

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :  
  
                  Plaintiff, :  
  
      - v. - :  
  
POKERSTARS, et al. :  
  
                  Defendants; :  
  
ALL RIGHT, TITLE AND INTEREST IN THE :  
ASSETS OF POKERSTARS, et al.; :  
  
                  Defendants-in-rem. :  
- - - - - x

11 Civ. 2564 (LBS)

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE  
GOVERNMENT’S MOTION TO STRIKE THE CLAIM OF ROBB EVANS  
OF ROBB EVANS & ASSOCIATES LLC, RECEIVER**

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- of counsel -

## **PRELIMINARY STATEMENT**

The Government respectfully submits this reply memorandum of law in further support of its motion, pursuant to Rule 12(b) and (c) of the Federal Rules of Civil Procedure and Rule G(8)(c) of the Supplemental Rules for Admiralty and Maritime Claims, to strike the claim filed in this in rem forfeiture action by Robb Evans of Robb Evans & Associates LLC, Receiver ("Robb Evans" or "Receiver" or "Claimant"). The defendants-in-rem in this matter include, among others, all right title and interest in the funds previously held in certain accounts at Sunfirst Bank in Utah (the "Subject Accounts"). Notwithstanding the arguments set forth in Claimant's opposition brief, and the new supporting documentation submitted therewith (the "FTC Materials"), Claimant fails to establish that the Receiver, standing in the shoes of either Jeremy Johnson, or any corporate entities actually covered by the Preliminary Injunction Order establishing the receivership, Federal Trade Commission v. Jeremy Johnson, et al., Case No. 2:10-cv-02203-RLH-GWF (D. Nev.) (The "FTC Action"), has standing to assert a claim to the Subject Accounts. Because the Claimant has failed to establish such standing, his claim should be stricken, and leave to amend should be denied as futile.

## ARGUMENT

### I. THE RECEIVER'S CLAIM FAILS TO ADEQUATELY DEMONSTRATE STANDING

#### A. The Law

To have constitutional standing, a claimant must demonstrate an "ownership or possessory interest in the seized or forfeited property." United States v. Pokerstars, No. 11 Civ. 2564 (LBS), 2012 WL 1659177, at \*2 (S.D.N.Y. May 9, 2012) (citing United States v. Cambio Exacto, S.A., 166 F.3d 522, 527 (2d Cir. 1999)). "If the claimant cannot show a sufficient interest in the property to give him Article III standing there is no case or controversy, in the constitutional sense, capable of adjudication in the federal courts." United States v. New Silver Palace Restaurant, Inc., 810 F. Supp. 440, 442 (E.D.N.Y. 1992) (internal quotation marks, alterations, and citations omitted); see also United States v. U.S. Currency, \$81,000.00, 189 F.3d 28, 35 (1st Cir. 1999); United States v. \$9,041,598.68, 163 F.3d 238, 244-45 (5th Cir. 1998); United States v. Contents of Accounts (Friko Corporation), 971 F.2d 974, 985 (3d Cir. 1992).

#### B. Discussion

##### 1. The Receiver's Claim and Answer Fails to Allege Any Specific Interest In the Subject Accounts Sufficient to Establish Standing

As set forth in the memorandum in support of the Government's motion to strike this claim, the Receiver seeks to allege a property interest in the Subject Accounts based on a

Preliminary Injunction Order that does not even the name the entities which hold those accounts (the "Subject Entities," described more fully below) as falling within the Receivership Estate. The Receiver attempts to show standing by arguing that the Subject Entities fall within the Receivership Estate because the Preliminary Injunction Order includes both the assets of Jeremy Johnson and the named Corporate Defendants in the FTC action, including "any subsidiaries, affiliates, any fictitious business names or business names created or used by these entities, or any of them, and their successors and assigns . . . ." Receiver Br. at 2 (quoting Preliminary Injunction Order). Despite reciting this language, the Receiver utterly fails in his claim or answer to set forth any verified allegation as to how the Subject Entities fall under this vague definition.

Accordingly, under the standards governing a motion to dismiss or a motion for judgment on the pleadings pursuant to Rule 12(b)(6) or 12(c), the Receiver's claim should be stricken. In order to avoid dismissal under Rule 12(b)(6) or (c), "the [claimant] must provide the grounds upon which [its] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting Bell Alt. Corp. v. Twombly, 550 U.S. 544, 555 (2007)); Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123, 126 (2d

Cir. 2001) (explaining that same standard governs motions under Rule 12(c)). Under this standard, the claim must allege "enough facts to state a claim to relief that is plausible on its face." Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (quotation omitted). No such facts have been alleged in the Receiver's claim, nor can they.

