver of sovereign  
6 immunity, nor indeed by any argument in their Response. The  
7 demand is bare, because there is no support for their position.  
8 When a governmental entity creates or preserves a fund from which  
9 victims may receive recompense, the costs and expenses of the  
10 claims process are not imposed on the taxpayers, but rather upon  
11 the fund. All three Special Master candidates (including the one  
12 proposed by the Leyva investors) are well-experienced with the  
13 conduct of claims and receivership proceedings in fraud cases  
14 brought by governmental entities. See, e.g., Ex. 11, pp. 100-101  
15 (case list for Robb Evans). All three candidates have confirmed  
16 that in his or her experience, when appointed to oversee a victim  
17 claims process in a case brought by a governmental entity, the  
18 governmental entity has never been ordered to pay their costs or  
19 expenses. Tait Decl., ¶¶ 4-5. Instead, these amounts are paid  
20 from the fund from which the victims will be compensated. Id.

21 In addition to lacking any support in law or custom, the  
22 Leyva investors' demand is disingenuous because they have  
23 themselves previously proposed that these types of expenses be  
24 paid from the seized assets. In their attempted class action  
25 case (pending before Judge Real), the Leyva investors sought in  
26 May 2009 to add the seized assets to a "receivership estate" they  
27  
28

1 sought to create.<sup>4</sup> Tait Decl., ¶ 3, Ex. 8 (proposed receivership  
2 order, pp. 7-8).<sup>5</sup> The Order they proposed directed a temporary  
3 receiver to expend funds from the receivership estate in  
4 exercising his/her authority to manage the assets, institute  
5 lawsuits, and carry out extensive additional duties. Ex. 8, pp.  
6 3-7. Notably, their proposed order also provided that "the  
7 receiver shall prepare periodic interim statements reflecting the  
8 receiver's fees and administrative costs and expenses incurred  
9 [and, after sending the statement to the parties] shall pay from  
10 the estate funds, if any, the amount of said statement." *Id.*, p.  
11 11.<sup>6</sup> Thus, the Leyva investors have already recognized the  
12 propriety of the payment arrangement the government has proposed.

13 The Leyva investors request in the alternative that the  
14 court defer its decision on how the Special Master is to be paid.  
15 Their proposal is directly contrary to Rule 53, which  
16 unequivocally requires the court to set forth in its order  
17 appointing the Special Master "the basis, terms, and procedure  
18 for fixing the master's compensation." Fed. R. Civ. P.  
19 53(b)(2)(E).

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23 <sup>4</sup> They later abandoned their demands to bind the defendant  
24 seized assets in their proposed receivership.

25 <sup>5</sup> The Leyva investors' Response incorrectly stated that  
26 their attempted class action was filed on December 12, 2008.  
27 Response, p. 3: 18-19, Hinds Declaration, ¶ 4. Their action was  
28 actually filed on May 27, 2009. Ex. 7 (dkt. No. 1).

<sup>6</sup> Their proposed order for the permanent receiver repeated  
these provisions. Tait Decl., Ex. 10, p. 11.

1 IV. THE PROPOSED ORDER

2 The Leyva investors appear to misunderstand the proposed  
3 order appointing the Special Master in important respects, and  
4 the government takes this opportunity to clarify the following  
5 points, lest their comments sow confusion with the court and  
6 other potentially interested parties:

7 The Special Master will not adjudicate facts. Government's  
8 Motion, n. 9. The Leyva investors' comments suggest that they  
9 believe the Special Master will adjudicate claims. Response, p.  
10 9: 15-24; p. 10, n.1. The government did not seek such power for  
11 the Special Master, because Rule 53 may require that each  
12 individual victim consent to such an appointment, and the court  
13 would have to rule that such adjudication would not interfere  
14 with any right to trial of factual issues by jury. See Fed. R.  
15 Civ. P. 53(a)(1)(A)-(B). By contrast, neither protection of jury  
16 trial rights nor consent is required for the functions the  
17 government has currently proposed pursuant to Rule 53(a)(1)(C):  
18 performing a neutral loss calculation in which the victims will  
19 hopefully have confidence, for the purposes of encouraging each  
20 victim to voluntarily resolve (i.e., settle) their potential  
21 claims in this matter on the basis of that calculation without  
22 litigation.

