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*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.

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18 SAMUEL W. HENKA, et al.,

19 Counter-Claimants,

20 vs.

21 UNITED STATES FIRE INSURANCE  
 22 COMPANY, a corporation.

23 Counter-Defendants.

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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**

**NOTICE OF MOTION AND  
 MOTION TO APPOINT  
 RECEIVER; MEMORANDUM OF  
 POINTS AND AUTHORITIES**

**Date: December 14, 2009**

**Time: 9:00 a.m.**

**Courtroom 8, 4<sup>th</sup> Floor, San Jose**

1 **TO ALL PARTIES HEREIN AND THEIR ATTORNEYS OF RECORD:**

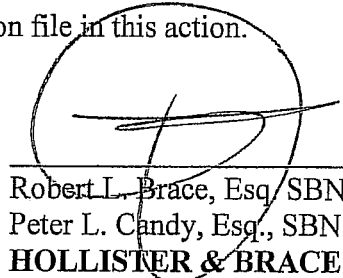
2 **NOTICE IS HEREBY GIVEN** that on December 14, 2009 at 9:00 a.m., or as soon  
3 thereafter as counsel may be heard, Counter-Claimants and Cross-Claimants Samuel W. Henka,  
4 Michael and Joyce Simmons, Christopher Walsh and Maria Del Carmen Alonso, on behalf of  
5 themselves individually, and as Representatives for the Class of victims who had their 1031  
6 exchange funds stolen by the owners of Vesta Strategies, LLC (collectively "Henka and the  
7 Class"), will move this Court, pursuant to Rule 66 of the Federal Rules of Civil Procedure, and  
8 18 U.S.C. §1964(b) (RICO), for an order:

9 (a) Appointing an independent fiduciary and receiver in this action to represent and  
10 act in the name of Cross-Defendants Vesta Strategies, LLC and Excalibur 1031 Group, LLC (the  
11 "Exchange Entities"), for purposes of managing, preserving, and protecting the Property of the  
12 Exchange Entities, including without limitation any insurance policies and related assets of the  
13 Exchange Entities, on grounds that the Exchange Entities have been abandoned by their owners,  
14 are currently incapacitated, and the only known asset of any value held by the Exchange Entities  
15 available to satisfy creditors' claims is in imminent danger of being harmed or forever lost as a  
16 result of the incapacitation; and

17 (b) Granting Henka and the Class such other relief as may be appropriate.

18 This motion will be heard at the United States Courthouse located at 280 South First Street,  
19 Fourth Floor, Courtroom 8, San Jose, California, and is based upon this Notice of Motion, the  
20 accompanying Declaration of Peter L. Candy, the accompanying Memorandum of Points and  
21 Authorities, and on all of the pleadings and papers on file in this action.

22  
23 DATED: *October 22, 2009*



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W. HENKA, and the Class*

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1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. INTRODUCTION**

3 This litigation involves a Class Action brought in the form of a Counter-Complaint and  
4 Cross-Complaint filed by five (5) representative Class members on behalf of a putative Class of  
5 approximately twenty-two (22) similarly situated people. The individual Class members each  
6 deposited substantial sums in 1031 exchange Funds (“Exchange Funds”) with Cross-Defendant  
7 Vesta Strategies, LLC (“Vesta”), and had their Exchange Funds stolen by John Terzakis  
8 (“Terzakis”) and Robert Estupinian (“Estupinian”), the owners of Vesta.

9 Terzakis and Estupinian formed Vesta in January 2004, to act as a Qualified Intermediary  
10 (“QI”) or “Exchange Accommodator,” whose business was to effectuate “like-kind” exchanges  
11 of real property and defer taxable gain for clients pursuant to Internal Revenue Code Section  
12 1031 (26 U.S.C. § 1031). As a QI, Vesta was obligated to hold its clients’ Exchange Funds,  
13 received from the sale of “relinquished” property, in trust for up to 180 days while the client  
14 located and purchased “replacement” property. Instead of properly holding its clients’ Exchange  
15 Funds in trust, Terzakis and Estupinian, pursuant to a RICO enterprise, misappropriated and  
16 diverted over \$38 million dollars in Exchange Funds for their own personal use and gain. The  
17 theft was exposed in the latter part of 2008 when the slowing real estate market imposed a de  
18 facto audit on the trust funds Vesta was supposed to be safeguarding on behalf of its clients. The  
19 audit revealed a deficit in Vesta’s client trust accounts of approximately \$17 million. To date,  
20 Samuel W. Henka, Michael and Joyce Simmons, Christopher Walsh and Maria Del Carmen  
21 Alonso (the Class Representatives), as well as the remainder of the Class (collectively “Henka  
22 and the Class”), have not recovered any of the \$17 million in Exchange Funds they entrusted to  
23 Vesta.

