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7 *Class*

8 **UNITED STATES DISTRICT COURT**  
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN JOSE DIVISION**

11 UNITED STATES FIRE INSURANCE  
12 COMPANY, a corporation,

13 Plaintiff,

14 vs.

15 VESTA STRATEGIES, LLC, a limited liability  
16 company; SAMUEL W. HENKA, an individual,

17 Defendants.

18 SAMUEL W. HENKA, et al.,

19 Counter-Claimants,

20 vs.

21 UNITED STATES FIRE INSURANCE  
22 COMPANY, a corporation.

23 Counter-Defendants.

24 SAMUEL W. HENKA, et al.,

25 Cross-Claimants,

26 vs.

27 VESTA STRATEGIES, LLC, a limited liability  
28 company; et al.,

Cross-Defendants.

Case No.: C0902388 JW PVT

**DECLARATION OF PETER L. CANDY  
IN SUPPORT OF MOTION TO  
APPOINT RECEIVER**

**Date: December 14, 2009**  
**Time: 9:00 a.m.**  
**Courtroom 8, 4<sup>th</sup> Floor, San Jose**

1 I, Peter L. Candy, declare as follows:

2 1. I am an attorney at Hollister & Brace. I am licensed to practice law in the State of  
3 California. I am personally apprised of the facts stated herein, and if sworn, could competently  
4 testify thereto. As to facts stated herein of which I am not personally apprised, those facts are  
5 stated on information and belief.

6 2. I am an attorney representing Counter-Claimants and Cross-Claimants Samuel W.  
7 Henka, Michael and Joyce Simmons, Christopher Walsh and Maria Del Carmen Alonso, on  
8 behalf of themselves individually, and as Representatives for all putative Class members  
9 similarly situated (collectively "Henka and the Class").

10 3. This litigation involves a Class Action, brought in the form of a Counter-  
11 Complaint and Cross-Complaint, on behalf of approximately twenty-two (22) similarly situated  
12 people. Henka and the Class each deposited substantial sums in 1031 exchange Funds  
13 ("Exchange Funds") with Cross-Defendant Vesta Strategies, LLC ("Vesta"). Following deposit,  
14 Henka and the Class had their Exchange Funds stolen by John Terzakis ("Terzakis") and Robert  
15 Estupinian ("Estupinian"), the owners of Vesta.

16 4. Terzakis and Estupinian formed Vesta in January 2004, to act as a Qualified  
17 Intermediary ("QI") or "Exchange Accommodator," whose business was to effectuate "like-  
18 kind" exchanges of real property and defer taxable gain for clients pursuant to Internal Revenue  
19 Code Section 1031 (26 U.S.C. § 1031). As a QI, Vesta was obligated to hold its clients'  
20 Exchange Funds, received from the sale of "relinquished" property, in trust for up to 180 days  
21 while the client located and purchased "replacement" property. Instead of properly holding its  
22 clients' Exchange Funds in trust, Terzakis and Estupinian, pursuant to a RICO enterprise,  
23 misappropriated and diverted over \$38 million dollars in Exchange Funds for their own personal  
24 use and gain. The theft was exposed in the latter part of 2008, when the slowing real estate  
25 market imposed a de facto audit on Vesta's trust accounts, revealing a deficit of approximately  
26 \$17 million. To date, Henka and the Class have not recovered any of the \$17 million in  
27 Exchange Funds they entrusted to Vesta.

1           5.       In September 2004, Terzakis and Estupinian, together with several additional  
2 partners, formed Cross-Defendant Excalibur 1031 Group, LLC (“Excalibur”), a limited liability  
3 company organized under the laws of the State of Delaware. Excalibur was reportedly organized  
4 to operate as a QI, but more specifically as a marketing sub-brand for Vesta, whereby Vesta,  
5 through Excalibur, could broaden its business presence in the northeastern portion of the United  
6 States. Similar to Vesta, Excalibur was a trustee of the Exchange Funds its clients entrusted to it.  
7 At the time of Excalibur’s formation, the company was 50% owned by Vesta. By February 2008,  
8 Excalibur was wholly owned by Vesta, and in reality by Terzakis and Estupinian, as the owners  
9 of Vesta.