23 The Special Master will not Manage the Seized Assets. This  
24 is a forfeiture case *in rem*, not a class action or equity  
25 receivership case. In an *in rem* civil forfeiture case, the  
26 government maintains custody over the seized funds, and the  
27 proposed order does not provide any differently. The  
28 government's continued custody protects the interests of all

1 potential claimants to the seized funds without having to pay a  
2 private party to maintain custody and process and mail payments.  
3 As this court knows, the government routinely directs  
4 distributions from seized funds as part of agreements to  
5 compromise litigation.

6 **V. THE SPECIAL MASTER CANDIDATES**

7 Finally, the Leyva investors object to the appointment of  
8 Edythe Bronston as Special Master "based on the work undertake[n]  
9 by Edythe Bronston" as receiver in the attempted class action.  
10 Response, pp. 8-9. This vague objection provides no reason for  
11 declining to appoint Ms. Bronston. The government continues to  
12 believe her appointment may save costs because of her prior  
13 familiarity with the case.

14 The Leyva investors do not state whether they object to the  
15 government's alternative candidate, Robb Evans, whose firm resume  
16 lists extensive experience with similar claims proceedings. Ex.  
17 11 to Government's Motion.

18 The Leyva investors propose a third candidate for  
19 consideration, Dennis Murphy. Government counsel is concerned  
20 that Mr. Murphy may have an ongoing business relationship with  
21 counsel for the Leyva investors (Exhibit 12 (emails dated January  
22 14-15, 2010)), which raises questions about whether he is an  
23 appropriately disinterested candidate because not all the victims  
24 are aligned with the Leyva investors or their counsel. Tait  
25 Decl., ¶ 7. This relationship calls into question whether Mr.  
26 Murphy will be able to truthfully execute the affidavit required  
27 by Fed. R. Civ. P. 53(b)(3)(A) (stating that there are no grounds  
28 for disqualification under 28 U.S.C. § 455). Based upon that

1 concern, the undersigned must object to his appointment on this  
2 particular case. Because the Leyva investors did not set forth  
3 Mr. Murphy's proposed rates, the government submits them here as  
4 Exhibits 10-11. Tait Decl., ¶ 6.

5 **VI. BECAUSE THE LEYVA INVESTORS ARE NOT YET PARTIES, THE COURT**  
6 **SHOULD CONSIDER THEIR RESPONSE AS AN AMICUS BRIEF**

7 Finally, the Leyva investors suggest that their Response  
8 constitutes an "intervention" in the case. Response, pp. 7-8.  
9 To the contrary, as the government stated in its motion,  
10 intervention in a forfeiture case is limited to those who file  
11 verified, individualized claims of ownership to the defendant  
12 property, in accordance with Rule G(5), Supplemental Rules for  
13 Certain Admiralty and Maritime Claims and Asset Forfeiture  
14 Actions, Federal Rules of Civil Procedure. See Motion, p. 3 n.4.  
15 The Leyva investors' Response (prepared by their counsel) meets  
16 none of the requirements for individualized claims set forth in  
17 Rule G(5) as to any of the five respondents, and these persons  
18 are therefore not yet parties to this case. United States v.  
19 8136 S. Dobson Street, Chicago, Illinois, 125 F.3d 1076, 1082  
20 (7<sup>th</sup> Cir. 1997) (absent a claim in accordance with Supplemental  
21 Rules, a person is not party to a civil forfeiture case).

22 However, it is appropriate for the court to exercise its  
23 discretion to consider the Leyva investors' Response as an amicus  
24 brief on the issue of appointment of a Special Master.

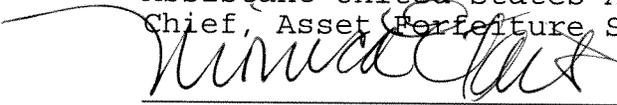
25 **VII. CONCLUSION**

26 The government acted quickly in this case to seize the  
27 defendant assets while the BDF Ponzi scheme was ongoing, using  
28 the powerful yet lawful seizure authority granted to the courts

1 by a forfeiture statute (18 U.S.C. § 981(b)). Were it not for  
2 such seizure authority, there can be no doubt that the defendant  
3 funds would have been dissipated by BDF as part of the Ponzi  
4 scheme, and the pool of victims would have increased  
5 exponentially as the fraud continued. The government's proposed  
6 Order Appointing Special Master will provide a "no-litigation  
7 option" for the victims, designed to speedily and efficiently  
8 resolve disputes over the seized funds within the rubric of the  
9 statutory forfeiture authority which has preserved the defendant  
10 funds from harm. For all of the above reasons, the government's  
11 motion should be granted and the Special Master appointed  
12 according to the terms of the government's proposed Order.

13 DATE: January 15, 2010 Respectfully submitted,

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