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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, ) NO. CV 09-2398 RGK (RZx)  
)  
Plaintiff, ) NOTICE OF MOTION AND MOTION FOR  
) APPOINTMENT OF A SPECIAL  
v. ) MASTER; EXHIBITS IN SUPPORT  
)  
\$6,874,561.25 IN FUNDS FROM SIX ) [PROPOSED ORDER FILED  
WELLS FARGO BANK ACCOUNTS, et ) CONCURRENTLY]  
al., )  
Defendants. ) DATE: January 25, 2010  
) TIME: 9:00 A.M.  
) PLACE: ROYBAL 850

22 PLEASE TAKE NOTICE that on January 25, 2010, at 9:00 a.m.,  
23 or as soon thereafter as the matter may be heard in Courtroom 850  
24 before the Honorable Robert G. Klausner, United States District  
25 Judge, located in the Roybal Federal Building, 255 E. Temple  
26 Street, Los Angeles, California, plaintiff United States of  
27 America will and hereby does move for the appointment of a  
28 Special Master in this case to oversee a claims process and

1 facilitate the distribution of the defendant funds to victims of  
2 a fraud scheme.

3 The motion is brought pursuant to Rule 53 of the Federal  
4 Rules of Civil Procedure and the Court's inherent authority.

5 This Motion is based upon this Notice of Motion and Motion, the  
6 Memorandum of Points and Authorities, the Declaration of Monica  
7 E. Tait and exhibits attached thereto, other facts appearing in  
8 the Court's file, and upon such further evidence, oral or  
9 documentary, as may be presented prior to or at any hearing on  
10 this motion.

11 There are as yet no parties to this case other than the  
12 United States. Because the titleholders to the defendant assets  
13 have been held in default by the clerk, this motion has not been  
14 served on them. Fed. R. Civ. P. 5(a)(2). The only potentially  
15 interested parties are the victims of the scheme to defraud  
16 described in the complaint, who have Article III standing to  
17 become claimants in this case for purposes of asserting a  
18 constructive trust pursuant to Ninth Circuit case authority.

19 United States v. \$4,224,958.57, 392 F.3d 1002 (9th Cir. 2004)  
20 ("Boylan").

21 Pursuant to Fed. R. Civ. P. 53(b)(1), the government has  
22 notified these known victims of this Motion by mail using a one  
23 page summary of the motion in English and Spanish. The victims  
24 have been notified that they can either read this motion and the  
25 proposed Order on the Internet at the United States Attorneys'  
26 Office website or request to receive a paper copy of the  
27 government's Motion and proposed order by mail. The motion  
28 hearing date has been set sufficiently far in advance to allow

1 time for the victims to be heard on the motion (should they wish  
2 to be heard). A certificate of notification by mail will be  
3 filed under seal to protect the victims' personal information  
4 from public disclosure.

5 DATE: December 18, 2009 Respectfully submitted,

6 GEORGE S. CARDONA  
7 Acting United States Attorney  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

3        This case involves a Ponzi investment fraud scheme. There  
4        are more than 2,300 victims whom the government currently  
5        believes collectively lost approximately \$30 million. These  
6        victims are desperate for some recovery. Many lost their entire  
7        life savings. Others borrowed against the equity in their homes  
8        to invest in the scheme, and are facing foreclosure. The  
9        government has seized millions of dollars that are traceable to  
10      the fraud scheme, funds that it seeks to distribute to victims in  
11      this forfeiture action. These victims deserve an orderly claims  
12      process designed to minimize litigation and resulting delay in  
13      receiving a fair distribution from these seized assets.

14 To that end, the government seeks the appointment of a  
15 Special Master to gather and analyze information regarding  
16 victims' claims and calculate a proposed loss amount for each  
17 victim. The government will then notify each victim individually  
18 of the loss amount, and invite them to either (1) accept a pro-  
19 rata share of the assets based on the Special Master's loss  
20 amount, or (2) come to court to litigate their claimed loss.  
21 Using a Special Master is necessary in this case to offer the  
22 victims a concrete, neutrally-calculated "no litigation" option  
23 for determining their losses.