24 Henka and the Class seek appointment of a receiver to represent and act in the name of  
25 Vesta, and Excalibur 1031 Group, LLC (“Excalibur”), the other QI, wholly owned by Vesta,  
26 which had access to and handled misappropriated Exchange Funds belonging to Vesta’s clients  
27 (Vesta and Excalibur are collectively referred to as the “Exchange Entities”). As it stands, the  
28 Exchange Entities have been abandoned by their owners, and are currently incapacitated and

1 without representation. The only known asset of any value held by the Exchange Entities and  
2 available to satisfy creditors' claims are the Commercial Crime Policies with 1031 Tax-Deferred  
3 Exchange Endorsements purchased by the Exchange Entities ("Crime Policies"). The Crime  
4 Policies are in imminent danger of being harmed or forever lost as a result of the incapacitation  
5 of the Exchange Entities. A receiver is needed to take control of the Exchange Entities and  
6 represent their interests, as well as to manage, preserve, and protect the assets of the Exchange  
7 Entities, including the Crime Policies. The facts and law supporting the appointment of a  
8 receiver in this action are set forth in further detail below.

## 9 **II. STATEMENT OF FACTS SUPPORTING APPOINTMENT OF A RECEIVER**

### 10 **1. The Fraudulent Scheme**

11 Terzakis and Estupinian's first venture together in the business of 1031 Exchange  
12 Accommodators was an entity by the name of Investment Advantage Group, LLC ("IAG"). IAG  
13 was formed in March 2000, as a limited liability company organized under the laws of the State  
14 of Delaware, to operate as QI for purposes of conducting tax-deferred exchanges for IAG's  
15 clients. In reality, IAG was a front which allowed Terzakis and Estupinian to treat client trust  
16 funds as their own personal funds for multiple purposes, including their own speculative real  
17 estate investments. Terzakis and Estupinian discovered that with rising real estate prices, new  
18 escrows being opened on relinquished properties were sufficient to pay for the close of escrows  
19 on replacement properties, thus enabling them to divert the majority of the funds held in trust,  
20 indefinitely, for their own individual gain. By using new deposits on relinquished properties to  
21 cover the close of escrows on replacement properties, Terzakis and Estupinian found they could  
22 conceal the ongoing theft of client trust money, and, in effect, operate a Ponzi scheme. This  
23 pattern of self-dealing resulted in a failed \$4.3 million exchange in December 2001, and a  
24 subsequent lawsuit filed by IAG's client, Portola Investments.<sup>1</sup> Negative publicity from the  
25 lawsuit resulted in IAG's failure, which caused Terzakis and Estupinian to form Vesta in January  
26 2004.

27  
28 <sup>1</sup> *Portola Investments v. Investment Advantage Group, LLC*, Santa Clara County Superior Court  
Case No. CV804388

1 Similar to IAG, Vesta was formed to act as a QI for purposes of 1031 exchanges, but in  
2 reality to operate as another front enabling Terzakis and Estupinian to continue their pattern of  
3 self-dealing and misappropriation of client trust assets. By the time Vesta was formed, Terzakis  
4 and Estupinian were experts in the art of stealing client trust assets and concealing their theft  
5 through corporate machinations and related entity transfers. The scheme was carried out by  
6 utilizing an extensive network of banks and bank accounts established in Vesta's name and  
7 located across the United States. The movement of money began with the commingling of client  
8 Exchange Funds in accounts established at East West Bank (headquartered in Pasadena,  
9 California) and Mellon Bank (headquartered in Pittsburg, Pennsylvania). Once commingled, the  
10 Exchange Funds were transferred to Vesta accounts established at the specific banks where  
11 Terzakis and Estupinian did much of their personal banking business. From these accounts, it  
12 was a simple matter for Terzakis and Estupinian to move Exchange Funds into their own  
13 personal and business accounts as they pleased.

14 In September 2004, Terzakis and Estupinian, together with several additional partners,  
15 formed Cross-Defendant Excalibur, a limited liability company organized under the laws of the  
16 State of Delaware. Excalibur was formed to operate as a QI, but more specifically as a marketing  
17 sub-brand for Vesta, whereby Vesta, through Excalibur, could broaden its business presence in  
18 the northeastern portion of the United States. Similar to Vesta, Excalibur was a trustee of the  
19 Exchange Funds its clients entrusted to it. At the time of Excalibur's formation, the company  
20 was 50% owned by Vesta. By February 2008, Excalibur was wholly owned by Vesta, and in  
21 reality owned by Terzakis and Estupinian, as the owners of Vesta.

22 As a result of Excalibur's affiliation with Vesta, and more importantly the fact the two  
23 companies were held under common ownership, Excalibur obtained access to the Exchange  
24 Funds of Vesta's clients. Between April 2005 and June 2008, approximately \$12,978,277 in  
25 Vesta Exchange Funds were transferred from Vesta's accounts to Excalibur's accounts and other  
26 accounts used to close the exchanges of Excalibur's clients. Once Excalibur took control of  
27 Vesta Exchange Funds, it became a co-obligor of the contractual and fiduciary obligations owed  
28 by Vesta to its clients.

