

Magistrate Judge Brian A. Tsuchida

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 FREDERICK DARREN BERG, )  
 )  
 Defendant. )

NO. MJ10-442  
MEMORANDUM IN SUPPORT OF  
MOTION FOR DETENTION

**I. Introduction**

The United States has moved for an order of pretrial detention of defendant, Frederick Darren Berg, based on Mr. Berg’s serious risk of flight and serious risk that he will obstruct justice. Mr. Berg is charged with a massive wire fraud scheme involving losses of well over \$100 million, as well as one count of Money Laundering and one count of Bankruptcy Fraud. The government believes he is a serious risk of flight based on the fact that he has admitted that he consulted with an attorney in an effort to establish an offshore trust in the Central American country of Belieze for the purpose of fleeing prosecution, but lied to the government and claimed he had never established this trust. The government has now discovered that Mr. Berg placed hundreds of thousands of dollars into an account in the name of this trust and then lied again when confronted by the Chapter 11 bankruptcy trustee about the source of these funds. Moreover, the government has evidence that Mr. Berg sought to reinstate his offshore trust in Belieze as recently as June 30, 2010.

1           The government also believes Mr. Berg is a serious risk to obstruct justice based  
2 on that fact that Mr. Berg has actively sought to obstruct justice during the investigation  
3 of his crimes by making false statements to the FBI, making false statements to the  
4 Chapter 11 bankruptcy trustee, and through the submission of false documents to the  
5 Chapter 11 bankruptcy trustee and the Federal Bankruptcy Court. Indeed, Mr. Berg has  
6 actively tried to conceal the source and nature of hundreds of thousands of dollars from  
7 the Federal Bankruptcy Court and Chapter 11 bankruptcy trustee in a personal bankruptcy  
8 case that is closely related to his criminal conduct. Because the very essence of the  
9 bankruptcy fraud charge in the pending complaint involves obstruction of justice and  
10 false statements submitted to a Federal Court, he has already shown that he is a serious  
11 risk to obstruct justice.

12           Mr. Berg has demonstrated that he simply cannot be trusted under any  
13 circumstances, as he has been lying to Federal agents, lying to the Federal Bankruptcy  
14 Court and lying to the Chapter 11 bankruptcy trustee, all while attempting to portray  
15 himself as a cooperative, forthright, defendant deserving of pretrial release and the court's  
16 trust. Because Defendant cannot be trusted to comply with any conditions of release and  
17 because he represents a significant risk of flight as well as a serious risk to obstruct  
18 justice, the Court should order pretrial detention.

## 19   **II. Factual Background**

20           The investigation that led to Mr. Berg's arrest started around July 16, 2010, when  
21 an attorney representing Mr. Berg approached the government and indicated Mr. Berg  
22 had committed a fraud and wished to provide a full accounting of his activity and  
23 cooperate with the government. Mr. Berg's counsel stated that Mr. Berg wished to accept  
24 responsibility and come in "palms up." Since that time, Mr. Berg's cooperation has been  
25 inconsistent and manipulative. He has provided extensive incriminating information  
26 about much of his criminal behavior while at the same time omitting significant material  
27 facts and outright lying about substantial assets still under his control. Thus his behavior  
28

1 has led to a false appearance of cooperation while preserving his access to resources that  
2 could support his flight from prosecution.

3 Between January 2001, and August 2010, Mr. Berg created and operated a series  
4 of investment funds purportedly for the purpose of investing in seller financed real estate  
5 contracts, hard money loans, real estate and mortgage backed securities. These funds  
6 were known as: Meridian Mortgage Investors Funds 1, 2, 3, 5, 6, 7, 8, 9, and 10 (the  
7 mortgage investment funds); Meridian Real Estate Opportunity Funds 1 and 2 (the real  
8 estate investment funds); and CS Note Holdco (the mortgage backed security investment  
9 fund).

10 The mortgage investment funds were purportedly established to primarily invest in  
11 the purchase of seller financed real estate contracts and to fund short term loans backed  
12 by mortgages on real property. Payments to investors in the mortgage investment funds  
13 were purportedly to be made from the cash flows generated by borrower payments. Over  
14 the past ten years, Mr. Berg raised approximately \$350 million from approximately 1,000  
15 investors in the mortgage investment funds. Instead of spending the money as promised,  
16 however, Mr. Berg began stealing from the funds and using the investors' money for his  
17 other business interests and personal expenses. In order to continue the scheme, Mr. Berg  
18 began using new investor's money to cover interest and principal payments to older  
19 investors in a classic Ponzi scheme.

20 In 2009, a large investor in the mortgage funds requested a redemption of their  
21 investment that Mr. Berg was unable to cover because of his thefts from the funds. In  
22 order to cover this redemption request and continue the scheme, Mr. Berg began creating  
23 new funds including two new mortgage investment funds, two funds that would  
24 purportedly invest in real estate, and an investment company that would purportedly  
25 purchase the large investor's notes at a discount. These funds, however, were in fact set  
26 up merely to continue the Ponzi scheme. Between March 2009, and August 2010,  
27 Mr. Berg managed to raise \$16 million in what he described as a "survival mode" attempt  
28 to salvage the scheme.