24        In October and December 2008, the government seized  
25        approximately \$12 million from Milton Retana, Best Diamond  
26        Funding Corp., and associated companies (collectively, "BDF").  
27        Those seized assets are the defendants in this *in rem* civil

1 forfeiture case.<sup>1</sup> The complaint alleges that Milton Retana and  
2 others solicited investors to invest with BDF by telling them  
3 that their money would be used to buy and sell real estate, and  
4 that the investors would earn a substantial monthly return.

5 Complaint, ¶¶ 7, 32.<sup>2</sup> In fact, only a small fraction of the  
6 money that Retana and BDF received from investors was used to  
7 purchase real estate, and Retana and the companies used money  
8 from other investors, or the investors' own principal, to make  
9 purported profit payments each month (*i.e.*, a Ponzi investment  
10 scheme). *Id.* ¶ 33.

11 Critically, the titleholders to the defendant assets (Retana  
12 and BDF) have released all of their claims to contest forfeiture  
13 of the defendant assets, and the clerk has separately entered  
14 default against them. Tait Decl., Exs. 2-8 (waivers and  
15 releases<sup>3</sup>); docket no. 18 (default). Thus, the only issues  
16 remaining to be determined in this action are the potential  
17 ownership claims of the estimated 2,300 people who invested  
18 approximately \$60 million in BDF's Ponzi scheme. In this  
19 circuit, these victims have Article III standing to intervene in

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20       <sup>1</sup> The defendants are: \$6,874,561.25 in Funds from Six Wells  
21 Fargo Bank Accounts; \$1,147,051.51 in Funds from Six Bank of  
22 America Accounts; \$3,978,403.00 U.S. Currency; \$6,400.00 in  
23 proceeds from 64 AMEX Travelers Checks; One 2004 Cadillac  
Escalade; One 2008 Lexus GX 470-V8; \$22,840.00 in U.S. Currency;  
and One Smith & Wesson Revolver.

24       <sup>2</sup> A copy of the complaint is attached as Exhibit 1 to the  
25 Declaration of Monica E. Tait and is referred to herein as  
"Complaint" followed by paragraph or page number references.

26       <sup>3</sup> The only person who has not executed a waiver is Jairo  
27 Ali Vega, titleholder to the defendant Smith & Wesson. However,  
28 Vega previously disclaimed any interest in that gun (Complaint  
¶ 28), and the clerk has entered default against him.

1 this action in order to assert constructive trust ownership  
2 interests in the seized funds. United States v. \$4,224,958.57,  
3 392 F.3d 1002 (9th Cir. 2004) (commonly known as "Boylan").<sup>4</sup> But  
4 while the victims may have the right to become litigants, the  
5 government believes that simply inviting them to intervene in the  
6 case, without offering a specific "no litigation" alternative and  
7 without crafting a structure for the claims process, is against  
8 the interests of justice because it will promote delay and  
9 unfairness:

- 10 - Each litigant would be entitled to use civil discovery,  
11 and may choose to contest and conduct discovery into  
12 the claims of other victims in order to decrease the  
13 number of persons in competition for the pool of assets  
14 in this case.
- 15 - The court would ordinarily have to adjudicate each  
16 litigant's claim individually. Litigating and  
17 adjudicating hundreds or thousands of such claims will  
18 substantially delay the ultimate resolution of this  
19 case.
- 20 - Those who intervene and become litigants may recover  
21 and obtain judgments at the expense of victims who do  
22 not have the wherewithal to intervene.
- 23 - Litigation over the litigant-victims' claims would  
24 delay recovery even for those victims who elect not to  
25 litigate. If the claims filed by the litigant-victims  
26 were to exceed the approximately \$12 million value of  
27 the defendant assets, it is likely that no funds could  
28 be distributed from the asset pool until the resolution  
of their litigation (and perhaps through any appeals).
- 29 - Delay would be particularly harsh for the kinds of  
30 victims who are less likely to participate in court  
31 proceedings, including the less wealthy (who may not be  
32 able to afford counsel to represent them) and those who

