

DECLARATION OF STEVEN R. WELK

I, Steven R. Welk, declare:

1. I am an Assistant United States Attorney for the Central District of California, and am one of the attorneys primarily responsible for the representation of the United States in these consolidated matters. I have personal knowledge of the facts set out herein and, if asked to do so, could and would competently testify thereto.

2. I have served as an AUSA in the Asset Forfeiture Section since 1995, and have been the Chief of the section since 2001. I am recognized by the Justice Department as an expert on forfeiture in general, and government fee-shifting statutes relating to forfeiture in particular. I first became aware of both the appointment of counsel in this case and the payment demands of Claimants' counsel on December 2, 2010, and assumed responsibility for that aspect of this case at that time. I am aware of no prior appointments pursuant to 18 U.S.C. § 983(b)(2) made in this district prior to the one here. As the Chief of the Asset Forfeiture Section, with oversight responsibility over all forfeiture matters filed in the district, I do not believe any prior appointment could have been made without my knowledge.

3. Among my first actions upon becoming aware of the appointment was to contact Randall Schnack, the CJA Managing Attorney for this district, and Mark Freedman of the Legal Services Corporation. I also sent an email to the asset forfeiture coordinators in each of the USAOs throughout the United States inquiring about their experiences, if any, with appointments of counsel made pursuant to 18 U.S.C. § 983(b)(2). Mr. Freedman was very helpful, and candidly admitted that while the LSC had developed a system for handling such appointments, the statutory appointment language was not reasonably reconcilable with the LSC's statutory mission. Mr. Freedman made it clear to me that the LSC

1 had not taken and did not intend to take any position on how the statute should be
2 interpreted.

3 4. Mr. Freedman stated that the appointment provision had been proposed
4 by Senator Sessions as part of one of the bills that was ultimately enacted as
5 CAFRA, but was drafted without any consultation with the LSC, which did not
6 become aware of the provision until the statute was passed.¹ This was consistent
7 with the recollection of a Justice Department official who was personally involved
8 in the drafting of CAFRA, and who recalled that the main point of contention
9 concerning the § 983(b)(2) appointment provision was whether it should apply to
10 all types of property, or only to the primary residence of an indigent claimant. He
11 advised me that the reference to the LSC was included very late in the drafting
12 process with the intent of having the LSC follow the same procedures it followed
13 in other cases in which it was authorized to participate.²

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15 ¹ I later obtained a copy of a March 2008 email from a colleague in the
16 Western District of Wisconsin in which Victor Fortuno, General Counsel for LSC,
17 stated “LSC’s involvement [in the § 983(b)(2) appointment process] came about
18 because of some confusion by Congress about how LSC works (neither we nor our
19 oversight committees were consulted). LSC does not provide representation itself,
20 but rather provides grants to local civil legal aid organizations.” Mr. Fortuno
21 further stated “the court approves the fees and costs through an order, which the
22 AUSA submits to the Department of Treasury for payment”

23 ² This information was provided to me by AUSA Stefan Cassella, who is
24 now the Chief of the Asset Forfeiture Section in the Baltimore USAO, but was the
25 Deputy Chief of Legal Policy in the Justice Department’s Asset Forfeiture and
26 Money Laundering Section (AFMLS) at the time CAFRA was being drafted.
27 AUSA Cassella was personally involved both in drafting the Department’s
28 proposals for CAFRA and the negotiations and Congressional hearings that led to
the enactment of the Act. The appointment provision was derived from H.R. 1916,
and was included in H.R. 1965 in greatly revised form. Another version was
included in H.R. 1658 as passed in 1999 and was mentioned in the 1999
Committee Report. The final, narrower version was included in S. 1931.