1           Despite his efforts to roll the Ponzi scheme into new investment funds, by June 15,  
2 2010, Mr. Berg was unable to keep up with the monthly interest payments. Mr. Berg then  
3 spent several weeks avoiding investors and telling a variety of lies to the investors to  
4 cover his scheme. On July 9, 2010, the investors in Funds 2, 5, 7, and 8 initiated actions  
5 to force the funds into involuntary Chapter 11 bankruptcy. *See In Re: Meridian Mortgage*  
6 *Investors Funds II-X*, Case Number 10-17952 (Bankr. W.D. Wash.). On July 20, 2010,  
7 the Bankruptcy Court appointed Mark Calvert of Cascade Capital as the Chapter 11  
8 Trustee for the funds. On August 4, 2010, Funds 6, 9, and 10 were added to the  
9 bankruptcy proceedings, and on August 16, 2010, Mr. Berg agreed to place Real Estate  
10 Opportunity Funds 1 and 2 into the bankruptcy proceedings. As trustee for the Meridian  
11 Funds bankruptcy, Mr. Calvert controls all of the investment funds placed into the  
12 bankruptcy proceeding.

13           On July 22, 2010, FBI agents met with Mr. Berg, his attorney, and bankruptcy  
14 trustee Mark Calvert at the Meridian office space on Fourth Avenue in Seattle,  
15 Washington. At that meeting, Mr. Berg stated that he was going to be helpful and that he  
16 knew he was going to jail. Mr. Berg's attorney, however, indicated that a full debriefing  
17 with Mr. Berg would have to wait until the bankruptcy proceedings settled down. During  
18 this meeting Mr. Berg was asked if he had any offshore accounts or assets. In response to  
19 this question, Mr. Berg responded that he had consulted with an attorney who specialized  
20 in the protection of assets and the creation of offshore trusts. Mr. Berg admitted that he  
21 had the attorney create a Delaware based limited liability company, but claimed he never  
22 funded this LLC and claimed he did not go forward with the creation of an offshore trust.

23           On July 27, 2010, attorneys representing investors in CS Note Holdco began  
24 executing a State court writ of pre-judgment attachment to seize many of Mr. Berg's  
25 personal assets from his homes and office space. Although Sheriff's deputies began  
26 service of the writs, Mr. Berg rushed to file for personal bankruptcy that same day and the  
27 parties agreed to leave Mr. Berg's personal property in place. *See In Re: Frederick*  
28 *Darren Berg*, Case No. 10-18668 (Bankr. W.D. Wash.). On August 19, 2010, the

1 bankruptcy court appointed Diana Carey as the Chapter 11 trustee for Mr. Berg's personal  
2 estate. As trustee for Mr. Berg's personal estate, Ms. Carey acquired all rights as  
3 representative of Mr. Berg's bankruptcy estate including Mr. Berg's rights as the owner  
4 and sole shareholder in his many business interests. On August 24, 2010, Mr. Berg  
5 signed consents for each of the business he listed on his bankruptcy schedules transferring  
6 control of the businesses to Ms. Carey.

7 Throughout August 2010, Mr. Berg's counsel repeatedly postponed a full  
8 debriefing with Mr. Berg citing a variety of reasons. These reasons included: vacation  
9 schedules of counsel, the need to sort through early disputes in the bankruptcy  
10 proceedings, and finally Mr. Berg's failure to reach an agreement with the bankruptcy  
11 trustee to provide him with a budget that would fund his criminal defense and a  
12 bankruptcy attorney. Although Mr. Berg would not participate in a government  
13 interview, he was meeting regularly with bankruptcy trustee Mark Calvert and his staff  
14 and providing them with information about his fraud scheme throughout July and August  
15 2010. Mr. Calvert and his staff were gradually provided access to all of the Meridian  
16 funds bank records, accounting records, asset files, investors files and other records.  
17 Additionally, Mr. Calvert and his staff met regularly with Mr. Berg to discuss the  
18 Meridian Funds and how he committed the fraud that led to the bankruptcy. Mr. Calvert  
19 has told FBI agents and the United States Attorneys Office that Mr. Berg's assistance has  
20 proved valuable to his investigation and he wishes to continue working with Mr. Berg.

21 Mr. Berg's assistance to Mr. Calvert and his staff took several weeks to develop,  
22 however, and involved substantial disagreements with Mr. Berg and his attorneys at  
23 several points. Mr. Calvert and his staff contacted the FBI and the United States  
24 Attorneys Office regarding concerns about access to records and Mr. Berg's behavior on  
25 multiple occasions throughout July and August 2010. Among the challenges they  
26 encountered were: Mr. Berg's initial refusal to surrender control of certain bank  
27 accounts; Mr. Berg's initial refusal to surrender control over the post office box that  
28 receives the mail for all of his companies including the investment funds; Mr. Berg's

1 efforts to open and fund new bank accounts without their knowledge; Mr. Berg's initial  
2 refusal to provide access to banking records for Meridian Partnership Management and  
3 MPM Investor Services; and incomplete access to records of other Meridian companies  
4 that had received illegal transfers of money from the investment funds.