**2. The FTC Materials Submitted by the Receiver Do Not Establish Standing for the Receiver in This Action**

The Receiver's assertion that the Receivership Estate has an ownership interest in the Subject Accounts remains untenable - notwithstanding the supporting materials from the FTC Action that the Receiver has now presented to this Court<sup>1</sup> - for the simple reasons that (1) Jeremy Johnson and the named Corporate Defendants in the FTC action, for whose assets the Receiver was appointed, have no legal ownership interest in the Subject Accounts; and (2) the entities that do own the Subject Accounts - Triple Seven LP, Golden Shores Properties Limited, Triple Seven, Inc., Kombi Capital, Powder Monkeys, and Mastery Merchant LLC (collectively, the Subject Entities) - do not fall within the scope of the Receivership Estate established in the FTC action.

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<sup>1</sup> While the Government maintains that the Receiver's claims should be stricken based on the Rule 12 standards set forth above, it nevertheless addresses the arguments related to the attached filings to demonstrate that leave to file an amended claim should be denied, as such leave would be futile.

**a. The Receiver, Standing in the Shoes of Jeremy Johnson or the Corporate Defendants, Does Not Have Standing to Assert A Claim to the Subject Accounts**

The Receiver argues that the Receivership Estate in the FTC Action includes the Subject Accounts because they are either (1) assets of Jeremy Johnson or (2) assets of "subsidiaries, affiliates, successors and/or assigns" of the identified Corporate Defendants in the FTC Action. (Claim p. 2). The Injunction authorizes both "the appointment of a Permanent Receiver for the Corporate Defendants and the assets of Jeremy Johnson," and "the freezing of the assets of Jeremy Johnson and the Corporate Defendants." (Injunction, p. 4, ¶ 7). The definition of "Corporate Defendants" includes 61 separate corporate entities, but none of these are the Subject Entities that own the Subject Accounts. Compare Injunction pp. 6-7, ¶ 8 (defining "Corporate Defendants") with Compl., Schedule B, ¶¶ 1-8 (the Subject Accounts).

Because the Receivership authorized by the Injunction does not include these Subject Entities, the Receiver has no ownership interest over these accounts. "The authority of a receiver is defined by the entity or entities in the receivership. . . . [A receiver] 'stands in the shoes of the corporation and can assert only those claims which the corporation could have asserted.'" Eberhard v. Marcu, 530 F.3d 122, 132 (2d Cir. 2008) (quoting Lank v. New York Stock Exch.,

548 F.2d 61, 67 (2d Cir. 1977)). A receiver cannot bring claims on behalf of entities other than the corporation in the receivership, and a receiver may not bring claims that the corporation in the receivership could not have brought. See Eberhard, 530 F.3d at 133 (“[T]he Receiver here stands only in the shoes of Todd Eberhard. He can press only those claims that Eberhard himself could assert, and Eberhard, as transferor, may not bring an action to set aside his own fraudulent conveyance”); Cobalt Multifamily Investors I, LLC v. Arden, 2011 WL 4542734, at \*10 (S.D.N.Y. Sept. 30, 2011) (applying to receiverships the rule “that a bankruptcy trustee can bring claims on behalf of the bankrupt corporation that she represents, but not on behalf of that entity’s creditors”) (quoting Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 118 (2d Cir.1991)).

Even taking the assertions in the Claimant’s FTC Materials as true, Jeremy Johnson and the named Corporate Defendants in the receivership could not assert a claim to the Subject Accounts. While items such as the Report of Receiver’s Financial Reconstruction (the “Receiver’s Report”) document interactions between Johnson and the Subject Entities, and make conjecture about the relationship between Johnson and the Subject Entities, those documents also set forth that neither Johnson nor the Corporate Defendants legally own the Subject Accounts or even the Subject Entities that do own those accounts.

It is well settled under the law of New York and other states<sup>2</sup> that once someone deposits funds in a bank or investment account -- or an account held by another -- they then lack a particularized interest in those funds. See Peoples Westchester Sav. Bank v. FDIC, 961 F.2d 327, 330 (2d Cir. 1992) (as soon as money is deposited, it is deemed to be the property of the bank, and the relationship between the bank and the depositor is that of debtor and creditor); United States v. All Fund On Deposit In the Name of Khan, 955 F. Supp. 23, 26-27 (E.D.N.Y. 1997) (abbreviated title) (under New York Law, an individual loses title to funds once the funds are deposited into an account held in the name of a third person); United States v. \$79,000 at Bank of New York, No. 96 Civ. 3493 (MBM), 1996 WL 648934, \*5 (S.D.N.Y. Nov. 7, 1996) (abbreviated title) (same).

Additionally, even assuming that Johnson or the actual Corporate Defendants under the receivership were shareholders or owners of the Subject Entities that own the Subject Accounts, they still would not have standing. See United States v. 479 Tamarind Drive, 2005 WL 2649001, at \*4 (S.D.N.Y. Oct. 14, 2005) (stating that corporate shareholders do not have cognizable interest in assets held by the corporation); United States v. New

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<sup>2</sup> In analyzing the question of standing in a forfeiture action, it is appropriate to look to state law to determine the nature of the property interest involved. United States v. Contents of Account Number 11671-8 in the Name of Latino Americana Express, 90 Civ. 8154 (MBM), 1992 WL 98840, \*3 (S.D.N.Y. May 6, 1992).



