UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
POKERSTARS, et al.;	:	
	:	11 Civ. 2564 (LBS)
Defendants;	:	
	:	
ALL RIGHTS, TITLE AND INTEREST IN THE ASSETS OF POKERSTARS, et al.,	:	
	:	
Defendants-in-rem.	:	
	:	

MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT'S MOTION TO DISMISS THE CLAIM OF AVOINE – SERVICO DE CONSULTADORIA E MARKETING, LDA

TRACHTENBERG RODES & FRIEDBERG LLP
Attorneys for Claimant Avoine – Servico de Consultadoria e Marketing, LDA
545 Fifth Avenue
New York, New York 10017
(212) 972-2929 tel
(212) 972-7581 fax
Leonard A. Rodes (LR 3675)
lrodes@trflaw.com

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Claimant Avoine – Servico de Consultadoria e Marketing, LDA ("Avoine") respectfully submits this memorandum of law in opposition to the Government's motion to dismiss Avoine's Claim under Fed.R.Civ.P. 12(b)(1).

SUMMARY OF OPPOSITION

The Government's motion asks this Court to conclude, on the basis of two sentences in an affirmative defense in Avoine's Answer, that Avoine lacks constitutional standing to contest the Government's claim for forfeiture of certain intellectual property used in the operation of the Absolute Poker business (the "AP IP" or "AP Assets").

This argument is plainly without merit. The Second Circuit has squarely held that "an allegation of ownership and some evidence of ownership are together sufficient to establish standing to contest a civil forfeiture." *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1158 (2d Cir. 1994) (emphasis added). Not only has Avoine alleged ownership of the AP IP, and further not only has Avoine provided "some evidence" of such ownership (in the form of its Chairman's sworn verifications of both its Claim and its Answer), but it has also provided to the Government documents demonstrating that ownership – documents that the Government nowhere mentions in its motion papers.

The Government contends that to the extent Avoine claims ownership, the claim is in essence a sham – i.e., that Avoine has been merely a "straw owner." This argument is similarly baseless. Avoine simply cannot be compared to the "straw owners" described in the cases relied on by the Government. Documents prove that, at all relevant times, Avoine exercised its rights as owner, or security interest holder, or licensor of the AP IP: first, Avoine became the owner of the AP IP in 2007 (long before the Government commenced this action) by assignment from the very company that the Government itself alleges was the

developer and owner of the AP IP (i.e., "SGS"); second, Avoine retained a security interest in the AP IP when it sold the AP IP to Absolute Entertainment S.A. for $250 million in promissory notes; and third, when Absolute Entertainment proved unable to make more than a few payments on those promissory notes, Avoine secured a Rescission Agreement with Absolute Entertainment by which it re-established its title to the AP IP and simultaneously became a licensor of the AP IP (first to Absolute Entertainment, and later to Blanca Games).

The Government ignores these documents and the facts they prove. To support its "straw owner" argument, it relies instead on the "innocent owner" allegations in the Second Affirmative Defense in Avoine's answer. Not only has the Government misconstrued Avoine's allegations, but its position – if accepted by this Court – would effectively destroy the statutory "innocent owner" defense. In other words, according to the Government, any time an owner of property alleges that it did not participate in or have actual knowledge of someone else's criminal use of that property, it has effectively admitted that it did not have sufficient "dominion and control" of the property to establish constitutional standing. That is not and cannot be the law, and no case cited by the Government states otherwise.

FACTS

By in or about 2006, SGS (BVI) Inc. ("SGS") was the parent company in the corporate structure of the Absolute Poker business, and was owned by about 250 shareholders who had, between 2001 and 2006, invested millions of dollars to develop the Absolute Poker brand and other AP Assets. *See* the accompanying Declaration of Leonard A. Rodes ("Rodes Decl."), Exh. B, Answer (hereinafter, "Answer") at ¶¶ 6, 27(a). As of 2006, SGS owned several subsidiaries, including Fiducia Exchange Ltd., a Malta limited liability company ("Fiducia"), Momentum Technologies, Inc., a British Virgin Islands corporation