---

33 <sup>4</sup> "Intervene," as used in this memorandum, refers to the  
34 process of becoming a litigant by filing a "claim" to contest the  
35 forfeiture of property pursuant to Rule 5, Supplemental Rules for  
36 Certain Admiralty and Maritime Claims and Asset Forfeiture  
37 Actions, Federal Rules of Civil Procedure ("Supplemental Rules").

1 do not speak or write well in English (who may be  
2 unable or reluctant to appear *pro se*).

3 It is therefore critical to reduce the number of likely  
4 court participants in this matter. Appointing a Special Master  
5 will reduce delay and promote fairness and justice by offering  
6 the victims an easy "no litigation" option they can confidently  
7 accept. If, as anticipated, most victims elect to take the "no  
8 litigation" option based on the Special Master's calculations,  
9 court battles and discovery proceedings in this case will be  
10 minimized, thus promoting the speediest and most efficient  
11 distribution of the seized funds to the victims in a fair and  
12 equitable manner.

13 **II. REASONS FOR APPOINTING A SPECIAL MASTER**

14 This case involves a Ponzi investment scheme carried out  
15 over the course of more than a year. Because of the nature of  
16 Ponzi schemes, the victims' claims are diverse and calculating  
17 their losses will be complex.

18 In a Ponzi scheme, "earlier investors' returns [i.e.,  
19 "interest"] are generated by the influx of fresh capital from  
20 unwitting newcomers rather than through legitimate investment  
21 activity." Cunningham v. Brown, 265 U.S. 1, 7-9 (1924).  
22 Determining how much money each victim actually lost is  
23 complicated by the numerous interest payments paid out during the  
24 scheme. For example, in this case:

25 - some victims invested early, and may have received 100%  
26 or more of their principal investment back from the  
27 perpetrators as alleged "interest" payments ("Ponzi  
28 payments").

25 - Other investors received some Ponzi payments, but  
26 received back less than their principal investment.

1        - Some investors took cash Ponzi payments and reinvested  
2        the funds with BDF, and therefore may claim to have  
3        still greater losses (based on the reinvested funds).  
4        - Other investors invested late in the scheme, and  
5        received no Ponzi payments at all.

6        Further, because this was a scheme targeted at Spanish-language  
7        speakers, many of the victims do not speak, read, or write well  
8        in English, adding an additional layer of difficulty to the  
9        evaluation and adjudication of their contentions.

10       The government seeks the appointment of a Special Master to  
11       supervise the process of gathering and analyzing the victims'  
12       claims and proofs of loss, and to calculate a proposed loss  
13       amount for each individual victim upon which to base a pro-rata  
14       distribution of the seized assets. The complexity of the work to  
15       be performed supports appointment of a Special Master. Moreover,  
16       the overarching goal of appointing a Special Master is to reduce  
17       the number of litigants in this case by encouraging the victims  
18       to voluntarily accept a pro-rata share of the seized assets based  
19       on a specific loss amount as calculated by a neutral third party,  
20       instead of litigating.

21       The government has already described why it is against the  
22       interests of justice to have 2,300 litigants actively competing  
23       with each other over the seized assets (supra, at p. 3), and why  
24       an easy "no litigation" option should be attractive to many  
25       victims, and to the Court. It is the government's hope and  
26       expectation, based on its knowledge of the people in the victim  
27       pool, that having the Special Master's neutral loss calculation  
28       will streamline the process, which will not only reduce effort by  
the court and the victims, but hopefully will also result in

1 fewer litigants, fewer court battles, and earlier finalization of  
2 this case. Even for those victims who ultimately become  
3 litigants, the Special Master's detailed calculations will be  
4 beneficial, because they will help frame the issues to be  
5 litigated as to each victim, thereby streamlining the resolution  
6 of the case. For example, a litigant-victim may choose to  
7 stipulate to the loss amount determined by the Special Master but  
8 refuse to accept a pro-rata distribution, leaving the court to  
9 decide only a question of law (whether or not pro-rata  
10 distribution is appropriate) as to that victim. Absent a Special  
11 Master, however, in order to reach a final judgment in this case  
12 2,300 victims would simply be invited to become litigants,  
13 without any structure to the process or prospects for  
14 streamlining the adjudication.