1           **2.       The Fidelity Bond Insurance Program**

2           The Federation of Exchange Accommodators (“FEA”) is a trade organization established  
3 to promote the interests of QIs handling 1031 Exchanges. The FEA recognized a need for its  
4 members to better compete with banks and title companies, who also operate as QIs, by  
5 obtaining insurance for the unregulated QIs. In conjunction with Willis (an insurance broker) and  
6 Cross-Defendant Continental Casualty Company (“Continental”), the FEA developed an  
7 insurance program intended to boost consumer confidence in QIs by protecting client funds from  
8 theft by the owners and employees of the QIs. The program involved modification of a standard  
9 Commercial Crime Policy by means of several 1031 Tax-Deferred Exchange Endorsements.

10           A standard Commercial Crime Policy protects an owner/employer from theft of the  
11 employer/owner’s assets by a dishonest employee. The Tax-Deferred Exchange Endorsements  
12 expanded coverage to include owner theft of client funds on deposit at the QI. The expanded  
13 coverage was effectively a financial guarantee made by insurance carriers regarding the fidelity  
14 of the QI and its owners, protecting the Exchange Funds of the QI’s clients against theft by  
15 owners of the QI. The Commercial Crime Policies with Tax-Deferred Exchange Endorsements  
16 (hereinafter the “Crime Policies”) effectively converted a two-party crime insurance policy into a  
17 three-party surety bond, or financial guarantee. The newly-created FEA insurance was referred  
18 to industry-wide as a “Fidelity Bond Program” which was consistent with the concept that  
19 Exchange Funds on deposit with the QI were “bonded” from theft by the QI or by the owner of  
20 the QI.

21           **3.       The Crime Policies Issued To Vesta and Excalibur**

22           Continental, along with Counter-Defendant United States Fire Insurance Company (U.S.  
23 Fire) and Cross-Defendant Liberty Mutual Insurance Company (“Liberty”), among others, began  
24 issuing coverage under the “Fidelity Bond Program” in exchange for substantial policy  
25 premiums obtained from QIs who wanted to compete with title companies and banks for the  
26 business of 1031 Exchange clients. Vesta purchased the “Fidelity Bond” coverage from  
27  
28

1 Continental in 2004, and from U.S. Fire in 2005, 2006 and 2007.<sup>2</sup> Excalibur purchased the  
2 “Fidelity Bond” coverage from Continental in 2005, 2006 and 2007, and from Liberty in 2007-  
3 2008.<sup>3</sup> The Exchange Entities purchased the Crime Policies from Continental, U.S. Fire, and  
4 Liberty (collectively the “Insurance Defendants”) to give their clients peace of mind regarding  
5 the security of Exchange Funds while on deposit. The Exchange Entities advertised the existence  
6 of the Crime Policies on their websites and in printed promotional materials in order to convince  
7 potential new exchange clients that their money would be safe during the 180-day exchange  
8 period.

9 By at least August 11, 2006, Continental became aware that, as an industry-wide practice,  
10 its insured QIs were advertising, and the public was reasonably construing, its Crime Policies to  
11 be three-party surety bonds or financial guarantees protecting the Exchange Funds of the third-  
12 party clients placed on deposit with the QIs.<sup>4</sup> Similarly, by at least February 1, 2007, U.S. Fire  
13 became aware, to the extent it was not already aware, that as an industry-wide practice, its  
14 insured QIs were advertising, and the public was reasonably construing, its Crime Policies to be  
15 three-party surety bonds or financial guarantees protecting the Exchange Funds of the QI’s  
16 clients.<sup>5</sup> As three-party surety bonds or financial guarantees, the understanding was that the

---

18 <sup>2</sup> Vesta’s “Fidelity Bond” portfolio, from January 2004 through Vesta’s collapse in July 2008,  
19 was comprised of at least the following policies: (a) January 2004 to August 15, 2004 Crime  
20 Policy issued to Vesta by Continental in the amount of \$5,000,000 (Policy number 267920538);  
21 (b) August 19, 2005 to August 19, 2006 Crime Policy issued to Vesta by U.S. Fire in the amount  
of \$2,000,000 (Policy number 626-030096-4); (c) July 19, 2006 to July 19, 2007 Crime Policy  
issued to Vesta by U.S. Fire in the amount of \$2,000,000 (Policy number 626-030403-3).

22 <sup>3</sup> Excalibur’s “Fidelity Bond” portfolio, from April 2005 through Excalibur’s collapse in July  
23 2008, was comprised of at least the following policies: (a) April 22, 2005 to August 15, 2005  
24 Crime Policy issued to Excalibur by Continental in the amount of \$2,500,000 (Policy number  
268100958); (b) August 15, 2005 to August 15, 2006 Crime Policy issued to Excalibur by  
25 Continental in the amount of \$2,500,000 (Policy number 268100958); (c) August 15, 2006 to  
26 August 15, 2007 Crime Policy issued to Excalibur by Continental in the amount of \$2,500,000  
(Policy number 268100958); (d) August 15, 2007 to August 15, 2008 Crime Policy issued to  
Excalibur by Liberty in the amount of \$2,500,000 (Policy number F14N578023001).

