

universal lease had a 25-year term and, for a particular time period (typically one to two weeks each year), a universal lease investor had three options: (1) use the room; (2) rent the room; or (3) allow a purportedly independent third party management company, namely World Phantasy Tours, Inc., doing business as Majesty Travel and as Viajes Majesty (World Phantasy Tours) or, later, Galaxy Properties Management, S.A. (Galaxy Properties), to rent the room in exchange for guaranteed payments of as much as 11% of their investment. Almost all of the purchasers of universal leases chose option three.¹

3. The government alleges, however, that the purportedly “independent” third party management companies, World Phantasy Tours and Galaxy Properties, were controlled by defendant, and could not make the promised payments to investors without the influx of money from new investors. In or about late 2005, defendant stopped paying any monies owed to universal lease investors, and to date at least \$330 million of the funds fraudulently obtained from investors is still owed to defrauded investors. As a result of the losses suffered by universal lease investors, this case is governed by the mandatory restitution provisions of Title 18, United States Code, Sections 3663A and 3664.

4. The government alleges that defendant and others used a significant portion of the money received from universal lease investors to purchase hotels, businesses, homes,

¹ In addition, the Securities Exchange Commission has brought a civil case against the defendant and others which seeks disgorgement for the benefit of what the government believes to be a common set of victims as in the above-captioned criminal case. *United States Securities and Exchange Commission v. Michael E. Kelly, et al.*, 07 C 4979 (N.D. Ill) (Bucklo, J.). The SEC has been apprised of the ongoing discussions between the government and defense counsel.

boats, automobiles, an airplane, a nightclub, a golf course, and an interest in a significant real estate development project. Almost all of these assets are located in Mexico. In conjunction with plea negotiations in this case, the defendant has informed the government that he intends to cause the liquidation and/or repatriation of assets to provide restitution to the victim investors.

5. Both parties contemplate that defendant will plead guilty pursuant to a plea agreement, and as a result the Court will enter a restitution order against the defendant in the full amount of each victim's loss, as determined by the Court. Section 3663 requires the United States Attorney's Office and the United States Probation Office to compile for the Court a complete accounting of the losses to each victim, and to provide notice to each victim regarding the amount of restitution owed to them so that the victim may correct or object to the government's calculations. 18 U.S.C. §§ 3663(a), 3663(d).

6. Section 3664(d)(6) expressly authorizes a district court to "refer any issue arising in connection with a proposed order of restitution to a . . . special master for proposed findings of fact and recommendations as to disposition, subject to a *de novo* determination of the issue by the court." 18 U.S.C. § 3664(d)(6).

7. The government and defendant Kelly agree that assets recovered from defendant Kelly will go toward restitution to the victims of the charged fraud in the amounts determined by order of the Court. Nonetheless, the government asserts that the same assets are subject to forfeiture pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c) as

alleged in the Information filed in this case and should therefore be preserved and repatriated as provided by law.

8. Title 21, United States Code, Section 853 provides:

Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, *or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section.*

Section 853(e)(1) (emphasis added).²

9. The statute also provides the court with authority to direct the repatriation of assets:

Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

Section 853(e)(4).

10. The parties, therefore, respectfully propose that the Court, pursuant to both the forfeiture and restitution provisions, appoint a special master to assist the Court in repatriating and preserving the availability of assets and, thereafter, in fashioning and enforcing a restitution order in this case. Specifically, the parties request that the Court

² Title 28, United State Code, Section 2461(c) provides that in any case in which property is subject to civil or criminal forfeiture, the government may include notice of forfeiture in an indictment or information pursuant to the Federal Rules of Criminal Procedure, and that the procedures set forth in 21 U.S.C. § 853 will apply to all stages of the criminal forfeiture proceeding.

appoint and empower a special master to perform the following necessary tasks:

- (a) identify all assets to be preserved and made available for liquidation and/or repatriation;
- (b) select an appropriate method and timetable to liquidate and/or repatriate any available assets;
- (c) as and when directed by the court, oversee and accomplish the liquidation and/or repatriation of any available assets for the benefit of the victims;
- (d) identify victims who suffered losses in consequence of the charged offenses;
- (e) quantify the loss suffered by each victim; and
- (f) apportion any available funds among the victims pursuant to orders of this Court.