5 Mr. Berg's initial refusal to provide access to the records for Meridian Partnership  
6 Management and MPM Investor Services was a substantial obstacle to the bankruptcy  
7 trustee's investigation. Mr. Calvert described these companies as the "clearinghouse"  
8 for the Meridian Funds. Meridian Partnership Management was the company that both  
9 accepted investor deposits and purchased mortgage notes for the benefit of the Meridian  
10 Funds. Throughout August 2010, Mr. Calvert told agents that despite his requests to  
11 Mr. Berg and his counsel to relinquish control over Meridian Partnership Management  
12 and MPM Investor Services, Mr. Berg had refused to place those companies in  
13 bankruptcy or provide access to the records of those companies. According to  
14 Mr. Calvert the bank records for the various funds showed significant amounts of money  
15 had gone from the investment funds accounts to the accounts for Meridian Partnership  
16 Management and MPM Investor Services. Therefore, the records of these two companies  
17 were important to determine the scope of the fraud involved in the Meridian companies.  
18 Mr. Calvert was not provided full access to these records until approximately August 30,  
19 2010, over a month after Mr. Berg's counsel initially indicated that Mr. Berg wished to  
20 fully cooperate.

21 During this time frame of July 16, 2010, through August 30, 2010, counsel for  
22 Mr. Berg indicated that delays in providing access to records and conducting a full law  
23 enforcement debriefing with Mr. Berg were the result of disagreements with the  
24 bankruptcy trustee over a proposed budget to fund Mr. Berg's criminal defense counsel  
25 and bankruptcy counsel as well as conflicts with a variety of vacation schedules.  
26 Ultimately, Mr. Berg's original defense counsel withdrew and Mr. Berg obtained  
27 approval for court appointed counsel through the Federal Public Defender's Office on  
28 or about September 3, 2010.

1 Based on the problems Mr. Calvert was experiencing with Mr. Berg's lack of  
2 cooperation and other concerns about the preservation of evidence and records, agents  
3 executed search warrants on August 30, 2010, at Mr. Berg's home on Mercer Island,  
4 Washington, as well as the Meridian office suite in Seattle, Washington. Among other  
5 things recovered during the search of Mr. Berg's office space were records related to a  
6 Delaware limited liability company in the name of DB517. *See* Attachment A. These  
7 records include an invoice from "Contract Management Inc." of Belize City, Belize dated  
8 June 30, 2010, addressed to Darren Berg "for reinstating the DB517 Trust and for all  
9 other professional services in relation thereto." The invoice also refers to "services  
10 rendered in liaising with Carlos Neuman of Panama Relocations Attorneys with regards  
11 to the usage of the shelf company Red Autumn Investment, Inc." Agents also discovered  
12 records for a U.S. based TD Ameritrade account in the name of DB517 LLC. The  
13 records did not indicate whether any funds had been transferred overseas. Agents have  
14 reviewed wire transfer records received from many of Mr. Berg's banks and have not  
15 found any transfers that appear related to the Belize trust or Red Autumn Investment Inc.

16 Agents finally met with Mr. Berg for a full debriefing on September 20, 2010. At  
17 that time, Mr. Berg was represented by new counsel from the Federal Public Defender's  
18 Office and he participated in a recorded interview that lasted approximately four hours.  
19 During the interview, Mr. Berg was represented by two attorneys from the Federal Public  
20 Defenders' office. He was advised that his presence was voluntary and that anything he  
21 said would be used against him as part of this prosecution. The entire interview was  
22 audio recorded. Mr. Berg provided a detailed overview of the history of his creation of  
23 Meridian Partnership Management and his investment funds as well as his criminal  
24 conduct. During the interview, agents asked Mr. Berg if he had any offshore accounts  
25 or if he had done anything to hide assets. Mr. Berg stated that in approximately March  
26 2010, he was about to get caught and he confided in a local real estate developer with  
27 whom he was friends. This developer introduced him to an attorney who specialized in  
28 protecting assets through trusts in Belize. According to Mr. Berg he had the attorney

1 create the DB517 trust but never transferred any funds to the trust. Mr. Berg admitted  
2 that he had opened an account at TD Ameritrade in the name of DB517, and stated that  
3 he deposited approximately \$200,000.00 into this account. However, he claimed all but  
4 approximately \$2,000.00 of this money had been transferred back to his businesses.  
5 Mr. Berg agreed to waive his attorney client privilege and allow us to speak to the  
6 attorney who created the DB517 trust to confirm these facts. Mr. Berg, however, has yet  
7 to provide the promised waiver of attorney-client privilege.

8 On September 27, 2010, Mr. Calvert and his staff provided an update on their  
9 investigation and indicated they were continuing to conduct a forensic accounting of the  
10 Meridian Funds bank records. At that time, Mr. Calvert stated that he and his staff were  
11 meeting regularly with Mr. Berg and he was continuing to assist them with recreating the  
12 history of the Meridian funds and his fraudulent scheme. Mr. Calvert stated that Mr. Berg  
13 had been valuable in categorizing the types of inflows and outflows of funds as recorded  
14 in the Quickbooks accounting records for the funds as well as his personal accounts.  
15 According to Mr. Calvert, he had sought approval from the bankruptcy court to pay  
16 Mr. Berg approximately \$15,000.00 per month in exchange for his cooperation.  
17 Mr. Calvert stated that in response to concerns raised by the government regarding this  
18 compensation agreement, Mr. Berg had decided not to accept this compensation.  
19 However, Mr. Calvert was concerned that as a result of this, Mr. Berg had obtained  
20 alternative employment in Los Angeles, California and would not be available to assist  
21 his investigation as regularly as he had in the past.