10           6.       As a result of Excalibur’s affiliation with Vesta, and more importantly the fact the  
11 two companies were held under common ownership, Excalibur obtained access to the Exchange  
12 Funds of Vesta’s clients. Between April 2005 and June 2008, approximately \$12,978,277 in  
13 Vesta Exchange Funds were transferred from Vesta’s accounts to Excalibur’s accounts and other  
14 accounts used to close the exchanges of Excalibur’s clients. Once Excalibur took control of  
15 Vesta Exchange Funds, it became a co-obligor of the contractual and fiduciary obligations owed  
16 by Vesta to its clients. Vesta and Excalibur are collectively referred to as the “Exchange  
17 Entities.”

18           7.       Henka and the Class (and/or their subrogors) have asserted coverage under the  
19 Commercial Crime Policies with 1031 Tax-Deferred Exchange Endorsements (“Crime Policies”)  
20 issued to the Exchange Entities. These Crime Policies were issued by Counter-Defendant United  
21 States Fire Insurance Company (“U.S. Fire”), Cross-Defendant Continental Casualty Company  
22 (“Continental”), and Cross-Defendant Liberty Mutual Insurance Company (“Liberty”)  
23 (collectively the “Insurance Defendants”). A standard Commercial Crime Policy protects an  
24 owner/employer from theft of the employer/owner’s assets by a dishonest employee. The Tax-  
25 Deferred Exchange Endorsements expanded coverage to include owner theft of client funds on  
26 deposit at the QI. The expanded coverage was effectively a financial guarantee made by the  
27 Insurance Defendants regarding the fidelity of the Exchange Entities and their owners, protecting  
28 Exchange Funds on deposit with the Exchange Entities, against theft by the owners of the

1 Exchange Entities. Henka and the Class have asserted coverage under the Crime Policies for the  
2 theft of their Exchange Funds committed by Terzakis and Estupinian.

3 8. The Crime Policies, by their terms, require the named "Insureds" to submit notice  
4 and proof of loss of owner theft before any benefits are to be distributed under the policies. The  
5 named "Insureds" under the Crime Policies are the Exchange Entities, not Henka and the Class.  
6 Furthermore, the Crime Policies purport to be for the benefit of the Exchange Entities only, and  
7 disclaim any benefit to third parties. The Insurance Defendants have denied coverage on the  
8 grounds Henka and the Class (and/or their subrogors) are not named "Insureds" as such parties  
9 are defined under the Crime Policies. The Insurance Defendants have taken the position that,  
10 because Henka and the Class are not the named "Insureds," they lack standing to pursue a direct  
11 claim against them under the Crime Policies.

12 9. The Crime Policies were procured by the Exchange Entities for the specific  
13 purpose of protecting Exchange Funds from owner theft. The policies were advertised to the  
14 public as protecting Exchange Funds from owner theft, and the public reasonably construed the  
15 Crime Policies as protecting Exchange Funds from owner theft. The Insurance Defendants have  
16 not attempted to deny, nor can they deny, the Crime Policies were intended to protect Exchange  
17 Funds from owner theft. The only question is whether clients of the Exchange Entities can  
18 pursue claims for theft directly against the Insurance Defendants.

19 10. The Exchange Entities were abandoned by their owners John Terzakis and Robert  
20 Estupinian in August 2008. These individuals abandoned the Exchange Entities after absconding  
21 with \$17 million in stolen Exchange Funds belonging to Vesta's clients. Terzakis and Estupinian  
22 now face the prospect of federal criminal indictments. They have no interest answering  
23 complaints filed against the Exchange Entities, hiring counsel to defend lawsuits brought against  
24 the Exchange Entities, or otherwise acting to preserve and protect the Exchange Entities'  
25 interests. They certainly have no interest prosecuting insurance claims on behalf of clients of the  
26 Exchange Entities, from whom they stole Exchange Funds, because this would require them to  
27 admit their guilt for the theft.