("Momentum"), and Panora Tech Belize Inc., a Belize corporation ("Panora") (Fiducia, Momentum and Panora referred to herein as the "Subsidiaries"). *Id.* Also as of 2006, the assets of SGS and the Subsidiaries included, among other things, computer hardware and software developed and used in the worldwide operation of the Absolute Poker business, the www.absolutepoker.com domain name and other domain names incorporating the word "absolutepoker," and other intellectual property (the "AP Assets"). *Id.*

In 2007, in a reorganization of its affairs that was designed by a large American law firm to obtain tax benefits for SGS's 250 U.S. shareholders, SGS assigned and transferred the AP Assets, along with all of SGS's equity in the Subsidiaries, to Avoine (a Madeira entity) and, at substantially the same time, SGS's shareholders became shareholders in Avoine's parent company, Madeira Fjord AS ("MFAS," a Norwegian entity). Answer ¶ 27(b).

Later in 2007, Avoine entered into agreements (the "Avoine-Absolute Sale") with Absolute Entertainment, S.A., a Belize corporation ("Absolute Entertainment"), pursuant to which, among other things, Avoine sold to Absolute Entertainment (a) all of the equity it owned in the Subsidiaries, and (b) all of the AP Assets, in consideration of which Absolute Entertainment delivered to Avoine two promissory notes obligating Absolute Entertainment to pay Avoine, in the aggregate, $250 million plus interest. Answer ¶ 27(c); Rodes Decl., Exhs. C and D. However, Avoine retained a security interest in the stock and assets sold to Absolute Entertainment. *Id.* The promissory notes required payments to Avoine aggregating roughly $3 million per month.

Absolute Entertainment made a few monthly payments, but then claimed financial difficulty. Avoine and Absolute Entertainment executed a series of forbearance agreements, but by late 2008, it became apparent to Avoine that Absolute Entertainment was unable to

discharge its obligations under the promissory notes. So, in or about late 2008, Avoine and Absolute Entertainment executed an agreement entitled "Rescission Agreement" which rescinded the 2007 Avoine-Absolute Sale (the "Rescission Agreement"). Answer ¶ 27(d); Rodes Decl., Exh. E.

Pursuant to the Rescission Agreement, Avoine/Absolute Entertainment relationship was converted to a licensor/licensee relationship. *Id.* Section 4. In addition, the Rescission Agreement entitled Avoine to retain any and all amounts previously paid by Absolute Entertainment in connection with the notes – which amounted to almost $10 million – as damages incurred Avoine in connection with the Avoine-Absolute Sale. *Id.*, Section 3.

While not expressly set forth in Avoine's pleadings, the documents described above and in its Answer – i.e., the instruments by which Avoine became owner of the AP Assets, the Avoine-Absolute Sale documents, and the Rescission Agreement – were all conceived, structured and drafted by a large American law firm. Rodes Decl. ¶7.

From and after the time of the Rescission Agreement, Avoine became a licensor of the AP IP (first to Absolute Entertainment, and later to Blanca Games). Answer ¶ 27(e).

Based on the foregoing facts (and the documents that establish them), the Government knows or should know that, while it is true that from no later than mid-2007, all operation of the Absolute Poker online poker business has been carried out by employees and/or agents of Absolute Entertainment or Blanca Games, *see* Answer ¶ 27(e), during the entirety of that period – and up to the present – Avoine has had a legal claim to, and financial stake in, the AP IP. Avoine's rights have, at all times, included the right to terminate Absolute Entertainment's (or Blanca Games's) use of the AP IP pursuant to the terms and conditions set forth in the above-described documents.

In or about May 2011, MFAS (Avoine's parent company) was declared bankrupt by the Norwegian Bankruptcy Court in a proceeding identified as No. 11-076587KONOBYF/1: Madeira Fjord. Answer ¶ 28. Thomas S. Brandi, an attorney and partner in the bankruptcy department of one of Norway's largest law firms, was appointed insolvency administrator (i.e., trustee) of the Estate. *Id.*; *see also* Exh. A to Avoine's Answer. In addition, Mr. Brandi was contemporaneously appointed sole director and Chairman of Avoine. Answer ¶ 28.