22 At this point, it appeared that Mr. Berg was being cooperative and generally  
23 forthright with the bankruptcy trustees and the government. On the afternoon of  
24 October 13, 2010, however, Andrew Wilson, a consultant working with bankruptcy  
25 trustee Diana Carey contacted FBI Special Agent Steve Rausch with new information  
26 regarding Mr. Berg's personal bankruptcy estate. Mr. Wilson told SA Rausch he had  
27 recently discovered a new bank account in Mr. Berg's name at Union Bank. Although  
28 Mr. Berg was specifically asked to list all bank currently accounts under his control

1 during the September 20, 2010 interview, he did not say anything about an account at  
2 Union Bank.

3 Mr. Wilson told SA Rausch that he had discovered the Union Bank account on  
4 September 30, 2010, when he found a wire transfer receipt at Mr. Berg's Mercer Island  
5 home, which showed a wire transfer on September 17, 2010, in the amount of  
6 \$145,000.00 from an account in the name of DB517 LLC at TD Ameritrade, to an  
7 account in the name of F Darren Berg at Union Bank. *See* Attachment B. Records for  
8 the Union Bank account show that Mr. Berg opened that account on September 9, 2010  
9 with a \$50,000.00 deposit and Mr. Berg deposited an additional \$145,000.00 on  
10 September 17, 2010. The records from Union Bank then show that Mr. Berg immediately  
11 withdrew \$116,030.00 from the account. *See* Attachment B, at 2. Records for the  
12 TD Ameritrade account show that Mr. Berg opened that account in February 2010.  
13 According to Mr. Wilson, Mr. Berg had never disclosed either of these accounts (the  
14 account at Union Bank or the account at TD Ameritrade) to the bankruptcy trustee and  
15 had not listed these accounts in his bankruptcy schedules. In addition, Mr. Berg had  
16 never told the bankruptcy trustee that he owned an interest in an LLC named DB517,  
17 and had not listed this company on his bankruptcy schedule.

18 According to Mr. Wilson, on Tuesday October 5, 2010, after the accounts were  
19 frozen, he asked Mr. Berg about the account at Union Bank, DB517 LLC and the TD  
20 Ameritrade account. Mr. Berg told Mr. Wilson that he did not think he had to disclose  
21 the Union Bank account because it was an account he opened after he filed bankruptcy.  
22 Mr. Berg also provided Mr. Wilson with a spreadsheet for the TD Ameritrade account  
23 that showed a deposit of \$225,000.00 into the TD Ameritrade account on August 3, 2010.  
24 According to Mr. Wilson, Mr. Berg initially told him that this \$225,000.00 came from a  
25 variety of sources. However, when pressed for more details, Mr. Berg told Mr. Wilson  
26 that some of the money came from two consulting contracts he had signed in early August  
27 2010.

1 Mr. Berg provided copies of the contracts to Mr. Wilson and told him that DB517  
2 LLC was a company he established to provide consulting services. According to Mr.  
3 Wilson, Mr. Berg said he had not disclosed his interest in DB517 LLC because it was  
4 created after he filed for bankruptcy and constituted a post-petition asset. As shown in  
5 Attachment A, however, DB517 LLC was created in July 2009, and Mr. Berg has  
6 admitted that he created this entity to help hide assets offshore..

7 Mr. Wilson said that Mr. Berg also claimed the \$225,000.00 deposit into the  
8 DB517 LLC account at TD Ameritrade represented post-petition earnings that he did not  
9 believe he was required to disclose to the bankruptcy trustee. Mr. Wilson explained that  
10 pursuant to an order entered in Mr. Berg's personal bankruptcy proceedings, he was  
11 entitled to keep post-petition earnings (earnings for work after the date he filed his  
12 petition for personal bankruptcy).

13 Special Agent Rausch, however, has determined that at least one of the two  
14 consulting contracts is bogus and the company named in the second contract cannot be  
15 located. Both contracts are dated August 1, 2010, and are identical with the exception of  
16 the name of the company purportedly hiring Mr. Berg and the amount of compensation  
17 called for in the contract. *See* Attachments C and D. Both contracts name DB517 LLC  
18 as the "consultant" and Mr. Berg as the manager of DB517. Each contract calls for Mr.  
19 Berg to consult on issues related to the ownership of a corporate jet. The first contract is  
20 purportedly with K6 Aircraft Leasing. The other contract is purportedly with Boards  
21 Aircraft LLC. The contract with Boards Aircraft LLC, is purportedly signed by "Greg  
22 Clausson."

23 Special Agent Rausch interviewed Greg Clausen, the Director of Operations  
24 for a company named Aero Air, a company associated with Boards Aircraft, that same  
25 day - October 13, 2010. He asked Mr. Clausen if he and/or Boards Aircraft LLC had  
26 recently hired Darren Berg in the past few months to perform any employment or  
27 consulting duties for Boards Aircraft, LLC. Mr. Clausen said he "did not think" he had  
28 hired Mr. Berg or agreed to use Mr. Berg's services as a consultant. Mr. Clausen also

1 stated that he was “nearly positive” that he did not sign a contract in the past few months  
2 hiring Mr. Berg as an employee or a consultant. Mr. Clausen said he knows Mr. Berg and  
3 was a friend of Mr. Berg. Mr. Clausen said he was not sure whether the owner of Boards  
4 Aircraft, Mark Wattles, could have entered a consulting contract with Mr. Berg. After  
5 reviewing a copy of the contract with his purported signature, however, Mr. Clausen  
6 contacted SA Rausch on October 18, 2010, and stated that the signature on the contract  
7 was not his signature and his name was actually misspelled on the contract.