28

1           11.     The only known asset of any value held by the Exchange Entities and available to  
2 satisfy creditors' claims are the Crime Policies. Terzakis and Estupinian have an ongoing  
3 fiduciary obligation to prosecute insurance claims against the Crime Policies in the name of the  
4 Exchange Entities, for the benefit of Henka and the Class. Their ongoing refusal to act on the  
5 Crime Policies in the name of the Exchange Entities constitutes a continuation of their fraudulent  
6 conduct and an ongoing breach of their fiduciary obligations. In the absence of the appointment  
7 of a receiver, the fraud and fiduciary breach that was perpetrated upon Henka and the Class will  
8 be perpetuated.

9           12.     The Exchange Entities, abandoned by their owners, are currently incapacitated  
10 and without representation. The Insurance Defendants are attempting to escape coverage on any  
11 grounds possible. This includes trying to take advantage of the fact the Exchange Entities are  
12 currently incapacitated and cannot represent themselves. U.S. Fire has moved for entry of a  
13 default judgment seeking rescission of its Crime Policies in response to Vesta's failure to appear  
14 in the action. Continental and Liberty are likely to assert and pursue similar defenses. Each of the  
15 Insurance Defendants has effectively denied or will deny coverage on grounds Henka and the  
16 Class lack standing to pursue a direct claim against them under the Crime Policies. Furthermore,  
17 each of the Crime Policies in their own way requires that claims made against the policies be  
18 made timely. Each day that passes without a receiver being appointed places the insurance assets  
19 further at risk. Unless a receiver is appointed to act in the name of the Exchange Entities to  
20 preserve and protect the insurance, the insurance assets comprised of the Crime Policies face the  
21 immediate threat of loss by default.

22           13.     The urgency of the threat is best exemplified by a recent decision issued in a  
23 related case *Carteret Ventures, LLC v. Liberty Mutual Insurance Company*, Civil Action No. 09-  
24 2831 (JLL), pending before the United States District Court for the District of New Jersey. The  
25 decision is adverse to Henka and the Class, and results directly from the fact nobody has been  
26 willing to act in the name of the Exchange Entities to pursue claims against the Crime Policies  
27 for owner theft. The plaintiff in the case, Carteret Ventures, LLC ("Carteret") was a client of  
28 Excalibur. Carteret transferred over \$11 million to Excalibur for purposes of completing a 1031

1 Exchange. Carteret's money was stolen by Terzakis and Estupinian. Liberty insured Excalibur  
2 pursuant to a Crime Policy. Excalibur, in its abandoned state and completely incapacitated, failed  
3 to provide Liberty with a completed loss submission. When Carteret attempted to submit the  
4 proof of loss on Excalibur's behalf, Liberty denied coverage on grounds Carteret lacked standing  
5 to pursue a claim on its own.

6 14. Carteret then sued Liberty seeking a declaration that it was both an "Insured" and  
7 the "Loss Payee" under the Crime Policy. Liberty responded with a motion to dismiss under Fed.  
8 R. Civ. P. 12(b)(6). On October 2, 2009, the District Court issued its ruling dismissing the case  
9 filed by Carteret. The Court felt that Liberty's policy was clear and unambiguous in denying  
10 Carteret rights under the policy, except to receive payment of a loss once identified.  
11 Furthermore, the Court felt the policy was clear and unambiguous in stating that Excalibur was  
12 the only party who could trigger a loss under the policy. In the Court's words, "Until Excalibur  
13 makes a proper claim for loss, there is no loss payable to anyone." On these grounds the Court