

1 MICHAEL BAILEY
United States Attorney
2 District of Arizona

3 KEVIN M. RAPP (Ariz. Bar No. 14249, kevin.rapp@usdoj.gov)
MARGARET PERLMETER (Ariz. Bar No. 024805, margaret.perlmet@usdoj.gov)
4 PETER S. KOZINETS (Ariz. Bar No. 019856, peter.kozinets@usdoj.gov)
ANDREW C. STONE (Ariz. Bar No. 026543, andrew.stone@usdoj.gov)
5 JOHN J. KUCERA (Cal. Bar No. 274184, john.kucera@usdoj.gov)
Assistant U.S. Attorneys
6 40 N. Central Avenue, Suite 1800
Phoenix, Arizona 85004-4408
7 Telephone (602) 514-7500
8 *Counsel for Plaintiff*

9 Thomas H. Bienert, Jr. (Cal. Bar No. 135311, admitted *pro hac vice*)
tbienert@bienertkatzman.com
Whitney Z. Bernstein (Cal. Bar No. 304971, admitted *pro hac vice*)
10 wbernstein@bienertkatzman.com
BIENERT | KATZMAN PC
11 903 Calle Amanecer, Suite 350
San Clemente, CA 92673
12 Tel.: (949) 369-3700
13 Fax: (949) 369-3701
Counsel for James Larkin

14
15 Additional counsel listed on next page

16
17 IN THE UNITED STATES DISTRICT COURT
18 FOR THE DISTRICT OF ARIZONA

19 United States of America,
20
21 Plaintiff,
22
23 v.
24 Carl Allen Ferrer,
25
26 Defendant.

Case No. 18-CR-00464-SMB
**JOINT MOTION TO
TEMPORARILY CONTINUE
ANCILLARY PROCEEDINGS**

Hon. Susan M. Brnovich
Date: June 21, 2019
Time: 1:30 p.m.

27
28

1 Paul J. Cambria, Jr., CA State Bar No. 177957, *admitted pro hac vice*
2 Erin E. McCampbell, NY State Bar No. 4480166, *admitted pro hac vice*
3 LIPSITZ GREEN SCIME CAMBRIA LLP
4 42 Delaware Avenue, Suite #120
5 Buffalo, New York 14202
6 Telephone: (716) 849-1333
7 Facsimile: (716) 855-1580
8 Email: pcambria@lglaw.com
9 emccampbell@lglaw.com
10 *Counsel for Michael Lacey*

11 Gary S. Lincenberg, CA State Bar No. 123058, *admitted pro hac vice*
12 Ariel A. Neuman, CA State Bar No. 241594, *admitted pro hac vice*
13 BIRD, MARELLA, BOXER, WOLPERT, NESSIM,
14 DROOKS, LINCENBERG & RHOW, P.C.
15 1875 Century Park East, 23rd Floor
16 Los Angeles, CA 90067-2561
17 Telephone: (310) 201-2100
18 Facsimile: (310) 201-2110
19 Email: glincenberg@birdmarella.com
20 aneuman@birdmarella.com
21 *Counsel for John Brunst*

22 Bruce Feder, AZ Bar No. 004832
23 FEDER LAW OFFICE, P.A.
24 2930 E. Camelback Road, Suite 160
25 Phoenix, Arizona 85016
26 Telephone: (602) 257-0135
27 Email: bf@federlawpa.com
28 *Counsel for Scott Spear*

29 David Eisenberg, AZ Bar No. 017218
30 DAVID EISENBERG PLC
31 3550 N. Central Ave., Ste. 1155
32 Phoenix, AZ 85012
33 Telephone: (602) 237-5076
34 Facsimile: (602) 314-6273
35 Email: david@deisenbergplc.com
36 *Counsel for Andrew Padilla*

37 Additional counsel listed on next page
38

1 Joy Malby Bertrand AZ Bar No. 024181
2 JOY BERTRAND ESQ LLC
3 P.O. BOX 2734
4 SCOTTSDALE, AZ 85252-2734
5 Telephone: (602)374-5321
6 Facsimile: (480)361-4694
7 Email: joy.bertrand@gmail.com
8 *Counsel for Joye Vaught*