8 Agent Rausch also interviewed the owner of Boards Aircraft LLC, Mr. Wattles,  
9 who told him that he had never engaged in any transactions with Mr. Berg or any entity  
10 associated with Mr. Berg other than trading the use of their respective airplanes. He said  
11 he would not even consider hiring Mr. Berg as a consultant to Boards Aircraft LLC  
12 because he does not believe Mr. Berg knows anything about airplanes. SA Rausch has  
13 been unable to locate anyone associated with K6 Aircraft Leasing.

14 Agent Rausch also reviewed records from TD Ameritrade related to Mr. Berg’s  
15 account in the name of DB517 LLC. He found that on August 2, 2010, this account  
16 received an incoming wire transfer in the amount of \$225,000.00 from an account at Bank  
17 of America in the name of Meridian-Greenfield LLC. Records for the Bank of America  
18 account show that Mr. Berg opened this account just four days earlier on July 29, 2010,  
19 and deposited a cashier’s check in the amount of \$398,773.57. *See* Attachment E. This  
20 deposit was the source of the funds that made up the \$225,000.00 wire transfer to Mr.  
21 Berg’s DB517 LLC account at TD Ameritrade and the later transfer of \$145,000.00 to  
22 Union Bank. The records from Bank of America show that in addition to wiring  
23 \$225,000.00 to his DB517 LLC account at TD Ameritrade, Mr. Berg also wired  
24 \$100,000.00 to an account in his name at Pacific Western Bank<sup>1</sup> on August 2, 2010, and  
25 another \$50,000.00 to a criminal defense attorney that same day. The remaining funds in  
26 the account (including two smaller deposits of unknown origin) were all exhausted by  
27 August 31, 2010. *See* Attachment G - Summary of Transactions.

28 \_\_\_\_\_  
<sup>1</sup> Mr. Berg disclosed his Pacific Western account to the bankruptcy trustee and the FBI.

1 The cashier's check dated July 29, 2010, was drawn on Commerce Bank and had a  
2 memo regarding "Lake Union Escrow." On October 15, 2010, Special Agent Daniel  
3 Bennet contacted Lake Union Escrow and learned that the \$398,773.57 cashier's check  
4 represented the proceeds of a property sale. Lake Union Escrow provided copies of the  
5 closing file related to that sale. Those records showed that the purchase and sale  
6 agreement was related to a home in the Magnolia area of Seattle, Washington and was  
7 initiated on July 19, 2010, between Meridian Greenfield LLC as the seller and Soleil LLC  
8 as the buyer. All Meridian Greenfield documents in the file are signed by Darren Berg.  
9 The documents from Lake Union Escrow indicate Mr. Berg signed the closing documents  
10 on July 27, 2010, and the sale closed on July 28, 2010.

11 A further review of records from Mr. Berg's Union Bank account show that the  
12 same day he wired \$145,000.00 from his TD Ameritrade account to the Union Bank  
13 account, he withdrew \$116,030.00. These funds remain unaccounted for. According to  
14 Mr. Wilson, Mr. Berg claimed he spent these funds establishing a new residence in Los  
15 Angeles and performing initial work on his consulting agreements.

16 Finally, despite his claims that he has been fully cooperative with the bankruptcy  
17 trustees' investigations, Mr. Berg has recently canceled multiple meetings with the  
18 trustees and his cooperation has diminished. The same day charges were initially filed in  
19 this case,<sup>2</sup> Mr. Berg was in Seattle, but abruptly canceled a planned meeting with Mr.  
20 Calvert and flew back to Los Angeles. Over the next several days, he told the trustees he  
21 would return to Seattle the following week for meetings with the trustees on Wednesday  
22 October 20, 2010, and Thursday October 21, 2010. However, Mr. Berg canceled these  
23 meetings also and told the trustees he decided to stay in Los Angeles. Mr. Calvert has  
24 told the government that while Mr. Berg continues to speak with them, his cooperation  
25 has diminished over the past several weeks and Mr. Berg has claimed he does not have as  
26 much time available to assist the trustees for a variety of reasons.

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28 <sup>2</sup> A ten count Information charging Mr. Berg with wire fraud and money laundering  
was filed the morning of October 14, 2010.

### 1 III. Legal Framework

2 The government may move for detention in a case that involves either “a crime of  
3 violence,” 18 U.S.C. 3142(f)(1)(A), or “a serious risk that such person will flee” 18  
4 U.S.C. 3142(f)(2)(A), or “a serious risk that [the defendant] will obstruct or attempt to  
5 obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or  
6 intimidate a prospective witness,” 18 U.S.C. 3142(f)(2)(B). The relevant statute requires  
7 that, should the Court conduct a detention hearing, it must consider all available pertinent  
8 information. Although a defendant may not be detained based solely on dangerousness  
9 unless one of the conditions listed in section 3142(f)(1) is present, *see United States v.*  
10 *Twine*, 344 F.3d 987 (9th Cir. 2003), in cases involving serious risk of flight or risk of  
11 obstruction of justice, the court must also consider the nature and seriousness of the  
12 danger to the community presented by defendant’s release, see 18 U.S.C. § 3142(g)(4).  
13 The Ninth Circuit has held “that danger may, at least in some cases, encompass pecuniary  
14 or economic harm.” *United States v. Reynolds*, 956 F.2d 192 (9th Cir. 1992).