Norwegian tax authorities have asserted a claim in the MFAS bankruptcy case alleging that, based (among other things) on Avoine's acquisition and disposition of the AP IP, MFAS is obligated to pay taxes totaling in excess of 175 million Norwegian Krone (roughly US$30 million). Answer ¶ 29. In other words, while the U.S. Government takes the position that Avoine was merely a "straw owner" of the AP IP in the 2007-2012 period, the Norwegian government has levied a multi-million dollar tax on Avoine's parent based on that ownership. Clearly, the Norwegian government believes Avoine's ownership was quite real.

ARGUMENT

THE ALLEGATIONS IN AVOINE'S VERIFIED CLAIM AND VERIFIED ANSWER ESTABLISH THAT IT HAS CONSTITUTIONAL STANDING

I. Standards Governing This Motion

A motion to dismiss for lack of constitutional standing is a challenge to the Court's subject matter jurisdiction. *See Alliance For Environmental Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 87-88 (2d Cir. 2006). Thus, the instant motion is properly considered under Fed.R.Civ.P. 12(b)(1). *Id.* at 89 n.6.

Challenges to subject matter jurisdiction may contest "either the facial sufficiency of

the pleadings in the complaint or the existence of subject matter jurisdiction in fact." *Dow Jones & Co. v. Harrods, Ltd.*, 237 F.Supp.2d 394, 404 (S.D.N.Y. 2002); *see Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 887 n.15 (2d Cir. 1996).

Here, the Government makes a facial challenge to Avoine's standing. It neither disputes Avoine's factual allegations, nor submits any evidence. Instead, the Government relies only its characterization of allegations in Avoine's pleadings. Accordingly, the Court must "accept[] as true the uncontroverted factual allegations in the complaint." *Id.*; *see Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998).

II. Avoine's Pleadings Adequately Allege a "Facially Colorable Interest" in the AP IP

It is well-settled that in order to establish Article III standing in connection with a civil forfeiture action, a claimant must merely establish that it has a "'facially colorable interest' in the property at issue, and courts have repeatedly noted that this standard is not difficult to satisfy." *U.S. v. Assets Described in Attachment A to the Verified Complaint Forfeiture In Rem*, 799 F.Supp.2d 1319, 1322 (M.D. Fla. 2011). *See also*, *United States v. $557,933.89, More or Less*, 287 F.3d 66, 79 (2d Cir. 2002) ("[T]he only question that the courts need assess regarding a claimant's standing [in a civil forfeiture proceeding] is whether he or she has shown the required 'facially colorable interest,' not whether he ultimately proves the existence of that interest."); *United States v. One–Sixth Share*, 326 F.3d 36, 41 (1st Cir. 2003) (At pleading stage, "the requirements for a claimant to demonstrate constitutional standing are very forgiving. ... [A]ny colorable claim on the defendant property suffices"); *United States v. One Lincoln Navigator*, 328 F.3d 1011, 1013 (8th Cir. 2003) (the "threshold burden" to plead standing in a forfeiture case based on ownership "is not rigorous.").

In addition, the standard for establishing a "facially colorable interest" is very flexible and "may be evidenced in a number of ways including showings of actual possession, control, title and financial stake." *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 647 F.2d 864, 866 (8th Cir.1981); *U.S. v. 1978 Cessna Turbo 210*, No. 97-6254, 1999 WL 407469, at *3 (6th Cir. June 2, 1999).

Accordingly, it is merely necessary for a claimant to allege a personal or financial stake in the assets seized. *U.S. v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 499 (6th Cir. 1998) ("Article III requires only that a claimant allege, inter alia, a personal stake in the outcome of the controversy"); *U.S. v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003) ("it is clear that Bearden and Andrews have Article III standing to challenge the forfeiture. Ms. Bearden paid for the Navigator ... [and] has the greatest financial stake in the car.").