9 Daniel J. Quigley, AZ Bar No. 011052
10 DANIEL J QUIGLEY PLC
11 5425 E Broadway Blvd., Ste. 352
12 Tucson, AZ 85711
13 Telephone: (520) 867-4430
14 Email: quigley@djqlc.com
15 *Counsel for Medalist Holdings Incorporated;*
16 *Leeward Holdings LLC;*
17 *Camarillo Holdings LLC;*
18 *Vermillion Holdings LLC;*
19 *Shearwater Holdings LLC; and*
20 *Cereus Properties LLC*

21 The Government and Claimants¹ by and through their respective counsel of record,
22 jointly move this Court for a continuance of ancillary proceedings in this matter. The
23 Parties agree that good cause exists to continue the ancillary proceedings currently set for
24 June 21, 2019, for a period of six months with a status conference on the matters set in five
25 months. However, the parties' rationales and bases for the continuance request differ and
26 are set forth below.

27 BACKGROUND

28 On April 5, 2018, pursuant to a plea agreement, defendant Carl Ferrer ("Ferrer"),
plead guilty to an Information charging 18 U.S.C. § 371 (Conspiracy to violate 18 U.S.C.
§§ 1952 (Travel Act), 1956 and 1957 (Money Laundering). (Dkts. 4, 7). On May 16, 2018,

¹ As used herein, "Claimants" refers to Michael Lacey, James Larkin, John Brunst, Scott Spear, Andrew Padilla, Joye Vaught, Medalist Holdings Inc., Leeward Holdings LLC, Camarillo Holdings LLC, Vermillion Holdings LLC, Shearwater Holdings LLC, and Cereus Properties LLC.

1 pursuant to Rule 32.2(b), the Court entered a Preliminary Order of Forfeiture (Dkt. 23),
2 which incorporated the list of assets identified in the plea agreement. (*Id.*). On June 29,
3 2018 (*see* Dkts. 29-41), and January 11, 2019 (*see* Dkt. 58), Claimants filed petitions
4 asserting interests in assets listed in the Preliminary Order of Forfeiture.

5 On October 19, 2018, this Court entered an order setting a November 16, 2018,
6 hearing on Claimants' petitions concerning assets listed in the initial Preliminary Order of
7 Forfeiture. On November 7, 2018, Claimants moved for a stay of all ancillary proceedings
8 (Dkt. 44).² The Government agreed that a stay was appropriate, albeit for different reasons
9 (Dkt. 52). The Court granted the motion in part by issuing a stay through December 7, 2018
10 (Dkt. 53).

11 In the meantime, on October 31, 2018, the Government obtained *ex parte* seizure
12 warrants for the attorney retainer funds³ in the Central District of California. Claimants
13 challenged the warrants and sought relief in this Court (*United States v. Lacey*, No. CR-18-
14 00422-06-PHX-SPL, Dkts. 360, 365, 376). In a hearing on November 16, 2018, the Court
15 denied Claimants' motions, directing that the challenges should be brought in the Central
16 District of California (*see* Dkt. 393). Claimants then filed motions asserting challenges
17 under the First, Fourth, Fifth and Sixth Amendments in that court, which heard argument on
18 December 12, 2018. That court also called for and received supplemental briefing. The
19 matters were fully submitted to the court in January 2019. Claimants' motions remain
20 pending.

21 Pursuant to a joint motion filed by the parties in this case on November 30, 2018
22 (Dkt. 54), the Court continued the ancillary proceedings until January 25, 2019 (Dkt. 56).⁴

24 ² On November 18 and 19, 2018, Claimants filed petitions asserting their interests in
25 the attorney trust funds that were listed in the Government's Stipulated Motion to Amend
(Dkts. 61, 62, 64-73).

26 ³ Claimants note that these are properly referred to as "law firm trust accounts."

27 ⁴ The Court's order encompassed all prior petitions of Claimants for assets that had
28 been listed in the original or amended Preliminary Orders of Forfeiture. (*See* Dkt. 56, listing
Dkts. 29-41).

1 Pursuant to another joint motion filed by the parties in this case on January 23, 2019 (Dkt.
2 62), the Court continued the ancillary proceedings until June 21, 2019 (Dkt. 64). More
3 recently, the parties met and conferred regarding their respective positions, and again agreed
4 to move jointly to continue the ancillary proceedings. Now, by this Second Joint Motion,
5 the parties seek to further articulate good cause for this Court to continue the ancillary
6 proceeding for six months, given the circumstance of this case.

7 While the parties jointly request the continuance, their rationales are different and so
8 are set forth separately here.