27 <sup>4</sup> Continental’s knowledge is demonstrated in an internal e-mail communication among certain  
28 Continental’s executive officers dated August 11, 2006, attached as Exhibit B to the Counter-  
Complaint and Cross-Complaint filed by Henka and the Class in this case (Docket No. 13).

<sup>5</sup> U.S. Fire’s knowledge was the result of litigation filed against U.S. Fire in the insurance coverage  
portion of the *Southwest Exchange* class action case, *SCCAA, et al. v. Brown & Brown et al.*, pending

1 Crime Policies provided the clients of the QIs the right to pursue loss claims against the insurers  
2 directly.

3 Despite this knowledge, neither Continental nor U.S. Fire took any action to stop the  
4 representations regarding third-party coverage from being made to the public. They took no  
5 action to alter public perception regarding the extent of coverage provided by the Crime Policies,  
6 nor did they take action to otherwise rescind their Crime Policies as a means of resolving the  
7 known misconception in coverage. Instead, Continental and U.S. Fire continued to collect and  
8 earn policy premiums from their insured QIs. Each day that Continental and U.S. Fire earned a  
9 premium, knowing that their insured QIs were misrepresenting the scope of coverage provided,  
10 was a day that these insurers confirmed coverage consistent with the scope of what was being  
11 represented.

#### 12 4. The Insurance Defendants' Denial of Coverage

13 Henka and the Class (and/or their subrogors) have asserted coverage under the Crime  
14 Policies for the theft of their Exchange Funds committed by Terzakis and Estupinian. However,  
15 the Crime Policies, by their terms, require the named "Insureds" to submit notice and proof of  
16 loss of owner theft before any benefits are to be distributed under the policies. The named  
17 "Insureds" under the Crime Policies are the Exchange Entities, not Henka and the Class.  
18 Furthermore, the Crime Policies purport to be for the benefit of the Exchange Entities only, and  
19 disclaim any benefit to third parties.<sup>6</sup> The Insurance Defendants have denied coverage on the  
20 grounds Henka and the Class (and/or their subrogors) are not named "Insureds" as such parties  
21 are defined under the Crime Policies. The Insurance Defendants have taken the position that,  
22 because Henka and the Class are not the named "Insureds," they lack standing to pursue a direct  
23 claim against them under the Crime Policies.

24  
25  
26 before the Hon. Robert C. Jones in the United States District Court for the District of Nevada, Case  
27 No. 2:07-cv-0536-RCJ-LCL.

28 <sup>6</sup> The disclaimer regarding third-party beneficiaries renders the Crime Policies ambiguous, because, in  
reality, the Crime Policies are surety agreements or financial guarantees executed for the benefit of  
the clients of the Exchange Entities.

1           **5. Adverse Domination of the Exchange Entities**

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

11           It is unreasonable to expect a defalcating officer or director of a corporation to protect the  
12 interests of the corporation. This is especially true under the circumstances alleged herein where  
13 assertion of claims against the Crime Policies in the name of the Exchange Entities would  
14 require the defalcating owners to admit that they engaged in acts of conversion and theft of client  
15 Exchange Funds. As such, the Exchange Entities, through their owners, have failed and refused,  
16 and continue to fail and refuse, to make a claim under the Crime Policies for the losses sustained  
17 by Henka and the Class. The adverse domination of the Exchange Entities by their owners has  
18 incapacitated, and continues to incapacitate, the Exchange Entities from making a claim against  
19 the Crime Policies, and otherwise acting to preserve and protect the only known asset the  
20 Exchange Entities have available to satisfy creditor claims.

21  
22           **III. A RECEIVER IS NECESSARY TO PROTECT THE INSURANCE ASSETS OF**  
23           **THE EXCHANGE ENTITIES AND PURSUE CLAIMS ON BEHALF OF**  
24           **CLIENTS WHO HAD THEIR EXCHANGE FUNDS STOLEN**

25           A receiver is needed to resolve the incapacity and to prosecute claims against the Crime Policies  
26 in the name of the Exchange Entities. In the absence of a receiver, the rights of the Exchange  
27 Entities with respect to the Crime Policies, including the beneficial interests of Henka and the  
28 Class, will suffer. Rule 66 of the Federal Rules of Civil Procedure, together with 18 U.S.C.  
§1964(b) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), authorizes

1 appointment of receivers. The receiver, in its capacity as an officer of the Court and as an  
2 independent fiduciary to the Exchange Entities, will need to set aside the default entered against  
3 Vesta, defend the lawsuit brought against Vesta by U.S. Fire, preserve the insurance coverage  
4 provided by the Crime Policies, and otherwise pursue, on behalf of the Exchange Entities, claims  
5 against the Crime Policies. In addition, to the extent monies are recovered under either the RICO  
6 or insurance portions of the Class Action Counter and Cross-Complaint, a successor trustee will  
7 be needed to safeguard the common fund and oversee its distribution to the Class. Henka and the  
8 Class are moving this Court for appointment of Thomas A. Dillon to act as the independent  
9 fiduciary and receiver in the case. They propose that Mr. Dillon's reasonable fees and expenses  
10 be taxed as a cost against any common fund recovered on their behalf in the case.