11. The appointment of a special master for these purposes is warranted for several reasons. First, the identification, liquidation, preservation, and repatriation of assets held by the defendant (or others associated with the defendant) in foreign countries will require the expertise of professionals experienced in such matters. This court-appointed professional would be best situated to evaluate – and, under the Court’s supervision, implement – the many decisions that must be made regarding how, when, and in what fashion any available assets are to be preserved and repatriated and how and when such assets should be sold to a third party. These decisions will affect both the availability of assets as well as total amount of money available to repay victims and the time-frame within which such payments can be made.

12. Second, there are thousands of victims in this case. Quantifying and substantiating losses for each victim will require significant human resources beyond the ability of the United States Probation Office, United States Attorney's Office, and the federal agencies who investigated and prosecuted the underlying offenses. Furthermore, although the parties have expended a significant amount of time and effort in identifying victims and the amounts of their losses, there may be victims yet to be discovered. A claims verification procedure – including, as may be appropriate, the posting of public notices and distribution of claims verification forms – may result in a more complete identification of the victims eligible for restitution in this case.

13. The parties have already spent a considerable amount of time and effort in identifying victims, in determining the amounts of victims' losses, in locating assets available for making restitution and in attempting to devise a plan for the liquidation and repatriation of assets. In order to conserve assets for the payment of restitution to victims, any special master appointed by this Court should be required to give due consideration to the parties' efforts and to make use of the fruits of those efforts wherever in the best interests of justice and the victims. Likewise, because the bulk of the assets proposed for liquidation and repatriation are ongoing businesses, any special master appointed by this Court should be required to give due consideration to the defendant's request that current management be utilized to the extent that it is determined to be in the best interests of justice and of the victims.

14. In order to facilitate the appointment of a special master, the defendant agrees to cause to be deposited the sum of \$1,000,000 with the Clerk of the Court to fund the initial fees, costs and other expenses associated with the appointment of a special master within five business days of the order of this Court. Defendant Kelly also agrees to provide any and all additional money necessary to continue funding the work of the court appointed officer until relieved of this obligation by order of court.

15. Based on the foregoing, the parties request that the Court appoint a special master and empower the special master to, among other things: analyze any and all matters pertaining to victims, victims' losses, and restitution in this case; and submit to the Court and the parties a proposed plan of action relating to the following tasks which, with the Court's approval, the special master may be charged with accomplishing:³

- (i) identify all assets to be preserved and made available for liquidation and/or repatriation;
- (ii) selecting an appropriate method and timetable to liquidate and/or repatriate any available assets;
- (iii) as and when directed by the court, overseeing and enforcing the liquidation and/or repatriation of any available assets for the benefit of the victims identifying victims who suffered losses in consequence of the charged offenses;
- (iv) quantifying the loss suffered by each victim; and
- (v) apportioning any available funds among the victims as determined by

³ It is contemplated that, after the special master submits the above-referenced plan of action, the Court will then enter a more detailed order setting forth the special master's duties, rights and responsibilities.

the Court.

16. Written proposals have been received from eight special master candidates and have been submitted to this Court. The parties reserve the right to make recommendations to the Court regarding the selection of a Special Master.

17. The government has spoken with Jeffrey Steinback, attorney for defendant Michael E. Kelly, who agrees with the requests set forth in this motion.

WHEREFORE, the United States moves pursuant to Section 853(e) and Section 3664(d)(6) for entry of an order appointing a special master.⁴

Respectfully submitted,

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⁴The government will submit a proposed order at the Court's request.

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

Agreed Revised Motion for Appointment of Special Master

was served on October 1, 2008, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

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