9 GOVERNMENT'S POSITION

10 A. Ancillary Proceedings Are Treated Like Civil Proceedings

11 The Ninth Circuit and several other Circuits have long recognized that Section 853(n)
12 ancillary proceedings in the criminal forfeiture context are fundamentally civil in nature and
13 are governed by the rules of civil procedure.⁵ In 2000, "Congress adopted Federal Rule of
14 Criminal Procedure 32.2 governing proceedings relating to criminal forfeiture, including

15 ⁵ See, e.g., *United States v. MacInnes*, 223 F. Appr'x 549, 551 (9th Cir. 2007) (stating
16 that a Section 853(n) petition by a person who is not the criminal defendant is civil in nature
17 because the determination should be governed by "the nature of the petitioner, rather than
18 the statute governing the proceeding"); *United States v. McHan*, 345 F.3d 262, 275-76 (4th
19 Cir. 2003) (comparing Section 853(n) proceedings to quiet title actions); *United States v.*
20 *Alcaraz-Garcia*, 79 F.3d 769, 772 n.4 (9th Cir. 1996) (holding that, under Fed. R. App. P.
21 4(a)(1), a Section 853(n) petitioner has sixty days to appeal a district court's decision, as
22 opposed to the ten-day time limit applied in criminal cases, because a Section 853(n)
23 proceeding is civil in nature); *United States v. Douglas*, 55 F.3d 584, 586 (11th Cir. 1995)
24 ("Congress ... viewed a § 853(n) hearing as a species of an 'action at law or equity'—a
25 substitute for separate *civil* litigation against the government.") (quoting 21 U.S.C. §
26 853(k)(2)); *United States v. Lavin*, 942 F.2d 177, 181-82 (3d Cir. 1991) (same holding as
27 *Alcaraz-Garcia*); *United States v. D'Esclavelles*, 541 F. Supp. 2d 794, 797 (E.D. Va. 2008)
28 (granting fees under Section 2465(b)(1) and stating, "The hearing that follows [a Section
853(n) petition] is civil in nature."), overruled on other grounds by *United States v. Buk*, 314
Fed. App'x 565, 570 (4th Cir. 2009); *United States v. Nolasco*, 2008 WL 4388518, at *2
(D.N.J. Sept. 29, 2008) ("Moving Petitioners correctly characterize their § 853(n) petition
as 'civil.'"); *United States v. McCollum*, 443 F. Supp. 2d 1154, 1165 (D. Neb. 2006) (stating
in *dicta*, "Although this is a criminal case, the matter before me is quasi-civil in nature and
arises pursuant to 21 U.S.C. § 853(n)"); *United States v. Wade*, 291 F. Supp. 2d 1314, 1316-
17 (M.D. Fla. 2003) (holding that a petitioner is not entitled to effective assistance of counsel
because Section 853(n) petitions are civil in nature).

1 third-party petitions.” *Pacheco v. Serendensky*, 393 F.3d 348, 352 (2nd Cir. 2004) (citing
2 Fed. R. Crim. P. 32(k)(2)). Rule 32.2 mandates that “when a third party files a petition
3 asserting an interest in property to be forfeited, the court must conduct an ‘ancillary
4 proceeding.’” *Id.* (citing Fed. R. Crim. P. 32.2(c)(1)). “That ancillary proceeding, although
5 occurring in the context of criminal forfeiture, closely resembles a civil action.” *Id.*; *United*
6 *States v. Moser*, 586 F.3d 1089, 1093 (8th Cir. 2009) (Section 853(n) “carries many of the
7 hallmarks of a civil proceeding, and it bears few if any hallmarks of a criminal proceeding”);
8 *see* Fed. R. Crim. P. 32.2(c)(1)(A) & (B).⁶ Thus, under Rule 32.2, a request for stay of a
9 third-party petition in a criminal forfeiture proceeding prior to discovery or a hearing should
10 be treated like a motion to stay a civil forfeiture complaint under Federal Rule of Civil
11 Procedure Rule 62. *See id.* (concerning 12(b) motion to dismiss). Because a stay analysis
12 with respect to civil forfeiture proceedings is equally applicable to related criminal ancillary
13 proceedings, the Government sets forth its arguments herein based on such premise.