#### 11 **IV. THE LAW GENERALLY APPLICABLE TO RECEIVERSHIPS**

##### 12 **1. Promoting Efficient Management of Property in Dispute**

13 One of the primary reasons courts appoint receivers is to promote orderly and efficient  
14 management of any property involved in a dispute for the benefit of the creditors. Generally, any  
15 reasonable method the District Court chooses to carry out this process will be acceptable. Any  
16 actions which the District Court deems appropriate in the administration of the receivership may  
17 be properly exercised. The District Court has broad discretion in the supervision of these matters.  
18 See *SEC v. Hardy*, 803 F.2d 1034, 1038-1039 (9th Cir. 1986).

##### 19 **2. Acting as an Officer of the Court**

20 The District Court that appoints the receiver establishes the extent of the receiver's  
21 authority. The receiver is not an agent of the plaintiff but actually is considered an extension of  
22 the Court. *Federal Home Loan Mortgage Corp. v. Tsinos*, 854 F. Supp. 113, 115 (E.D.N.Y.  
23 1994). It is the order of appointment and the succeeding orders from the Court that control the  
24 receiver's course of action. *Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1241 n.  
25 8 (9th Cir. 1995). As a result, the receiver's authority is wholly determined by the orders of the  
26 appointing Court. *Federal Home Loan Mortgage Corp. v. Spark Tarrytown, Inc.*, 829 F. Supp.  
27 82, 85 (S.D.N.Y. 1993).  
28

1           **3.       Bond Requirements**

2           If a bond is not required by statute, the District Court has the discretion to order the  
3 posting of the bond, and to determine the terms and conditions of the bond. See *FTC v. World*  
4 *Wide Factors, Ltd.*, 882 F.2d 344, 348 (9th Cir. 1989); 28 U.S.C. § 754. In cases in which a  
5 receiver is appointed to protect property, if requiring a bond would cause further depletion of  
6 property, a bond is not required unless it is essential to protect the applicant's interest in the  
7 property. See *SEC v. Universal Fin.*, 760 F.2d 1034, 1039 (9th Cir. 1985).

8           **4.       Factors Relevant to Determining If a Receiver Should Be Appointed**

9           The appointment of a receiver in a diversity case is a procedural matter governed by  
10 federal law and federal equitable principles. (See Fed. R. Civ. P. 66 and Advisory Committee's  
11 Note; *New York Life Ins. Co. v. Watt West Inv. Corp.*, 755 F. Supp. 287, 289-92 (E.D. Cal.  
12 1991); *Midwest Sav. Ass'n v. Riversbend Assocs. Partnership*, 724 F. Supp., 661 (D. Minn.  
13 1989). In cases where a federal statute authorizes appointment, a court's discretion is governed  
14 to the extent it is addressed by the statute. Otherwise, there is no precise formula for determining  
15 when a receiver may be appointed. *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.* (1993) 999  
16 F.2d 314, 317. Courts have identified many factors that are relevant to determining if a receiver  
17 should be appointed, including the following:

- 18           • Whether fraudulent conduct (or the probability of fraudulent conduct) has  
19           occurred or exists;
- 20           • Whether property is in immediate danger of being harmed or lost;
- 21           • Whether legal remedies are adequate;
- 22           • Whether the harm to the proponent by denying the appointment will be greater  
23           than the injury to parties opposing the appointment;
- 24           • Whether the proponent has a reasonable probability of success in the underlying  
25           action;
- 26           • Whether the possibility of irreparable injury to the applicant's interests in property  
27           exists; and
- 28           • Whether the interests of the applicant and others sought to be protected will in fact  
            be served by receivership.

1 Courts may apply some or all of the foregoing general factors to determine whether appointment  
2 of a receiver is appropriate. (See Jenner & Block, LLC, *Federal Litigation Guide* § 8.100(4)  
3 (2009).)

4 **V. APPLICATION OF THE RELEVANT FACTORS WARRANTS APPOINTMENT**  
5 **OF A RECEIVER IN THIS CASE**

6 **1. Fraudulent Conduct**

7 Terzakis and Estupinian absconded with \$17 million in Exchange Funds belonging to  
8 Vesta’s clients. They did so leaving the Exchange Entities incapacitated and in financial  
9 collapse. The Exchange Entities were forced to shut their doors and they ceased doing business  
10 in August 2008. Since then, Henka and all Class members have not seen a single penny of the  
11 \$17 million that was stolen from them. A significant portion of the misappropriated Exchange  
12 Funds have been traced to the personal and business bank accounts of Terzakis and Estupinian.  
13 The balance was used to close the exchange transactions of the Exchange Entities’ prior clients,  
14 conceal prior thefts, and perpetuate the Ponzi scheme. The fraud that Terzakis and Estupinian  
15 perpetrated upon Henka and the Class is indisputable.