15 The government will take all appropriate steps to minimize  
16 the costs and expenses of the Special Master. The government has  
17 already obtained completed questionnaires and supporting  
18 documentation from approximately 2,200 victims describing their  
19 claimed losses, and will deliver these materials to the Special  
20 Master. The government will in addition seek to take all lawful  
21 steps to share its documentation showing BDF's intake of victims'  
22 funds and payments to some victims as purported "interest"  
23 (including obtaining court approval, if required, see Fed. R.  
24 Crim. P. 6(e)(3)(E)(i)). These steps will minimize the Special  
25 Master's expenses by reducing or eliminating the need for the  
26 Special Master to subpoena records from third parties, and  
27 shortening the time and effort needed for data collection and  
28 data entry. This will maximize the use of the Special Master's

1 time on his/her analysis and computation of the individual  
2 victims' losses based on the data. The government will also take  
3 responsibility for notifying the victims of matters relating to  
4 the Special Master's activities (such as by mailing claim forms  
5 or posting notices on the Internet or VNS), thus minimizing  
6 administrative expenses.

7 As a result of the Boylan decision, the responsibility for  
8 actually adjudicating losses and victim compensation in civil  
9 forfeiture cases in this Circuit was transferred from the  
10 government to the court. As demonstrated, the government has  
11 already undertaken substantial efforts to determine the  
12 identities of the victims of the scheme and preliminarily  
13 ascertain their losses. Moreover, the government recovered the  
14 defendant assets and commenced this action for the purpose of  
15 seeing the assets returned to the victims. It would be  
16 inappropriate for the government to referee or become involved in  
17 disputes that may arise among victim claimants (beyond arguing  
18 for a fair distribution plan that treats all victims equitably).  
19 Involving a Special Master in the loss calculation will minimize  
20 the Court's involvement in such disputes as well.<sup>5</sup>

21

22

---

23 <sup>5</sup> To this extent this matter is litigated, the government  
24 will ultimately advocate to this court a pro-rata distribution of  
25 the assets according to the verified losses suffered by each  
26 victim, without regard to whether any victims can trace their  
27 invested funds to the defendant assets. Imposition of a  
28 constructive trust (which requires proof of tracing) is  
inappropriate in a large-scale Ponzi investment fraud scheme.  
United States v. Real Property Located at 13328 and 13324 State  
Highway 75 North, Blaine County, Idaho, 89 F.3d 551, 553-554  
(1996) (equity demands all innocent defrauded claimants to a res  
must share equally regardless of tracing fictions).

### III. ARGUMENT

A. This Court Has the Authority to Appoint a Special Master

1. Rule 53(a)(1)(C) Authorizes the Appointment of A Special Master

A Court may appoint a master to "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of the district." Fed. R. Civ. P. 53(a)(1)(C). While "appointment of a master must be the exception and not the rule" (Advisory Committee Notes, 2003 amendments), this matter is the type of exceptional case justifying such an appointment. The sheer number of victims/potential claimants, the complexity of the computations, and the need for a process to streamline individualized loss calculations for the victims in order to reduce the number of court participants in this action all support the Court's exercise of its discretion to appoint a Master. Because this Court otherwise faces the prospect of as many as two thousand claimant-litigants, utilizing a Special Master to help organize and streamline the cases is in the interests of the efficient administration of justice. See In Re World Trade Center Disaster Site Litigation, 2006 WL 3627760 at \*1 (S.D.N.Y. 2006) (faced with thousands of individualized injury claims, district court appointed Special Masters to, inter alia, "help organize the cases to facilitate their efficient and just progress").