In the case at bar, the facts as alleged by Avoine – which must be accepted as true on the Government's motion – support the conclusion that Avoine has a "facially colorable interest" under several alternative theories, each of which is sufficient to satisfy the standing requirements.

A. Avoine Has Alleged Facts Demonstrating Its Ownership

Formal ownership of or title to the assets in question is clearly sufficient to establish standing to assert a claim in a forfeiture action. *United States v. One 1945 Douglas C-54 (DC-4) Aircraft*, 647 F.2d 864, 866 (8th Cir. 1981). *See also U.S. v. $148,840.00 in U.S. Currency*, 521 F.3d 1268, 1273 (10th Cir. 2008) ("At the pleading stage, a claimant satisfies this burden by alleging a sufficient interest in the seized property, such as an ownership interest, some type of lawful possessory interest, or a security interest.").

Here, Avoine alleges that its predecessor-in-interest (SGS) developed the AP IP using millions of dollars of capital invested by 250 shareholders (only a few of whom were part of management); that it received the AP Assets by assignment from SGS in a tax-motivated corporate reorganization; and that, after selling those assets to Absolute Entertainment in 2007, it reacquired ownership of the AP Assets in late 2008, when the Rescission Agreement was executed. Answer ¶¶ 27 to 29.

Indeed, Avoine has done more than simply *allege* that it is the owner of the AP IP. In addition, by June 2012, it had twice provided to the U.S. Attorney the documents demonstrating as much. *See* Rodes Decl. ¶ 8 and Exhs. C, D, E and F.

Avoine's ownership allegations, and the documents evidencing its ownership, should end further inquiry and lead to the denial of the Government's motion. *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1158 (2d Cir. 1994) ("an allegation of ownership and some evidence of ownership are together sufficient to establish standing to contest a civil forfeiture.").

B. Avoine's Security Interest Also Establishes Standing

It is well-settled that a security interest in property seized by the government is sufficient to satisfy standing to maintain a claim in a forfeiture action. *In re Metmor Financial, Inc.*, 819 F.2d 446, 451(4th Cir. 1987); *U.S. v. Premises Known as 7725 Unity Ave. North, Brooklyn Park, Minn.*, 294 F.3d 954, 957 (8th Cir. 2002) ("Because GMAC's mortgage can be satisfied by the return of the property subject to forfeiture, GMAC's junior lienholder interest in the property is sufficient to support Article III standing. GMAC need not prove its interest is superior to the Government's interest to have a stake in the outcome of the forfeiture proceedings.") (internal citation omitted); *U.S. v. Munson*, Nos. 08–2065, 08–2159,

08–4326, 2012 WL 1302601, at *4 (4th Cir. April 17, 2012) ("a claimant must have a colorable ownership, possessory or *security interest* in at least a portion of the defendant property") (emphasis added). *See also* Government Br., p. 8 citing *U.S. v. One Silicon Valley Bank Account*, 05 Civ. 295, 2007 WL 1594484, at *2 (W.D. Mich. June 1, 2007) ("To establish standing, 'the claimant must demonstrate that he has a colorable ownership, possessory or *security interest* in at least a portion of the defendant property.'") (emphasis added).

Here, Avoine has alleged that, during the period from mid-2007 (when it sold the AP Assets to Absolute Entertainment) to late 2008 (when it recovered title to those assets), it retained a security interest in the AP Assets in connection with the Avoine-Absolute Sale. Answer ¶ 27(c). Avoine has also alleged that, even after the Rescission Agreement, it took care to document its status as (in addition to licensor of the AP Assets (*see* Point I(C), below)) a secured party. Answer ¶ 27(e). The Avoine-Absolute Sale documents support and describe Avoine's security interest and rights in connection with the AP Assets. While it may be fairly debated whether Avoine's American lawyers competently documented and perfected its security interest in the AP Assets, there can be no doubt that Avoine's expectation was that it should have at all times the right to recover possession and control of the AP Assets in the event that its purchaser failed to perform its obligations. Indeed, as evidenced by the Rescission Agreement, Avoine was able to obtain its purchaser's (Absolute Entertainment) acknowledgment that, due to Absolute Entertainment's failure to make payments due under the promissory notes it gave to Avoine, it was relinquishing title to – as well as dominion and control over – the AP Assets to Avoine.