16 Terzakis and Estupinian have an ongoing fiduciary obligation to prosecute insurance  
17 claims against the Crime Policies in the name of the Exchange Entities, for the benefit of Henka  
18 and the Class. The obligation is residual to the original fraud that Terzakis and Estupinian  
19 perpetrated against Henka and the Class. Instead of stepping forward, admitting the theft, and  
20 providing notice of claims and proof of loss, Terzakis and Estupinian insist on hiding facts,  
21 concealing the truth, and doing anything possible to avoid having to admit their guilt. Their  
22 ongoing refusal to act on the Crime Policies in the name of the Exchange Entities constitutes a  
23 continuation of their fraudulent conduct and an ongoing breach of their fiduciary obligations. In  
24 the absence of the appointment of a receiver, the fraud and breach of fiduciary duty that was  
25 perpetrated on Henka and the Class will be perpetuated. Simultaneously, Henka and the Class  
26 will continue to be deprived access to the insurance benefits to which they are rightfully entitled.

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1           **2.       The Threat to Property is Immediate, And, If Sustained, Irreparable**

2           The only asset of any value held by the Exchange Entities, and available to satisfy  
3 creditor claims, is the "Fidelity Bond" coverage purchased from the Insurance Defendants. These  
4 Crime Policies were procured specifically to cover the Exchange Entities in the event of owner  
5 theft of client Exchange Funds, the precise loss suffered in this case. The Insurance Defendants  
6 are attempting to escape coverage on any grounds possible. This includes trying to take  
7 advantage of the fact the Exchange Entities are currently incapacitated and cannot defend  
8 themselves.

9           U.S. Fire has moved for entry of a default judgment seeking rescission of its Crime  
10 Policies in response to Vesta's failure to appear in the action. Continental and Liberty are likely  
11 to assert and pursue similar defenses. Each of the Insurance Defendants has effectively denied or  
12 will deny coverage on grounds Henka and the Class lack standing to pursue a direct claim  
13 against them under the Crime Policies. Furthermore, each of the Crime Policies in their own way  
14 requires that claims made against the policies be made timely. Unless a receiver is appointed to  
15 act in the name of the Exchange Entities to preserve and protect the insurance, the insurance  
16 assets comprised of the Crime Policies face the immediate threat of loss by default.

17           The urgency of the threat is best exemplified by a recent decision issued in a related case  
18 *Carteret Ventures, LLC v. Liberty Mutual Insurance Company*, Civil Action No. 09-2831 (JLL),  
19 pending before the United States District Court for the District of New Jersey. The decision is  
20 adverse to Henka and the Class, and results directly from the fact nobody has been willing to act  
21 in the name of the Exchange Entities to pursue claims against the Crime Policies for owner theft.  
22 The plaintiff in the case, Carteret Ventures, LLC ("Carteret")<sup>7</sup> was a client of Excalibur. Carteret  
23 transferred over \$11 million to Excalibur for purposes of completing a 1031 Exchange. Carteret  
24 alleges its money was stolen by Excalibur, its owners (i.e. Terzakis and Estupinian), and/or its  
25 employees.

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28 <sup>7</sup> Carteret is not presently a member of the Vesta Class, insofar as Carteret was a client of, and deposited Exchange Funds exclusively with Excalibur, not Vesta.

1 Liberty insured Excalibur pursuant to the Crime Policy referenced in footnote 3 above.  
2 Excalibur, in its abandoned state and completely incapacitated, failed to provide Liberty with a  
3 completed loss submission. When Carteret attempted to submit the proof of loss on Excalibur's  
4 behalf, Liberty denied coverage on grounds Carteret lacked standing to pursue a claim on its  
5 own. Carteret then sued Liberty seeking a declaration that it was both an "Insured" and the "Loss  
6 Payee" under the Crime Policy. Liberty responded with a motion to dismiss under Fed. R. Civ. P.  
7 12(b)(6).

8 On October 2, 2009, the District Court issued its ruling dismissing the case filed by  
9 Carteret. The Court felt that Liberty's policy was clear and unambiguous in denying Carteret  
10 rights under the policy, except to receive payment of a loss once identified. Furthermore, the  
11 Court felt the policy was clear and unambiguous in stating that Excalibur was the only party who  
12 could trigger a loss under the policy.<sup>8</sup> In the Court's words, "Until Excalibur makes a proper  
13 claim for loss, there is no loss payable to anyone." On these grounds, the Court found that  
14 Carteret did not have standing to submit a claim under the terms of the policy, and an order was  
15 issued dismissing Carteret's case.