1 5. Mr. Freedman told me that the LSC received no direction from Congress
2 as to how the provision should be put into effect. However, because the issue has
3 arisen in various districts since CAFRA's enactment, the LSC had developed the
4 following procedure with respect to § 983(b)(2) appointments: if an attorney
5 contacts the LSC and indicates a desire to be appointed under the statute, Mr.
6 Freedman issues what is essentially a form letter (like the one issued in this case)
7 advising the court that it consents to the requested appointment. From that point
8 forward, the LSC has no further involvement. It does not inquire into the
9 qualifications or suitability of the attorney requesting appointment. It does not
10 advise the requesting attorney that he or she is subject to the restrictions and
11 limitations that apply to the LSC as a matter of federal law. Because the LSC
12 provides no direct funding to the appointed attorney, the LSC does not advise the
13 attorney of the rules and regulations applicable to recipients of LSC grants. Nor
14 does the LSC monitor the case or require the appointed attorney to report to it with
15 respect to his or her billing submissions or handling of the case. Mr. Freedman
16 advises appointed attorneys to make a fee request directly to the court at the end of
17 the case, and to ask that the award be paid directly to the appointed attorney. He
18 stated that there have been cases where a court has refused to issue an award
19 directly to an appointed attorney because such an award would be in direct conflict
20 with the plain language of the statute (requiring entry of "a judgment in favor of the
21 Legal Services Corporation"). In those instances, the LSC accepts the payment
22 and then passes the money through to the appointed attorney in full. While I have
23 had insufficient time to fully explore the workings of the LSC in the week allowed
24 for the filing of this opposition brief, I have yet to find any statutory or regulatory
25 basis for this process, and Mr. Freedman did not suggest that there was one.

26 6. I also inquired by email of all of the asset forfeiture coordinators in the
27 United States concerning their experiences, if any, with § 983(b)(2) appointments,
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1 as well as officials with AFMLS in Washington.³ I received responses from seven
2 USAO's concerning such appointments⁴, and four of those reported more than one
3 such appointment in their districts. I am unaware of any appointments in non-
4 responding districts. There was not a single case in which an appointed attorney
5 either asked for or received an interim payment of fees under the appointment
6 provision. In every instance where a request was made, it was submitted by the
7 appointed attorney after the entry of the merits judgment in the case in which he or
8 she was appointed. Moreover, of the cases for which specific information could be
9 obtained, there were two in which the statutory case maximum was exceeded, and
10 in those cases, the fee awards were \$9,939.50 (District of Idaho, June 2010) and
11 \$12,000.80 (District of Oregon, April 2008). According to AUSAs in the Eastern
12 District of New York, Western District of Wisconsin, Southern District of Iowa,
13 Northern District of California and the District of Maryland, the awards issued in
14 those districts have been for substantially less than the case maximum. According
15 to the asset coordinator there, the WD Wisconsin, which appears to have had more
16 of these appointments than any other district in the country, has never had an
17 award that exceeded the statutory case maximum. At least one appointed attorney
18 (in the Southern District of Iowa) opted to forego payment entirely. Most
19 importantly for the purposes of this motion, all of the awards issued to date were
20 the result of post-judgment applications for fees.

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22 ³ Each judicial district has an asset forfeiture coordinator in the USAO, who
23 is either the Chief of the Asset Forfeiture Section, or the AUSA primarily
responsible for forfeiture matters in the office.

24 ⁴ Positive responses were received from the Western District of Wisconsin,
25 District of Idaho, Eastern District of New York, Northern District of California,
26 Eastern District of California, District of Oregon, Southern District of Iowa and the
27 District of Maryland. There has been more than one appointment in each of
Wisconsin, ND Cal, Oregon and ED Cal.

1 7. The Fiscal Section of the USAO in this district does not deal with court-
2 ordered attorney fee awards.

3 8. The USAO may not submit a request for payment of an award payable
4 from the Judgment Fund unless the submitting AUSA can certify to the Treasury
5 Department that the order requiring the payment is “final” within the meaning of
6 28 U.S.C. § 2412, meaning that the government has determined that it will not
7 appeal the order, or that all appeals have been exhausted.

8 9. Attached hereto as exhibit A is a true and correct copy of this Court’s
9 Order of July 9, 2010.

10 10. Attached hereto as exhibit B is a true and correct copy of this Court’s
11 Order of October 13, 2010.

12 11. Attached hereto as exhibit C is a true and correct copy of this Court’s
13 Order of October 28, 2010.

14 12. Attached hereto as exhibit D is a true and correct copy of from Eric
15 Honig to Monica Fernandez of the CD California USAO’s Fiscal Section.

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17 I declare under penalty or perjury under the laws of the United States that
18 the foregoing is true and correct. Executed this 10th day of January in Los Angeles,
19 California.

20 /S/ Steven R. Welk
21 AUSA Steven R. Welk
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