Here, the Master would perform a neutral analysis of victims' claimed pecuniary losses in comparison with financial records and BDF's internal records already in the government's

1 possession, and would calculate an individualized loss amount for  
2 each victim, essentially facilitating early settlement of the  
3 victims' claims. The actual pecuniary loss would be calculated  
4 as follows for each victim:

5 [Funds actually paid by victim to BDF]

6 *MINUS*

7 [Funds actually paid by BDF to victim]

8 *EQUALS*

9 [Actual Pecuniary Loss]<sup>6</sup>

10 This formula of calculating loss is one accepted method of  
11 determining losses for victims of Ponzi schemes. See United  
12 States v. Van Alstyne, 584 F.3d 803, 818 (9<sup>th</sup> Cir. 2009)  
13 (calculating actual pecuniary loss of Ponzi scheme victims in a  
14 similar manner for purposes of calculating offense level); In re  
15 Taubman, 160 B.R. 964, 980, 982 (S. D. Ohio 1983) (similar  
16 calculation of actual pecuniary loss deemed an equitable way to  
17 distribute funds from bankruptcy estate of Ponzi schemer). The  
18 government is willing to recognize each victim's claim in the  
19 amount of the Actual Pecuniary Loss as calculated by the Special  
20 Master<sup>7</sup>, and to distribute the seized funds pro-rata to all such  
21 victims in accordance with those amounts.<sup>8</sup>

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22  
23 <sup>6</sup> Victims who received more money from BDF than they  
24 actually paid to the company would have no Actual Pecuniary Loss.

25 <sup>7</sup> There may be a small number of victims whose claims the  
26 government would not recognize, such as persons who were also BDF  
insiders. These persons would have to litigate their interests.

27 <sup>8</sup> To the extent that individual claimants disagree with the  
28 formula, they would have to reject the loss calculation, become  
litigants in the case, and raise the issue with the Court. By  
appointing the Special Master to perform this calculation, the

1           The Master would be a neutral party, not aligned with either  
2 the government or BDF, and would have experience calculating  
3 victim losses in Ponzi schemes. That neutrality, expertise, and  
4 credibility would likely encourage the majority of the victims to  
5 accept the Special Master's loss calculations (the "no  
6 litigation" option) rather than intervene in the case as  
7 litigants. Given the number of civil and criminal cases pending  
8 in this district and the resulting docket congestion, it is  
9 readily apparent that no district judge or magistrate judge in  
10 this district could timely and effectively perform these  
11 calculations for 2,300 victims. Thus, appointment of a Special  
12 Master for these purposes is amply justified.<sup>9</sup>

13           2. The Court Has the Inherent Authority to Appoint a  
14           Special Master Apart from Rule 53

15           The Supreme Court has recognized that district courts have  
16 the inherent authority to appoint a Special Master to assist the  
17 court in the administration of justice. In In re Peterson, the  
18 Supreme Court reviewed a district court's decision to appoint an  
19 auditor "to make a preliminary investigation as to the facts,

20 government is not suggesting that the Court is adopting this  
21 formula as the final measure of recovery for litigated claims in  
22 this case. Even if a different formula were ultimately employed  
23 to resolve litigated claims, the Special Master's analysis and  
calculations would still assist the parties and the Court in  
resolving disputes over victims' losses.

24           <sup>9</sup> The government is not proposing at this time that the  
25 Special Master make recommendations directly to the Court  
concerning the victims' loss amounts. See Fed. R. Civ. P.  
26 53(a)(1)(B). As the case proceeds, however, the government may  
27 recommend that the Court adjust the duties of the Special Master  
28 to allow the Master to make recommendations directly to the Court  
regarding loss amounts, if the Court finds such an adjustment to  
be consistent with any rights parties may have to a jury trial.  
Fed. R. Civ. P. 53(b)(4); 53(a)(1)(B).