16 Obviously, in light of the foregoing, a receiver is needed to resolve the incapacity of the  
17 Exchange Entities, and to prosecute claims against the Crime Policies in the name of the  
18 Exchange Entities on behalf of their clients. Each day that passes without a receiver being  
19 appointed places the insurance assets further at risk. The Crime Policies in question, regardless  
20 of the insurer, all require that claims to be made by the "Insured" must be made timely. The more  
21 time that passes without a claim being made by the Exchange Entities, the stronger the insurers'  
22 arguments that claims are untimely. In the absence of a receiver, the rights of the Exchange  
23 Entities with respect to the Crime Policies, including the beneficial interests of Henka and the  
24 Class, face the threat of immediate and irreparable loss.

25  
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28 <sup>8</sup> Henka and the Class take issue with these points. As indicated previously, the disclaimer regarding third-party beneficiaries, among other provisions, render the Crime Policies patently ambiguous, because, in reality, the Crime Policies are surety agreements or financial guarantees executed for the benefit of the clients of the Exchange Entities.

1           **3.       Legal Remedies May Be Inadequate**

2           The results in the *Carteret* case demonstrate not only how the Exchange Entities' present  
3   incapacitation threatens the loss of available insurance, but also how, in the absence of a  
4   receiver, the legal remedies available to Henka and the Class may be inadequate. Henka and the  
5   Class are in the same position as *Carteret* with respect to the Crime Policies. Both are "Loss  
6   Payees" under the policies, and even though the insurance was procured specifically for their  
7   benefit, if the named "Insured" (Vesta or Excalibur) fails to assert or prosecute the claim,  
8   coverage may be precluded.

9           Henka and the Class have sued the Insurance Defendants directly on a theory of breach of  
10   contract. Their breach of contract claims are derivative of the Exchange Entities' claims as the  
11   named "Insureds" under the Crime Policies. Whether Henka and the Class have standing to sue  
12   directly is a legal issue which likely must be litigated in this case. The District Court in *Carteret*  
13   indicated that even though *Carteret* was a "Loss Payee," and entitled to benefits under the policy  
14   in question, it was not the named "Insured," and had no standing to pursue a claim directly. The  
15   *Carteret* decision is not binding on this Court. Nevertheless, a decision by this Court similar to  
16   that in *Carteret* would deprive Henka and the Class insurance coverage that indisputably was  
17   procured for their benefit. Appointment of a receiver would obviate the need to litigate the issue,  
18   and eliminate the risk that legal remedies may be inadequate.

19           **4.       Denial of the Appointment will Harm the Class Greater than It will the**  
20           **Insurers**

21           Denial of the appointment will likely force Henka and the Class to litigate their rights to  
22   sue the Insurance Defendants directly for breach of contract. This could result in a ruling adverse  
23   to the Class, depriving them of the only known asset available to satisfy the obligation owed to  
24   them as creditors. Regardless of the outcome, the costs of litigation and attorneys fees  
25   attributable to the endeavor will be significant. This will further limit their ability to be made  
26   whole in the case. This was certainly not the result they bargained for when they agreed to pay  
27   Vesta a fee for keeping their Exchange Funds safe.

1 The Insurance Defendants, on the other hand, collected substantial policy premiums from  
2 the Exchange Entities over the years they provided coverage pursuant to the Crime Policies.  
3 They collected the premiums in exchange for providing the Exchange Entities a financial  
4 guarantee that the Exchange Funds of their clients would be covered in the event of owner theft.  
5 The policies were procured by the Exchange Entities to protect against the exact type of loss that  
6 occurred. Appointment of a receiver will force the Insurance Defendants to process claims made  
7 on behalf of the clients who were stolen from, or to deny coverage to these individuals and  
8 litigate on other grounds. Either way, this was the precise risk the Insurance Defendants  
9 bargained for when they issued the policies and accepted premiums. As such, the relative  
10 prejudices weigh substantially in favor of Henka and the Class, and approval of their request that  
11 a receiver be appointed.

#### 12 **5. Probable Success in the Underlying Action**

13 Henka and the Class deposited over \$17 million in Exchange Funds with Vesta. The  
14 money was deposited in trust, to be made available to them when it came time to close escrow on  
15 their identified replacement properties. Their money was stolen by Terzakis and Estupinian  
16 before they had the chance to identify their replacement properties. It was diverted to the  
17 personal and business accounts of Terzakis and Estupinian, and otherwise used to conceal the  
18 Ponzi scheme being operated through Vesta. The cause of the loss and culpability of the  
19 defendants is indisputable. The only question is whether sufficient assets exist to cover the losses  
20 sustained by Henka and the Class.