14 **B. Stay Pursuant to 18 U.S.C. § 981(g)(1)**

15 To address the conflicts that may arise from discovery and the possibility of self-
16 incrimination when there are simultaneous criminal and civil proceedings, Congress passed
17 the Civil Asset Forfeiture Reform Act of 2000 (“CAFRA”), which provides for a stay of
18 civil forfeiture proceedings that are related to a criminal investigation or prosecution. *See*
19 18 U.S.C. § 981(g). Specifically, Section 981(g)(1) states:

20
21 Upon the motion of the United States, the court shall stay the civil forfeiture
22 proceeding if the court determines that civil discovery will adversely affect
23 the ability of the Government to conduct a related criminal investigation or
24 the prosecution of a related criminal case.

25
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27
28 ⁶ “The Advisory Committee explained that because ancillary proceedings can be
enormously complicated, ‘procedures akin to those available under the Federal Rules of
Civil Procedure,’ such as motions to dismiss, discovery, and motions for summary
judgment, ‘should be available to the court and the parties to aid in the efficient resolution
of the claims.’” *Pacheco*, 363 F.3d at 352 (citing Fed. R. Crim. P. 32.2 advisory committee’s
note to subdivision (c)).

1 Thus, in order to stay these Ancillary Proceedings pursuant to Section 981(g)(1), this
2 Court need only determine that (1) these proceedings are related to a criminal proceeding or
3 investigation, and (2) any civil discovery will adversely affect the Government's ability to
4 conduct a related criminal investigation or prosecution in the related criminal matter. *See*
5 18 U.S.C. § 981(g)(1); *see also United States v. Real Prop. Located at 6415 N. Harrison*
6 *Ave., Fresno Cty.*, No. 1:11-CV-00304-BAM, 2012 WL 4364076, at *3 (E.D. Cal. Sept. 21,
7 2012). If the Government satisfies this two-pronged test, "the Court is obligated by the plain
8 language of the statute to grant the Government's request for a stay." *6415 N. Harrison*
9 *Ave.*, 2012 WL 4364076, at *6.

10 **C. The Ancillary Proceeding Is Related To The Criminal Proceeding**

11 Section 981(g)(4) defines the terms "related criminal case" and "related criminal
12 investigation" as follows:

13 [A]n actual prosecution or investigation in progress at the time at which the
14 request for the stay, or any subsequent motion to lift the stay is made. In
15 determining whether a criminal case or investigation is 'related' to a civil
16 forfeiture proceeding, the court shall consider the degree of similarity
17 between the parties, witnesses, facts, and circumstances involved in the two
18 proceedings, without requiring an identity with respect to any one or more
19 factors.

19 18 U.S.C. § 981(g)(4). Courts within the Ninth Circuit have consistently found that
20 "[w]here common facts, similar criminal offenses, and common parties exist, the criminal
21 and civil cases are considered to be 'related.'" *149 G St., Lincoln, Cal.*, 2013 WL 2664770,
22 at *4; *see One 2008 Audi R8 Coupe*, 866 F. Supp. 2d at 1183; *6415 N. Harrison Ave.*, 2012
23 WL 4364076, at *3.

24 **D. At This Time, Discovery Will Adversely Affect The Criminal Matter**

25 Section 981(g)(1) does not require the Government to demonstrate a particular
26 showing of prejudice; the Government need only demonstrate likely or anticipated prejudice
27 or harm. Section 981(g)(1) "does not require a particularized showing of prejudice or
28 specific harm as contemplated by [the Individual Defendants]." *Florida Capital Bank*, 2009

1 WL 3458189 at *2. The only thing this Court “must determine is whether civil discovery
2 will interfere with the [related] criminal [proceeding].” *Id.* “Courts have routinely issued
3 Section 981(g)(1) stays on the basis of the Government’s allegations of *likely* prejudice to
4 the criminal proceeding caused by the civil discovery.” *One 2008 Audi Coupe*, 866 F. Supp.
5 2d at 1185 (emphasis in original).

6 **E. Proceeding Now With The Ancillary Proceedings Would Burden The**
7 **Rights Of Certain Individual Claimants In The Related Criminal**
8 **Investigation Or Case**

9 It is the Government’s general policy to seek to stay related civil proceedings
10 (including any ancillary proceedings) in order to avoid implicating the rights of individual
11 criminal defendants in an effort from having to choose between (1) subjecting themselves
12 to civil discovery and (2) invoking their Fifth Amendment rights. The Government’s policy
13 is consistent with Section 981(g)(1).