1 hear the witnesses, examine the accounts of the parties, and make  
2 and file a report in the office of the clerk of this court, with  
3 a view to simplifying the issues for the jury . . . ." 253 U.S.  
4 300, 304 (1920). The Supreme Court ruled that such an  
5 appointment was within the "inherent power" possessed by district  
6 courts "to provide themselves with appropriate instruments  
7 required for the performance of their duties." Id. at 312. The  
8 Court went on to observe that "where accounts are complex and  
9 intricate, or the documents and other evidence voluminous, or  
10 where extensive computations are to be made, it is the better  
11 practice to refer the matter to a special master or commissioner  
12 than for the judge to undertake to perform the task himself."  
13 Id. at 313 (citations omitted). Similarly, Rule 16 recognizes  
14 that in civil actions, the court may "take appropriate action" to  
15 adopt "special procedures for managing potentially difficult or  
16 protracted actions that may involve . . . multiple parties . . .  
17 ." Fed. R. Civ. P. 16(c)(2)(L). Thus, this Court has the  
18 inherent authority to appoint a Special Master for the purposes  
19 the government has proposed.

20 3. Matters the Court Must Consider When Appointing a  
Special Master

21 When considering whether to appoint a master, Rule 53  
22 requires the court to consider the fairness of imposing the  
23 likely expenses on the parties, and to protect against  
24 unreasonable expense or delay. Fed. R. Civ. P. 53(a)(3). Under  
25 the order the government requests, the Special Master would be  
26 compensated not by the parties out-of-pocket, but from the  
27 defendant assets in rem, which constitute "a fund or subject  
28

1 matter of the action within the court's control." Rule  
2 53(g)(2)(B). Thus, the costs would be borne out of the fund  
3 against which the victims would be asserting their claims. The  
4 titleholders to the defendant assets cannot object because they  
5 have released their interests in the assets. Exhibits 2-8. The  
6 victims are being notified of this motion and will therefore have  
7 an opportunity to intervene and object if they disagree.

8 The costs to the fund will be far outweighed by the benefits  
9 to the victims of a streamlined process that will minimize the  
10 time needed to resolve this matter (by encouraging acceptance of  
11 the stated loss amount instead of litigation). Moreover, payment  
12 from funds taken from the wrongdoer is the typical manner in  
13 which other court-appointed fund managers (such as receivers) are  
14 paid in large investor fraud cases such as those brought by the  
15 Securities and Exchange Commission. As already noted, the  
16 government will take appropriate steps to minimize the costs and  
17 expenses of data collection by providing records and other  
18 information in its possession to the Special Master. Moreover,  
19 the Court and the government will be able to control costs by  
20 reviewing the Master's periodic applications for disbursements of  
21 funds (Order ¶ 16), and the Court may limit payments as the Court  
22 deems necessary or appropriate.

23 With regard to delay, the government believes the Special  
24 Master will speed completion of this action, rather than delay  
25 it, by reducing litigation between the government and the victims  
26 it is seeking to protect, and between the victims themselves.  
27 Therefore, this factor weighs in favor of granting the motion.