15 In making a determination with respect to pre-trial detention, the Court must  
16 evaluate several enumerated factors to determine “whether there are conditions of release  
17 that will reasonably assure the appearance of the person as required and the safety of any  
18 other person and the community. . . .” 18 U.S.C. § 3142(g). These factors include:

19 (1) the nature and circumstances of the offense charged, including whether the  
20 offense is a crime of violence, or an offense listed in section 2332(g)(5)(B) for  
21 which a maximum term of imprisonment of 10 years or more is prescribed or  
22 involves a narcotic drug;

23 (2) the weight of the evidence against the person;

24 (3) the history and characteristics of the person, including -

25 (A) the person’s character, physical and mental condition, family ties,  
26 employment, financial resources, length of residence in the community,  
27 community ties, past conduct, history relating to drug or alcohol abuse,  
28 criminal history, and record concerning appearance at court proceedings;  
and

(B) whether, at the time of the current offense or arrest, the person was on  
probation, on parole, or on other release pending trial, sentencing, appeal, or  
completion of sentence for an offense under Federal, State, or local law,  
and;

1 (4) the nature and seriousness of the danger to any person or the community that  
2 would be posed by the person's release.

3 *Id.* The Court must balance all of these factors in determining whether a defendant  
4 should be detained pending trial.

5 It is well-settled that at a detention hearing the government may present evidence  
6 by way of an evidentiary proffer sufficient to make the court aware of the defendant's role  
7 in the offense, the weight of the evidence against the defendant, and other relevant  
8 factors. *See, e.g., United States v. Salerno*, 481 U.S. 739, 743 (1987); *United States v.*  
9 *Winsor*, 785 F.2d 755 (9th Cir. 1986). At the detention hearing in this case, the United  
10 States intends to proffer evidence of Mr. Berg's risk of flight as well as his danger to the  
11 community and the risk that he will obstruct justice.

12 The standards of proof differ with respect to the "risk of flight" and  
13 "dangerousness" prongs of the statute. A detention order based on the defendant's risk of  
14 flight must be supported by a preponderance of the evidence. *United States v. Motamedi*,  
15 767 F.2d 1403 (9th Cir. 1985). A detention order based on the defendant's dangerousness  
16 must be supported by clear and convincing evidence. 18 U.S.C. § 3142(f).

#### 17 **IV. Argument**

##### 18 **A. The evidence establishes that defendant presents a serious risk of 19 flight, a serious risk to obstruct justice, and that he is a danger to 20 the community.**

21 The evidence in this case demonstrates that Mr. Berg is a substantial risk of  
22 flight such that no condition or combination of conditions will reasonably assure his  
23 future appearances in Court. In addition, the evidence demonstrates that Mr. Berg is a  
24 serious risk to obstruct justice. As shown above, the government has obtained evidence  
25 that Mr. Berg established a trust in the name of DB517 in the Central American country  
26 of Belize. Although Mr. Berg has provided some details regarding his establishment of  
27 a U.S. based limited liability company in the name of DB517, Mr. Berg lied to the  
28 government and claimed he had not gone forward with plans to create the actual offshore  
trust. In addition, Mr. Berg lied to the government when he claimed that he had placed  
approximately \$200,000.00 in a bank account in the name of DB517, but said he had

1 returned all but \$2,000.00 of this money to his businesses. In fact, as the evidence now  
2 shows, Mr. Berg placed substantially more funds into the TD Ameritrade account in the  
3 name of DB517 and did not return any of those funds to his businesses.

4 In addition, the evidence now shows that the funds Mr. Berg placed into the  
5 DB517 account were stolen from the bankruptcy estate and that Mr. Berg actively sought  
6 to conceal these assets from the bankruptcy court and to obstruct the Chapter 11 trustee's  
7 investigation of the nature of these funds. While Mr. Berg told the Chapter 11 trustee that  
8 these funds constituted post-petition earnings for the performance of two consulting  
9 agreements, the evidence shows that at least one of the consulting agreements Mr. Berg  
10 presented to the trustee is false and that the source of the funds was in fact the sale of an  
11 asset that was part of the bankruptcy estate. Mr. Berg's lies to the Chapter 11 bankruptcy  
12 trustee and his fabrication of fake consulting agreements in an attempt to conceal assets  
13 from the bankruptcy trustee and the bankruptcy court all took place while Mr. Berg was  
14 attempting to portray himself as a cooperative and remorseful defendant who could be  
15 trusted while on pretrial release. This conduct demonstrates that no conditions or  
16 combination of conditions will reasonably assure the safety of any other person and the  
17 community and that Mr. Berg is a serious risk of flight and a serious risk to obstruct of  
18 justice. As will be shown below, all four factors set forth in the Bail Reform Act strongly  
19 militate in favor of detention.

20 **B. The nature and circumstances of the offenses favors detention.**

21 Mr. Berg's wire fraud scheme is the largest Ponzi scheme ever prosecuted in the  
22 Western District of Washington. The losses from his ten year scheme to defraud his  
23 investors are well over \$100 million. The scheme involved an extraordinary level of  
24 sophistication and manipulation. Indeed, Mr. Berg has admitted that in order to  
25 perpetuate his scheme, he spent countless hours fabricating documents to mislead  
26 investors and independent auditors. Mr. Berg's ability to fabricate documents, deceive  
27 hundreds of educated professionals and manipulate the truth for nearly a decade  
28 demonstrates that it would be impossible to effectively supervise him while on pretrial

1 release and that condition or combination of conditions will reasonably assure his future  
2 appearances in Court or the safety of the community.