14 Should any related ancillary proceeding be allowed, not only will the Government’s
15 ability to prosecute this criminal proceeding be impaired, but certain of Claimants’ Fifth
16 Amendment rights may be violated. This is based on anticipated discovery inherent in such
17 proceedings. *See United States v. 4Certain Real Prop. & Premises Known as 4003-4005*
18 *5th Ave., Brooklyn, N.Y.*, 55 F.3d 78, 83 (2nd Cir. 1995) (claimant in a civil forfeiture case
19 faces the dilemma of remaining silent and allowing the forfeiture or testifying against the
20 forfeiture and exposing himself to incriminating admissions).

21 **CLAIMANTS’ POSITION**

22 Under 21 U.S.C. § 853(n), third parties that have filed petitions asserting an interest
23 in property that the government attempts to forfeit from a criminal defendant have a right to
24 an evidentiary hearing. At the hearing, the third party petitioner “may testify and present
25 evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the
26 hearing.” 21 U.S.C. § 853(n)(5). The Government may also “present evidence and
27 witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses
28 who appear at the hearing.” *Id.* “In addition to testimony and evidence presented at the
hearing, the court shall consider the relevant portions of the record of the criminal case

1 which resulted in the order of forfeiture.” *Id.* “The hearing shall be held before the court
2 alone, without a jury.” 21 U.S.C. § 853(n)(2).

3 “While the ancillary proceeding is mandatory, nothing in either Rule 32.2(b) or
4 Section 853(n) sets a deadline for when the ancillary proceeding must begin.” Stefan D.
5 Cassella, *Asset Forfeiture Law in the United States* § 23-3, at 660-61 (2007). Section
6 853(n)(4) provides that, “to the extent practicable and consistent with the interests of
7 justice,” the court should hold a hearing on third-party claims within thirty days, but, “[a]s
8 a practical matter, courts seldom resolve third party claims that quickly.” *Id.* § 23-6, at 667.
9 As the statutory language reflects, the thirty-day time frame is not mandatory, and it should
10 not be applied when, as here, the parties collectively agree that going forward with ancillary
11 proceedings at this time is not practicable or in the interests of justice.

12 Ancillary proceedings should be postponed in this case for a number of reasons.
13 First, challenges to the Government’s seizures and efforts to forfeit Claimants’ and other
14 parties’ attorney retainer funds remain pending in the Central District of California, where
15 this Court directed that Claimants’ constitutional objections under the First, Fourth, Fifth
16 and Sixth Amendments should be heard and decided. *See, e.g., In re Seizure of Up To and*
17 *Including \$10,000 in Bank Funds Held in JP Morgan Chase Account #XXXXX9285*, No.
18 18-MJ-02875 (C.D. Cal.). Similar issues are pending in a Ninth Circuit appeal regarding
19 other civil forfeiture proceedings commenced by the Government in the Central District of
20 California to seize and forfeit assets of several of the Claimants. *See In re Any and All*
21 *Funds Held in Republic Bank of Arizona Accounts XXXX1889, etc.*, No. 18-56455 (9th Cir.)⁷
22 Ancillary proceedings here should be deferred pending decisions in these cases and as a
23 matter of judicial economy.

24 Second, ancillary proceedings cannot occur until the Court determines “whether the
25 Government has established the requisite nexus between the property [sought to be
26 forfeited] and the offense,” *i.e.*, whether the “property is subject to forfeiture” under the law.
27

28 ⁷ Briefing has concluded and expedited oral argument is scheduled for July 9, 2019.

1 Fed. R. Crim. P. 32.2(b)(1); *see also id.* 32.2(b)(5)(B) (same nexus requirement if forfeiture
2 determination is made by a jury). Neither the Government’s claims nor a cooperating
3 defendant’s concession that property is subject to forfeiture can be enough to establish the
4 requisite nexus that funds are, in fact, “tainted” criminal proceeds. The statute requires an
5 independent determination by the Court, and this too is of constitutional import, because
6 parties who hold untainted assets are free to use them as they choose. *See Luis v. United*
7 *States*, 136 S. Ct. 1083, 1091 (2016) (government’s forfeiture of untainted assets violated
8 Sixth Amendment right to counsel of choice; “It is the difference between what is yours and
9 what is mine.”); *see also United States v. Daugerdas*, 892 F.3d 545, 552 (2d Cir. 2018) (due
10 process clause forbids binding claimant to determination in prior proceedings between
11 criminal defendant and the government that property was subject to forfeiture, where
12 claimant “was not permitted to participate”). In this case there has been no determination
13 that *any* of assets the Government seeks to forfeit are criminal proceeds, much less that
14 every dollar of revenue ever earned by Ferrer and Backpage.com – whether for employment
15 ads, real estate ads, escort ads, or anything else – was known criminal proceeds.⁸