21 The Crime Policies were procured by the Exchange Entities for the specific purpose of  
22 protecting Exchange Funds from owner theft. The policies were advertised to the public as  
23 protecting Exchange Funds from owner theft, and the public reasonably construed the Crime  
24 Policies as protecting Exchange Funds from owner theft. The Insurance Defendants have not  
25 attempted to deny, nor can they deny, the Crime Policies were intended to protect Exchange  
26 Funds from owner theft. The only question is whether the clients of the Exchange Entities can  
27 pursue claims directly. The issue would not exist if the Exchange Entities could act on their own  
28 to protect their interests. Due to their abandonment, however, they cannot. A receiver is needed

1 to resolve the incapacity of the Exchange Entities and to prosecute claims against the Crime  
2 Policies on behalf of Henka and the Class.

3 **VI. THOMAS A. DILLON SHOULD BE APPOINTED AS THE RECEIVER IN THIS**  
4 **CASE**

5 Henka and the Class respectfully request that Thomas A. Dillon, Esq. be appointed to act  
6 as the independent fiduciary and receiver on behalf of the Exchange Entities. Mr. Dillon is a  
7 practicing attorney, with offices in Burlingame, California. He has served numerous  
8 appointments as an independent fiduciary and receiver acting under the supervision and direction  
9 of the federal District Courts. Mr. Dillon has substantial experience and is well-qualified to act  
10 on behalf of the Exchange Entities in this case. In his past appointments as an independent  
11 fiduciary and receiver, Mr. Dillon has been responsible for: (a) determining the continued  
12 economic viability of the entity for which he serves; (b) marshalling the entity's assets in order to  
13 pay down creditor claims (c) supervising litigation directed at marshalling assets and/or  
14 protecting the interests of persons for whom he serves as independent fiduciary and receiver; and  
15 (d) supervising orderly winding down of insolvent entities and administering necessary filings.

16 The following are examples of work performed by Mr. Dillon:

17 From December 2001 to the present Mr. Dillon has served as an independent fiduciary  
18 and receiver appointed by the U. S. District Court for the District of Nevada (Reno) in a case  
19 involving a fraudulent medical plan covering more than 30,000 plan participants and  
20 beneficiaries nationwide. In that case the plan received \$14 million in premiums, it paid \$6  
21 million in claims, administration, and other charges. There was \$8 million unaccounted for.  
22 During the same period plan participants incurred \$25 million in medical charges. To date Mr.  
23 Dillon has successfully recovered more than \$20.5 million, most of which will be used to pay  
24 down claims and to reimburse participants for out-of-pocket losses.

25 From 2001 to 2005 Mr. Dillon served as Special Master appointed by the U.S. District  
26 Court for the Eastern District of California in a litigation involving an insolvent Taft-Hartley  
27 multi-employer welfare fund. In that case he settled provider claims totaling \$6.3 million against  
28 3,000 participants. He also reimbursed participants for their out-of-pocket losses associated with

1 the insolvency.

2 From 1996 to 1998 Mr. Dillon served as a Special Master appointed by the United States  
3 District Court for the Eastern District of California in a litigation involving an insolvent Multi  
4 Employer Welfare Arrangement. He successfully negotiated settlement of 1,500 creditor claims  
5 totaling \$1.5 million against 1,000 Plan participants. He also reimbursed participants for out-of-  
6 pocket losses.

7 From 1996 to 1998 Mr. Dillon served as a Fund Administrator appointed by the United  
8 States District Court for the Northern District of California in a case involving a \$7 million  
9 litigation settlement fund. The fund was established in settlement of claims filed on behalf of  
10 2,609 participants in a pension plan sponsored by a major corporation. In that case Mr. Dillon  
11 successfully located and paid 98% of the class members and their beneficiaries.

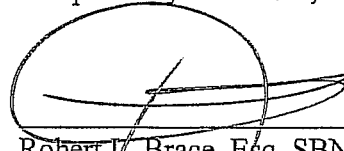
12 Mr. Dillon has agreed to serve as an independent fiduciary and receiver in this case. He is  
13 willing to provide his services at an hourly rate of \$300. Henka and the Class believe that such a  
14 rate is reasonable. They propose that Mr. Dillon's reasonable fees and expenses be taxed as an  
15 item of costs against any common fund recovered on their behalf in the case. They request that  
16 the Court not require the posting of a bond, on grounds that a bond is not required by statute, and  
17 a bond would cause further depletion of insurance assets, assuming such assets can be recovered.

## 18 VII. CONCLUSION

19 The Exchange Entities, abandoned by their owners, are currently incapacitated and  
20 without representation. The only known asset of any value held by the Exchange Entities and  
21 available to satisfy creditors' claims are the Crime Policies. The Crime Policies are in imminent  
22 danger of being harmed or forever lost as a result of the incapacitation of the Exchange Entities.  
23 A receiver is needed to take control of the Exchange Entities and represent their interests. The  
24 receiver must manage, preserve, and protect the assets of the Exchange Entities, including the  
25 Crime Policies. The facts and law relevant to appointment of a receiver support the appointment.  
26 Furthermore, the relative prejudices weight substantially in favor of Henka and the Class and  
27 their request that a receiver be appointed.

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Respectfully submitted,



DATED: October 22, 2009

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