3 More significantly, however, is Mr. Berg's recent Bankruptcy Fraud which  
4 involved concealing substantial assets from the Chapter 11 trustee and the bankruptcy  
5 court as well as concerted efforts to obstruct the trustee's investigation of those assets.  
6 This conduct is especially egregious in light of Mr. Berg's attempt to deceive the  
7 government, the Chapter 11 trustees and the bankruptcy court into believing that he was  
8 going to be cooperative and work towards making his victims whole. The funds Mr. Berg  
9 has concealed are the very assets he claims he is cooperating with the trustees to make  
10 available for distribution to the victims of his massive fraud scheme. This conduct shows  
11 that Mr. Berg simply cannot be trusted to comply with any conditions of release and that  
12 pretrial supervision would be insufficient to reasonably assure his future appearances or  
13 the safety of the community.

14 **C. The weight of the evidence supports detention.**

15 Although the Ninth Circuit has held that the weight of the evidence is the least  
16 important statutory factor, *see Motamedi*, 767 F.2d at 1403, this factor is relevant to a risk  
17 of flight analysis because a defendant's tendency to flee increases with the strength of the  
18 evidence against him and the likelihood of conviction at trial. That is, the stronger the  
19 evidence of guilt, the greater the likelihood that a defendant will flee or not return to face  
20 the charges levied against him, and thus the more important the need for pre-trial  
21 detention.

22 The weight of the evidence against Mr. Berg is incredible. He has fully admitted  
23 to his massive fraud scheme and provided an extensive recorded confession to the  
24 government. There is simply no question that he will be convicted and sentenced to an  
25 extremely long period in prison. Based on the government's tentative calculation of the  
26 United States Guidelines, Mr. Berg will face an advisory guideline range of 360 months  
27 to life in prison. *See* Attachment F - Tentative Guideline Calculations. Should Mr. Berg  
28 be convicted following a trial, his guideline range is off the chart. These severe penalties

1 create a strong incentive to flee prosecution, especially for a defendant who has never  
2 before served any time in prison.

3 **D. The history and characteristics of the defendant support detention.**

4 The history and characteristics of the person encompasses several components  
5 including the person's character, mental condition, family ties, employment, financial  
6 resources, community ties, past conduct, and criminal history. 18 U.S.C.  
7 § 3142(g)(3)(A). Mr. Berg's history and characteristics are those of a career criminal  
8 and master manipulator who cannot help but lie. Unlike the vast majority of majority of  
9 defendants charged with operating a Ponzi scheme, Mr. Berg has a prior Federal criminal  
10 history. In 1989, Mr. Berg was convicted of Bank Fraud in the District of Oregon. This  
11 conviction was related to a check kiting scheme in which Mr. Berg stole approximately  
12 \$30,000.00. Shortly after this conviction, in the early 1990's, Mr. Berg was investigated  
13 by the FBI in Vancouver, Washington in relation to a scheme to sell fraudulent accounts  
14 receivables. Although this case was never prosecuted, Mr. Berg recently admitted that he  
15 did in fact engage in a scheme in which he defrauded a victim of \$80,000.00 by selling a  
16 fake account receivable. At the time Mr. Berg committed this new fraud, he was still  
17 serving his five year term of probation for his prior bank fraud. As the Supreme Court  
18 noted in *United States v. Salerno*, 481 U.S. 739, 742 (1987), the Bail Reform Act was  
19 passed specifically in response to "the alarming problem of crimes committed by persons  
20 on release." *Id.* citing S.Rep. No. 98-225, p. 3 (1983), U.S. Code Cong. & Admin. News  
21 1984, pp. 3182, 3185. Mr. Berg's long history of fraud heavily outweighs other factors  
22 that might support his release.

23 Several of Mr. Berg's other characteristics also support detention. Most notably,  
24 Mr. Berg's lack of legitimate employment demonstrates that he is not tied to any current  
25 employment obligations. In addition, Mr. Berg's efforts to fabricate evidence of  
26 employment show that he is a risk to obstruct justice and that he cannot be trusted to deal  
27 honestly with pretrial services. Mr. Berg's financial resources are also an extremely  
28 troubling factor that supports detention. It is now clear that Mr. Berg has managed to

1 steal approximately \$400,000.00 from the bankruptcy estate. The disposition of a  
2 substantial portion of these funds remains unknown. Therefore, Mr. Berg likely has  
3 access to well over a hundred thousand dollars that he could use to finance his flight  
4 from prosecution.

5 Mr. Berg's lack of stable community ties are also a reason for detention. Since his  
6 crimes have come to light, Mr. Berg has cut his ties to the Seattle, Washington area and  
7 established a new home in Los Angeles. He has told the bankruptcy trustees that he  
8 moved to Los Angeles in order to work on his consulting agreements. This claim,  
9 however, is false in regards to at least one of his purported consulting contracts and  
10 appears likely to be entirely false. Therefore, Mr. Berg's ties to the Los Angeles area are  
11 tenuous at best. In light of the fact that Mr. Berg's employment in Los Angeles appears  
12 fake, and he has substantially curtailed his community ties to Seattle, Mr. Berg has no  
13 stable community ties that would mitigate his risk of flight. Moreover, his current  
14 residence in Los Angeles is troubling in light of the proximity to the southern U.S. border  
15 and his admitted plans to flee to Central America.