16 Third, ancillary proceedings should be stayed pending the outcome of the
17 proceedings in the Delaware Court of Chancery in *Camarillo Holdings, LLC, et al. v. Amstel*
18 *River Holdings, LLC, et al.* (C.A. No. 2018-0606-SG). The Chancery Court action relates
19 to Claimants’ interests in certain assets the Government seeks to forfeit from Ferrer and
20 Backpage.com, LLC and its affiliates (the attorney trust funds). The central issue in an
21 ancillary hearing—the parties’ respective interests in forfeited assets—is governed by state
22 law. *See, e.g., United States v. Hooper*, 229 F.3d 818, 820 (9th Cir. 2000) (“[s]tate law
23 determines whether Claimants have a property interest”); *United States v. Alcaraz-Garcia*,
24 79 F.3d 769, 774 (9th Cir. 1996) (“Under 21 U.S.C. § 853(n)(6) the ‘legal right, title or

25
26 ⁸ As set forth in the pending motion to dismiss the Superseding Indictment (*see*
27 *United States v. Lacey et al.*, 18-CR-00422-PHX-SMB, at Dkt. 561), in making
28 determinations about whether there is any “nexus” or “taint,” the Government would have
to show that specific ads related to illegal conduct, that each defendant knew this, but
nonetheless published each ad, and that each defendant intended and acted to further an
unlawful business enterprise related to the ads.

1 interest' of the third party is determined by state law.”). As the pending Delaware case
2 predates the Government’s efforts to forfeit the attorney trust funds, and also may resolve
3 certain disputes relating to Claimants’ interests in the assets at issue, a stay pending the
4 resolution of the Delaware action is appropriate.

5 **CONCLUSION AND JOINT REQUEST**

6 Based on the forgoing, the parties respectfully request that the Court continue the
7 ancillary proceedings for a period of six months, and set a status conference in this regard
8 in five months, or at another such date as the Court sets. A Proposed Order is being lodged
9 contemporaneously with this Amended Joint Motion to Stay.

10 Respectfully submitted this 5th day of June 2019.

11
12 MICHAEL BAILEY
United States Attorney
District of Arizona

13
14 */s/ John J. Kucera*
KEVIN M. RAPP
MARGARET PERLMETER
15 PETER S. KOZINETS
16 ANDREW C. STONE
JOHN J. KUCERA
Assistant U.S. Attorneys

17
18 BRIAN BENCZKOWSKI
Assistant Attorney General
U.S. Department of Justice
19 Criminal Division

20 REGINALD E. JONES
Senior Trial Attorney
U.S. Department of Justice
21 Criminal Division
22 Child Exploitation and Obscenity Section

23 BIENERT | KATZMAN PC

24 *s/ Thomas H. Bienert, Jr.* _____

25 Thomas H. Bienert, Jr.
Whitney Z. Bernstein
26 Attorneys for James Larkin

27 LIPSITZ GREEN SCIME CAMBRIA LLP

28 *s/ Paul J. Cambria, Jr.* _____

Paul J. Cambria, Jr.

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2
3
4
5
6
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13
14
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24
25
26
27
28

Erin McCampbell
Attorneys for Michael Lacey

BIRD MARELLA BOXER WOLPERT
NESSIM DROOKS LINCENBERG AND
RHOW
s/ Gary S. Lincenberg

Gary S. Lincenberg
Ariel A. Neuman
Attorneys for John Brunst

FEDER LAW OFFICE, P.A.
s/ Bruce Feder

Bruce Feder
Attorneys for Scott Spear

DAVID EISENBERG PLC
s/ David Eisenberg

David Eisenberg
Attorney for Andrew Padilla

JOY BERTRAND ESQ LLC
s/ Joy Bertrand

Joy Bertrand
Attorney for Joye Vaught

DANIEL J QUIGLEY PLC
s/Daniel J. Quigley

Daniel J. Quigley
Attorneys for Medalist Holdings Incorporated;
Leeward Holdings LLC; Camarillo Holdings
LLC; Vermillion Holdings LLC; Shearwater
Holdings LLC; and Cereus Properties LLC