Silver Palace Restaurant, Inc., 810 F. Supp. 440, 443 (E.D.N.Y. 1992); United States v. Real Property Associated with First Beneficial Mtg. Corp., 2009 WL 1035233, at \*3 (W.D.N.C. April 16, 2009) (citing United States v. Two Bank Accounts, 2008 WL 5431199 (D.S.D. Dec. 31, 2008) (sole shareholder has no standing)).

**b. The Subject Entities Are Not Covered by the Receivership**

The Receiver attempts to avoid the black-letter law cited above by arguing that the Subject Entities themselves fall within the Court-created receivership as “subsidiaries, affiliates, successors, and/or assigns” of the named Corporate Defendants in the FTC action. This argument also fails for a number of reasons. Most importantly, it has not been established even in the actual FTC Action that the Subject Entities fall under the Receivership Estate. Indeed, the Receiver has been compelled to file a motion in that action “clarifying” the actual scope of the Receivership Estate in that action and whether it applies to the Subject Entities. See Exhibit 2 to Caris Declaration. This motion has not been granted, and, in fact, is strongly contested. Several entities have filed an opposition, labeling the Receiver’s motion a motion to “expand” the receivership. These entities argue: “The Receiver seeks to take this extreme action based upon an incomplete investigation and the flawed conclusions drawn from one-sided discovery that was deliberately designed to support the Receiver’s theories rather

than finding the truth.” Response in Opposition to FTC Motion, attached as Exhibit A.

Because it has not even been determined within the FTC Action that the Subject Entities fall within the scope of the Receivership Estate, the Receiver cannot assert a claim in this action attempting to stand in the shoes of those Subject Entities. See Eberhard, 530 F.3d at 133.

Further, the FTC Materials themselves do not establish that the Subject Entities fall within the Receivership Estate. The Receiver provided essentially no analysis of these documents in his brief, but a cursory review of these documents is telling. The Receiver’s Report, for example, sets forth the ownership structure of many of the Subject Entities, including Triple Seven LP, Kombi Capital, Powder Monkeys, and Mastery Merchant LLC. Receiver’s Report at 6, 38. Neither Johnson nor any of the named Corporate Defendants are owners of these entities. While the Receiver’s Report sets forth many financial transactions involving the Subject Entities, it does not even attempt to assert that they are legally owned by Johnson or the Corporate Defendants. Instead, it seeks to draw self-serving legal conclusions based on its own analysis of those facts. Even assuming that these documents were part of a verified claim, the Court is “not bound to accept as true a legal conclusion couched as a factual allegation.” Ashcroft v. Iqbal, 556 U.S. 662, 678

(2009) (quoting Twombly, 550 U.S. at 555); cf. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (“It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record.”), holding modified on other grounds by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004).

Because it has not been established within the FTC Action that the Subject Entities fall within the Receivership Estate, the Receiver lacks standing to assert a claim to the Subject Accounts in this case.

## **II. LEAVE TO AMEND SHOULD BE DENIED BECAUSE AMENDMENT WOULD BE FUTILE**

Though a court may generally grant a party leave to amend its claim, it may also deny a motion to amend a pleading “where there is ‘undue delay, bad faith, dilatory motives or undue prejudice to the opposing party,’ or where such amendment would be futile.” Orthocraft, Inc. v. Sprint Spectrum L.P., 98 CV 5007 (SJ), 2002 WL 31640477, at \*1 (E.D.N.Y. Nov. 16, 2002) (citing Fed. R. Civ. P. 15(a)); see also In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 220 (2d Cir. 2006) (“[W]here amendment would be futile, denial of leave to amend is proper”). “Granting leave to amend is futile if it appears that plaintiff cannot address the deficiencies identified by the court and allege facts sufficient to support the claim.” Panther Partners Inc. v. Ikanos Comms., Inc., 347 F. App’x 617, 622 (2d Cir.

2009).

As explained above, leave to amend the Receivers' Claim would be futile, as no set of facts can establish any more ownership interest in the contents of the Subject Accounts on the part of the Receiver than Jeremy Johnson or the actual Corporate Defendants had - which is to say, no ownership interest. Because leave to amend would be futile, the Court should deny the Receiver leave to amend the Claim.

**CONCLUSION**

For the foregoing reasons, the Government respectfully requests that the Court enter an order striking the claim of Robb Evans of Robb Evans & Associates LLP, Receiver, for lack of standing, without leave to amend.

Dated: New York, New York  
August 13, 2012

Respectfully submitted,

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