16 Finally, one of the most important conditions of pretrial release imposed on any  
17 defendant who is granted bail is the condition that he not commit any further crimes.  
18 Indeed, this is a mandatory condition that must be in every bond. *See* 18 U.S.C.  
19 § 3142(b) and (c)(1)(A). Yet, Mr. Berg's history and characteristics show that he is  
20 willing and able to completely ignore such important Court restrictions and evade  
21 detection by law enforcement. This history demonstrates that no condition or  
22 combination of conditions will reasonably assure the safety of any other person or the  
23 community and that he cannot be trusted to appear for court.

24 **E. The nature and seriousness of defendant's danger to the community**  
25 **and any other person supports detention.**

26 The nature and seriousness of Mr. Berg's danger to the community is substantial.  
27 While the concept of dangerousness typically focuses on crimes of violence, in fact, white  
28 collar crimes pose serious dangers. The legislative history of the Bail Reform Act of  
1984 makes clear that Congress intended that the "safety of any other person or the

1 community” language in Section 3142 was expected to be given a broad construction.  
2 See Report of the Senate Committee on the Judiciary, S. Rep. No. 225, 98th Cong., 1st  
3 Sess. 12 (1983) (“the reference to safety of any other person is intended to cover the  
4 situation in which the safety of a particular identifiable individual, perhaps a victim or  
5 witness, is of concern, while the language referring to the safety of the community refers  
6 to the danger that the defendant might engage in criminal activity to the detriment of the  
7 community. The Committee intends that the concern about safety be given a broader  
8 construction than merely danger of harm involving physical violence.”). This legislative  
9 history was cited with approval in *United States v. King*, 849 F.2d 485 (11th Cir. 1998).

10 Courts have appropriately construed the statute to find that protection of the  
11 community from economic harm is a valid objective of bail conditions. See *United States*  
12 *v. Reynolds*, 956 F.2d 192, 193 (9th Cir. 1992) (post-conviction for mail fraud and  
13 witness tampering, the Court held that for purposes of detention, “danger may, at least in  
14 some cases, encompass pecuniary or economic harm”); see also *United States v.*  
15 *Giordano*, 370 F.Supp.2d 1256, 1270 (S.D. Fla. 2005) (“no question that an economic  
16 danger, like that posed by a serial defrauder, falls under the broad umbrella of  
17 ‘dangerousness’ as that term is used throughout the Bail Reform Act”); *United States v.*  
18 *Madoff*, 586 F.Supp.2d 240, 253 and n. 11 (S.D.N.Y. 2009) (Court accepted that “in  
19 certain circumstances an economic or pecuniary harm may give rise to a consideration of  
20 danger” for purposes of pretrial detention and noted that “[t]he question appears to  
21 become one of propensity to commit further crimes, even if the resulting harm is solely  
22 economic”).

23 Mr. Berg’s conduct in this case, which was a long-term concerted plan to steal  
24 millions of dollars from hundreds of victims, was followed by new criminal conduct  
25 committed while falsely portraying himself as forthright and cooperative with the  
26 government’s investigation and that of the Chapter 11 bankruptcy trustees. This  
27 willingness to commit new crimes while under the microscope of an FBI investigation  
28 and two bankruptcy court investigations, demonstrates that Mr. Berg poses the highest

1 degree of economic danger to the community. Indeed, anyone willing to engage in such  
2 reckless, irrational criminal conduct is totally unworthy of the court’s trust.

3 Mr. Berg’s release also presents a serious risk of obstruction of justice. Despite  
4 exhaustive efforts to track all of the proceeds of Mr. Berg’s crimes, Mr. Berg has  
5 managed to steal nearly \$400,000.00 from the bankruptcy estate at the same time he has  
6 been sitting down with the government and claiming to be cooperative. Mr. Berg has  
7 blatantly lied to the FBI about what bank accounts he controls, he has submitted false and  
8 misleading bankruptcy schedules to the U.S. Bankruptcy Court, and he has submitted  
9 false documents to the Chapter 11 trustee. This conduct was designed solely to obstruct  
10 both the FBI investigation and the Chapter 11 trustee’s investigation of his criminal  
11 conduct and shows that no conditions of release will effectively curtail his behavior.

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1 **V. Conclusion**

2 Defendant is asking this Court to trust him and his promise to appear at future  
3 court hearings and not engage in any additional criminal behavior. Yet everything about  
4 the nature and circumstances of this case and defendant's history and characteristics  
5 shows that he cannot be trusted. Defendant has shown a willingness and ability to  
6 engaged in egregious criminal conduct and obstruction of justice during a FBI  
7 investigation and a Federal Bankruptcy Court investigation with which he was  
8 purportedly cooperating. Moreover, Defendant presents an ongoing and substantial  
9 economic danger to the community that should not be over looked. *See U.S. v. Reynolds,*  
10 *956 F.2d 192, (9th Cir. 1992)* (danger may encompass pecuniary or economic harm). For  
11 the foregoing reasons, the government respectfully requests that this Court order Mr. Berg  
12 detained pending trial.

13 DATED this 22nd day of October, 2010.

14 Respectfully submitted,  
15 JENNY A. DURKAN  
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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via facsimile.

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