C. Avoine's Status as Licensor of the AP Assets Satisfied Article III Standing Requirements

A contractual interest in seized property is sufficient to establish standing in a forfeiture action. *U.S. v. Basler Turbo-67 Conversion DC-3 Aircraft* (1), 1996 WL 88075, at *3 (9th Cir. Feb. 14, 1996) (contract purchaser of aircraft has constitutional standing, and Government's suggestion to the contrary was "mystifying"); *U.S. v. 105,800 Shares of Common Stock of FirstRock Bancorp, Inc.* 830 F.Supp. 1101, 1116 -17 (N.D.Ill. 1993) (Contractual interests pursuant to option contracts sufficient to satisfy the standing requirements in forfeiture action).

More specifically, Avoine's interest as a licensor of the AP Assets (pursuant to the agreements referenced in its Answer, and submitted with the Rodes Decl.) satisfies the standing requirements. *Basler Turbo-67 Conversion DC-3 Aircraft, supra*, 1996 WL 88075 at *3 (parties to a technology licensing agreement have standing); *see Monsanto Co. v. Geertson Seed Farms*, ___ U.S. ___, 130 S.Ct. 2743 (2010) (both the owner-licensor and licensee of intellectual property rights to genetically-altered alfalfa had constitutional standing); *Novartis Seeds, Inc. v. Monsanto Co.*, 190 F.3d 868, 871 (8th Cir. 1999) (party to license agreement had constitutional standing).

Here, Avoine has expressly alleged that, after it recovered title to the AP Assets under the Rescission Agreement, it became an express or implied licensor of those assets to Absolute Entertainment and, beginning in 2010, to Blanca Games. Answer ¶ 27. That is a sufficient pleading of its constitutional standing.

III. Innocent Ownership Is Not Tantamount To "Straw" Ownership

The Government does not dispute that Avoine is the legal owner of the AP Assets. *See* Government Br., pp. 2, 8 and 10. Instead, the Government asserts that Avoine is a "straw owner" of the AP Assets, within the meaning of several cases cited in its moving brief. *See* Government Br., pp. 2 and 8-10.

The Government submits no proof to support its assertion that Avoine is only a nominal or "straw" owner of the AP Assets. Rather, its argument rests exclusively on its citation of the allegations supporting Avoine's Second Affirmative Defense, which asserts that Avoine is an "innocent owner" of the AP Assets, under 18 U.S.C. §983(d). The argument should be rejected for myriad reasons.

First, the Government mistakes the law when it insists (Government Br. p. 10) that Avoine's innocent owner allegations "must be factored into a standing analysis." *See, e.g., U.S. v. Assets Described in Attachment A to the Verified Complaint Forfeiture In Rem,* 799 F.Supp.2d 1319, 1324 (M.D.Fla. 2011) ("Again, the issue of 'ownership' or 'innocent owner' does not relate to either standing or to the sufficiency of a claim. As one author has aptly explained, '[a] person with standing to contest the forfeiture can engage in pre-trial discovery, file dispositive motions, put the Government to its proof in the first phase of the forfeiture trial ..., and otherwise litigate the forfeiture case whether or not he ever asserts innocent ownership as an affirmative defense to the forfeiture.'") (internal citations omitted).

Second and more importantly, the allegations in question[1] - i.e., that Avoine's

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[1] The two allegations upon which the Government's motion rests read as follows:

> e. From and after the 2007 Avoine-Absolute Sale, all operation of the Absolute Poker online poker business has been carried out by employees and/or agents of Absolute Entertainment or its

management did not know of the defendants' use of the AP Assets in connection with allegedly criminal activity, because the operation of the Absolute Poker website (allegedly in violation of UIGEA) was handled by its licensee (Answer ¶ 27(e)-(f)) – merely establish the plausibility for pleading purposes of Avoine's statutory innocent owner defense. *See* 18 U.S.C. §983(d). Were this Court to equate those allegations with an admission of "straw ownership," it would effectively operate as a judicial abrogation of a statutorily prescribed defense. There is no case cited by the Government that supports that equation.

