UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff,	
v.	:
8 GILCREASE LANE, QUINCY FLORIDA 32351, <i>ET AL</i> ., Defendants.	
Thomas A. Bowdoin, Jr., Bowdoin/Harris Enterprises, Inc. & Adsurfdaily, Inc., Claimants.	

Civil Action No. 08-1345 (RMC) ECF

Plaintiff's Opposition to Claimant's Petition to Determine Proportionality

PLAINTIFF'S OPPOSITION TO CLAIMANT'S PETITION TO DETERMINE PROPORTIONALITY

COMES NOW, plaintiff United States of America, by and through its attorney, the

United States Attorney for the District of Columbia, to oppose the Motion to Determine Proportionality that claimant ADSURFDAILY ("ASD") filed in this civil forfeiture action *in rem.* ASD submits that the Court should evaluate "the proportionality factor . . as a significant consideration in the emergency hearing." The proportionality factor the Court is asked to consider is whether some funds should be returned now because forfeiture of the entire defendant *res* might violate the excessive fines clause of the Eighth Amendment to the United States Constitution. As section 982(g) of Title 18 makes clear, a claimant has the burden to establish that a forfeiture "was constitutionally excessive." This means that the proportionality analysis comes only after forfeiture is decreed.¹

¹<u>Cf. United States v. Funds in the Amount of \$170,926.00</u>, 895 F. Supp. 810, 813 (N.D. Ill. 1997); <u>One Parcel of Real Estate Located at 13143 S.W. 15th Lane</u>, 872 F. Supp. 968, 974 (S.D. Fla. 1994).

In this case, however, an excessive fines analysis is not just premature – it is irrelevant. The United States asserts that the defendant property in this case is forfeitable as proceeds of criminal activity. See Complaint, Counts I & II. The excessive fines analysis does not apply to forfeiture of criminal proceeds. See United States v. Real Property Located at 22 Santa Barbara Dr., 264 F.3d 860, 874-75 (9th Cir. 2001) (the Eighth Amendment does not apply to the forfeiture of drug proceeds; all property traceable to such proceeds is forfeitable even though the property doubled in value due to appreciation); United States v. Powell, 2 Fed. Appx. 290, 294 (4th Cir. 2001) (forfeiture of proceeds is never excessive; for this purpose, proceeds and property traceable to proceeds are the same thing); United States v. Betancourt, 422 F.3d 240, 251 (5th Cir. 2005) (the fact that property acquired with drug proceeds has appreciated in value has no Eighth Amendment significance; drug dealer who used fraction of proceeds from \$76,000 drug offense to purchase lottery ticket must forfeit all \$5.4 million in lottery winnings); United States v. 1948 South Martin Luther King Dr., 270 F.3d 1102, 1115 (7th Cir. 2001) (Eighth Amendment does not apply to forfeiture of property purchased with drug proceeds); United States v. One Parcel of Real Property Known as 16614 Cayuga Road, 69 Fed. Appx. 915, 919-20 (10th Cir. 2003) (the forfeiture of proceeds can never be constitutionally excessive); United States v. One Parcel...Lot 41, Berryhill Farm, 128 F.3d 1386 (10th Cir. 1997) (same, collecting cases); United States v. Real Property...Parcel 03179-005R, 287 F. Supp.2d 45, 59-60 (D.D.C. 2003) (forfeiture of property purchased with criminal fraud proceeds does not violate the excessive fines clause even if the property has substantially appreciated in value; to hold otherwise would reward a defendant who invested his criminal proceeds by allowing him to retain the capital gain).

CONCLUSION

For the foregoing reasons, the United States respectfully submits that claimant's Petition

to Determine Proportionality should be DENIED. A proposed order is attached.

Respectfully submitted,

<u>/s/ Jeffrey A. Taylor</u> JEFFREY TAYLOR, DC Bar No. 498610 UNITED STATES ATTORNEY

<u>/s/ William R. Cowden</u> WILLIAM R. COWDEN, DC Bar No. 426301 VASU B. MUTHYALA, CA Bar No. 210462 Assistant United States Attorneys Criminal Division, Asset Forfeiture Unit 555 Fourth Street, N.W., Fourth Floor Washington, DC 20530 (202) 307-0258 william.cowden@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Opposition to be served by means of the Court's ECF system on this 29th of September 2008 upon claimants' counsel of record.

<u>/s/ William R. Cowden</u> WILLIAM R. COWDEN

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ORDER DENYING PETITION TO DETERMINE PROPORTIONALITY

O R D E R

Upon consideration of the Petition to Determine Proportionality at the outset of this case,

the Opposition thereto, and the entire record herein, it is this day of

, 2008, HEREBY Ordered that the Petition is DENIED.

ROSEMARY M. COLLYER United States District Judge