B. THE PROPOSED SPECIAL MASTER

2 The government proposes that the Court appoint Edythe  
3 Bronston as the Special Master. Ms. Bronston is recommended  
4 because she is already familiar with the BDF scheme and has  
5 already had contact with many of the victims, in connection with  
6 her previous appointment as a receiver in a related civil case.<sup>10</sup>  
7 Her appointment would save time by eliminating the need for the  
8 Special Master to familiarize herself with the case. Ms.  
9 Bronston has separately served as a receiver and claims  
10 administrator in a Securities and Exchange Commission matter  
11 involving a Ponzi scheme. SEC v. John W. James, et al., CV 06-  
12 4966 FMC (FFMx). Therefore, she has the requisite experience  
13 analyzing investor claims and computing investors losses. See  
14 Ex. 9 (Curriculum Vitae ("CV") for Ms. Bronston.) Ms. Bronston  
15 proposes to hire an accounting firm which has substantial  
16 experience with Ponzi schemes and other investment frauds. Ex.  
17 10 (CV for LoBuglio and Sigman). Both Ms. Bronston and the  
18 accounting firm principal have agreed to bill for their  
19 professional services at \$325.00 per hour, which appears  
20 reasonable.<sup>11</sup> See World Trade Center Disaster Site Litigation,  
21 2006 WL 3627760 at \*2 (fixing compensation of Special Masters at  
22 \$500.00 per hour).

<sup>10</sup> Ms. Bronston was appointed by Judge Real as a receiver for the BDF entities in the matter Leyva v. Best Diamond Funding, et al., CV 09-3740 R (JCx). Judge Real released Ms. Bronston on November 2, 2009 at her request, after she was unable to find sufficient additional BDF assets to justify continuing the receivership.

<sup>11</sup> Ms. Bronston's professional legal services would be billed at \$375.00 per hour. (Ms. Bronston's own law firm will act as her counsel.)

1       In the alternative, the government proposes that the Court  
2 appoint Robb Evans as the Special Master, whose proposal for this  
3 matter and firm CV are attached collectively as Ex. 11. Mr.  
4 Evans and his firm have substantial experience analyzing victim  
5 claims in investment fraud cases brought by the Securities and  
6 Exchange Commission. Mr. Evans has his own in-house accounting  
7 staff, and has agreed to limit his fees and those of his CPA  
8 staff to \$325.00 per hour.<sup>12</sup>

9       Government counsel believes that each of the proposed  
10 Special Masters are able to execute the affidavit required by  
11 Fed. R. Civ. P. 53(b)(3)(A), stating that there are no grounds  
12 for disqualification under 28 U.S.C. § 455. The government will  
13 notify the court of the execution of the affidavits prior to the  
14 date noticed for hearing.

15 **C. THE PROPOSED ORDER**

16       The proposed order sets forth all the matters required to be  
17 addressed by Rule 53(b)(2):

- 18       1. The masters' duties (Order ¶¶ 4, 6-10) are summarized  
19                    above.
- 20       2. Ex parte communications (Order ¶ 11). Because the  
21                    duties of the Special Master will require him/her to  
22                    collect evidence from the government and from the  
23                    victims, and because she/he will not adjudicate any  
24                    matters in this case, it would be both burdensome and  
25                    unnecessary to prevent the Special Master from having  
26                    ex parte communications with the government or the

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28       <sup>12</sup> Mr. Evans' outside counsel's fees would be capped at  
          \$375.00 per hour.

victims. However, there appears to be no reason why the Special Master should communicate ex parte with the Court, and such communication should therefore be prohibited.

3. The record to be preserved (Order ¶ 12). The Order would require the preservation of most records used by the Special Master.

4. Time limits, method of filing the record, standards of review. Most of these provisions are inapplicable in light of the particular duties to be assigned to the master in this case. The Special Master is not to make any orders or rulings in this matter. Rather, her/his job will be to calculate a proposed loss amount for settlement purposes.

5. Compensation (Order ¶¶ 14-16). The Special Master would be compensated from the defendant assets by means of regular noticed applications to this Court for reimbursement.

D. THE PROPOSAL FOR PROCESSING VICTIM CLAIMS

After the Special Master has completed the individualized analyses for each victim, the government will send each victim the Special Master's analysis for that victim, and invite the victim to either (1) accept a pro-rata share based on the Special Master's calculations, or (2) file a claim of ownership in this action pursuant to the Supplemental Rules within 35 days after the notice is sent to the victim. Supplemental Rule G(4)(b)(ii)(B). The government will seek the entry of default against victims who do not respond. However, the government will

1 hold open for an additional reasonable period of time the "no  
2 litigation" option to accept a pro-rata share based on the  
3 calculated Actual Pecuniary Loss.