And, third, the Government simply misconstrues the two allegations upon which it purports to rely. The allegation that Avoine's management had no knowledge of illegality (Answer ¶ 27(f)) simply paraphrases the relevant standard under the innocent owner defense. And the allegation that Avoine was not involved in the "operation" of the Absolute Poker website (Answer ¶ 27(e)) merely supports the conclusion that Avoine's manager was not actually aware of the (allegedly) illegal use of the AP Assets. Even were the Court permitted to read ¶ 27(e) in a vacuum, that paragraph may not reasonably be read as an admission that Avoine did not have "dominion and control" over the AP Assets – because the allegation expressly states that the operation of the website by Absolute Entertainment (and then by Blanca Games) was performed "as express or implied licensees" of Avoine.

But ¶ 27(e) may not be read in a vacuum; rather, it must be read in the context of

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> contractors and/or assignees (e.g., Blanca Games), as express or implied licensees, and not by Avoine.
>
> f. During the period 2007 to the present, neither Avoine nor its management knew of the allegedly wrongful conduct upon which the plaintiff's forfeiture claim is predicated.

Answer ¶ 27(e)-(f); *see* Government's Br. p. 10.

Avoine's other allegations, including:

- ¶¶ 27(a)-(d) of its Answer, alleging that Avoine was an owner, licensor and security interest holder pursuant to instruments that valued the AP Assets at $250 million and gave it the right at all times to terminate its licensee's use of those assets; and
- ¶¶ 28-29 of its Answer, alleging that the Norwegian government has recognized Avoine's interest in the AP Assets and Subsidiaries sufficiently genuine as to justify imposition of a 175 million Norwegian Krone tax based on MFAS' indirect interest (as parent of Avoine) in the AP Assets.

In sum, based on all of the allegations set forth in Avoine's Answer – which must be accepted as true for purposes of this motion – it may not be summarily concluded that Avoine is merely the "straw" owner of the AP Assets.[2]

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[2] The several cases cited by the Government to support its "straw owner" argument are inapposite and/or distinguishable for several reasons.

First, none of the cases involves a facial challenge; rather they all involve factual challenges based on the movants' submission of evidence of straw ownership. Indeed, most of those challenges were made only after discovery had been completed. Here, by contrast, the Government makes a facial challenge, before Avoine has obtained any discovery.

In that regard, we note that Avoine served document requests and interrogatories on Blanca Games in June 2012 – the entity that the Government evidently believes is the "real" owner of the AP Assets. Rodes Decl. ¶ 9 and Exhs. G and H. However, Blanca Games has ignored those discovery requests (Rodes Decl. ¶ 10), and now has entered into a purported settlement agreement with the Government (*see* Docket Nos. 237-239) by which, among other things, it hopes (with the Government's blessing, evidently) to deprive Avoine of any discovery.

Second, and more importantly, in none of the Government's cases was the straw owner able to allege and/or demonstrate a personal or financial stake in the seized asset. Indeed, in several of those cases, it was obvious or admitted that the straw owner received his title to the property for the very purpose of avoiding forfeiture. *E.g., U.S. v. Premises and Real Property with Bldgs., Appurtenance and Improvements at 500 Delaware Street, Tonawanda, New York,* 113 F.3d 310, 311-12(2nd Cir. 1997) (transfer of property was made for 1 dollar, was made after the transferor was arrested, and claimant-transferee "acknowledge[d]" that the transfer "was done to try to avoid a forfeiture").

CONCLUSION

In short, Avoine respectfully submits that the Government's motion to dismiss Avoine's claim should be denied in all respects.

Dated: New York, New York
August 13, 2012

TRACHTENBERG RODES & FRIEDBERG LLP
Attorneys for Claimant Avoine – Servico de Consultadoria e Marketing LDA

By: _____
Leonard A. Rodes (LR 3675)
545 Fifth Avenue
New York, New York 10017
(212) 972-2929