4 If any court claims are filed, the government is likely to  
5 propose to the Court a process for early determination of the  
6 validity of some or all of those claims (if possible). For  
7 example, the government expects to argue to the Court that while  
8 the litigant-victims may have Article III standing to file a  
9 claim asserting a constructive trust under Boylan, as a matter of  
10 equity no constructive trusts should be imposed in this  
11 particular case because of the nature of the fraud scheme.

12 United States v. Real Property Located at 13328 and 13324 State  
13 Highway 75 North, Blaine County, Idaho, 89 F.3d 551, 553-554  
14 (1996) (equity demands all innocent defrauded claimants to a res  
15 must share equally regardless of tracing fictions). The  
16 government may also argue that on the facts of this case, summary  
17 proceedings to adjudicate the litigant-victims' claims may be  
18 appropriate.

19 In the government's view, the defendant assets should be  
20 forfeited, liquidated, and distributed pro-rata to victims with  
21 verifiable losses in accordance with statutory and regulatory  
22 procedures, rather than through this civil forfeiture action.

23 See 18 U.S.C. § 981(e)(6); 28 C.F.R. § 9.8. Even though the  
24 perpetrators of the fraud scheme have capitulated, Boylan  
25 prevents the government from accomplishing the above result  
26 without further court proceedings. However this case ultimately  
27 resolves itself, the calculations performed by the Special Master  
28 will be invaluable to the just resolution of the matter.

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IV. CONCLUSION

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For the foregoing reasons, the government's motion for  
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appointment of a Special Master should be granted.

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DATE: December 18, 2009 Respectfully submitted,

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GEORGE S. CARDONA  
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Acting United States Attorney  
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CHRISTINE C. EWELL  
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Assistant United States Attorney  
Chief, Criminal Division  
STEVEN R. WELK  
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Assistant United States Attorney  
Chief, Asset Forfeiture Section

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MONICA E. TAIT  
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Assistant United States Attorney

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Attorneys for Plaintiff  
United States of America

DECLARATION OF MONICA E. TAIT

1. I am an Assistant United States Attorney in the Central District of California. I am the attorney chiefly responsible for representing the government's interest in the action United States v. \$6,874,561.25 in Funds from Six Wells Fargo Bank Accounts, et al., CV 09-2398 RGK (RZx). I have personal knowledge of the following facts unless otherwise indicated and, if called as a witness, would testify thereto under oath.

2. On April 7, 2009, I caused to be filed the government's complaint in this action, a true and correct copy of which is attached as Exhibit 1.

3. The government received from potential claimants Milton Retana, Best Diamond Funding Corp., Best Diamond Realty Corp., Best Alliance Construction Group Inc., First Class Bancorp, Inc., Libreria Del Exito Mundial, Inc., and Lidia Campos (the "releasing persons/entities"), through counsel for Retana, executed documents waiving, relinquishing, and surrendering all rights to contest the civil, criminal, or administrative forfeiture of the defendant assets, all rights to receive notice of any forfeiture proceedings concerning the defendant assets, and all rights to judicial review of the forfeiture of the defendant assets. True and correct copies are attached hereto as Exhibits 2 through Exhibit 8.

4. I recommend the appointment of Edythe Bronston as Special Master for this matter, for the reasons described in the attached motion. Attached hereto as Exhibit 9 is the Curriculum Vitae ("CV") Ms. Bronston sent me. Attached hereto as Exhibit 10 are materials Ms. Bronston sent me concerning her proposed

1 accounting firm, LoBuglio and Sigman.

2 5. In the alternative, I recommend the appointment of Robb  
3 Evans as the Special Master. Attached hereto collectively as  
4 Exhibit 11 are materials I received from Mr. Evans' firm.

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

7 Executed this 18<sup>th</sup> day of December, 2009 at Los Angeles,  
8 California.

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MONICA E. TAIT

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