UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

CLAIMANT AVOINE'S MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT'S MOTION (D.E.237-238) "FOR ENTRANCE OF STIPULATED ORDER OF SETTLEMENT AND ORDER FOR THE INTERLOCUTORY SALE OF PROPERTY"

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
(LR3675)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Claimant Avoine – Service de Consultadoria e Marketing LDA ("Avoine") respectfully submits this memorandum of law in opposition to the Government's motion (D.E. 237) seeking (1) approval of a settlement agreement unconditionally dismissing from this case claimant Blanca Games and its affiliates (the "Blanca Entities"); and (2) an order permitting seizure and sale of all of the intellectual property owned by Avoine (the "AP Assets").

PRELIMINARY STATEMENT

First, the motion for interlocutory sale should be denied because the Government has failed to demonstrate that the AP Assets are "at risk of deterioration, decay, or injury by being detained in custody pending the action," as Rule G(7) requires. Indeed, nowhere does the Government suggest (much less prove) that its detention of Avoine's intellectual property will cause the property's "deterioration" or "decay" or "injury." Instead, it claims only that the AP Assets may "depreciate" *in value* – and, even then, only its "value *for accounting purposes*" (emphasis added). But the Government cites no case (and we have found none) holding that "depreciation" (without also "deterioration, decay, or injury" to the property itself) justifies a Rule G(7) interlocutory sale order. If "depreciation" alone were enough, there would be interlocutory sales taking place routinely in all forfeiture cases.

Moreover, Avoine respectfully submits that it would be an imprudent exercise of this Court discretion to order an interlocutory sale. The AP Assets – which by their nature promise a stream of revenues of indefinite duration – should not be disposed of at a deeply discounted price by the Government before it proves a prima facie case of entitlement to forfeiture. This is especially so now, after Judge Weinstein had held – in a thoroughly reasoned and amply supported decision – that poker is predominantly a game of skill, and not a game of chance. If that decision portends the conclusion here that internet poker is, likewise, not a game of chance, but instead predominantly a game of skill, then the Government's case will fail. Furthermore,

the Government is not even in a position to sell the AP Assets, because it has admitted to Avoine that it does not yet possess the most important of those assets: i.e., the software used in the operation of the Absolute Poker web based business (the "AP Software"). While the Government has advised that an unnamed Korean company claims to possess a copy of the AP Software (wrongful possession, we note), and that the Korean company is willing to turn its copy over to the Government, no sale of AP Assets should even be contemplated until the Government is able to represent to the Court, and to potential purchasers: (a) that it has custody of the AP Software (and that it is, in fact, operational), and (b) that its Korean transferor retains neither a copy of, nor any rights in, the software. Short of that, fair value in an auction is unachievable.

Finally, to the extent the Government's motion seeks the dismissal of the Blanca Entities from this case, it should be granted only on the condition that the Blanca Entities, all of which are foreign companies beyond this or any U.S. court's subpoena power, comply with Avoine's discovery requests (served several months ago). The Blanca Entities became parties here voluntarily, filing a verified claim asserting ownership of the AP Assets – a claim in irreconcilable conflict with Avoine's claim of ownership. The Government has taken the Blanca Entities' side in that conflict; indeed, the Government has filed a motion (D.E.197) to dismiss Avoine's claim (D.E.150) precisely because it views the Blanca Entities as the "real" owners of the AP Assets, and argues that Avoine is merely a "straw owner." By moving now to dismiss the Blanca Entities unconditionally from this case, the Government effectively seeks to impede Avoine's effort to obtain the very discovery it requires to disprove the Government's "straw owner" argument. To prevent such unfairness, the Court should condition the Blanca Entities' dismissal on their compliance with Avoine's discovery requests.

ARGUMENT

I. The Government Has Not Demonstrated Grounds for An Interlocutory Sale Under Rule G(7).

Insofar as is pertinent here, Rule G(7) provides that in a civil forfeiture action, upon motion by a party "having custody of the [defendant] property," a Court "may" order an interlocutory sale of the property if "the property is … at risk of deterioration, decay, or injury by being detained in custody pending the action; …" Rule G(7)(b)(i)(A). Thus, Rule G(7) confers discretion to order an interlocutory sale of the AP Assets only if the Government proves (1) that it is a party "having custody" of the property proposed to be sold; (2) that the "property" itself is "at risk of deterioration, decay, or injury;" and (3) that the risk exists because of the Government's "detention" of the property.

First, the Government has not shown that it is a party "having custody" of the most important component of the AP Assets: i.e., the operating software for the Absolute Poker website. In fact, it has admitted to Avoine that it does not have custody of that software. See the accompanying Declaration of Leonard A. Rodes in opposition to the Government's motion ("Rodes Aff."), at ¶2. While the Government has advised the undersigned counsel that it has been "in contact" with an unnamed Korean company that claims to possess a copy of the Absolute Poker operating software, and that the Korean company has represented to the Government that it would provide the Government with a copy of the software (see Rodes Aff. ¶3), there is no indication in the Government's moving papers that the software has been provided to the Government; or that the Government has verified that the software is valid and operational; or that the Government has obtained the Korean company's written release of any arguable interest in the software. Unless and until the Government is in a position to represent to this Court that it has received the software (and that it is operational and free from any claims of

parties who would not be bound by a forfeiture judgment), it is simply not a party "having custody" of the software.

Next, the Government neither alleges nor demonstrates that the AP Assets are at risk of "deterioration" or "decay" or "injury." Rather, the Government argues only that, while the Absolute Poker website sits dormant, the value of the AP Assets may "depreciate."

"Depreciation" is not mentioned in Rule G(7). And, the Government has cited, and our own research has disclosed, no case in which defendant property that was not at risk of "deterioration" or "decay" or "injury," was nonetheless ordered to be sold under Rule G(7)(b)(i)(A) simply because its *value* was expected to decline over time. If "depreciation" were the standard, then forfeiture plaintiffs could always obtain interlocutory sales, as it is the nature of all property to "depreciate." In short, "depreciation" by itself is irrelevant. *United States v. Real Properties Situated at 105 Graff Lane, Quarry Creek, Charleston, Kanawha County, W. Va.*, 2011 WL 5975820 *2 (S.D.W.Va. Nov. 28, 2011) ("Rule G(7)(A) mentions 'deterioration, decay, or injury,' but it does not cite depreciation as a valid basis for interlocutory sale.").

Thus, where actual deterioration of the condition of the property itself is not shown, the motion will be denied. *United States v. $6,787.00 in U.S. Currency*, 2007 WL 496747 *2 n.1 (N.D.Ga. Feb. 13, 2007) ("The risks that justified interlocutory sales of real property in these cases are absent here. The Jaguar is not likely to deteriorate, or suffer vandalism or repossession, in the Government's care.").

The sole case relied on by the Government (at Govt. Br. p. 10) – i.e., *United States v. $1,133,648.97 seized from Bank of Hawaii*, 2008 WL 687337 (D. Hawaii Mar. 11, 2008)(adopting forfeiture order of magistrate judge) – is plainly inapposite.

First, in *Bank of Hawaii*, the magistrate judge expressly found that the "*condition* of the

Subject Defendant Properties … are [sic] *deteriorating*." *Id*. at *5 (emphasis added). In the instant case, the Government does not even claim, much less prove, any "deterioration" in the "condition" of the AP Assets.

Second, the magistrate judge in *Bank of Hawaii* concluded that forfeiture was proper under a subparagraph (B) of Rule G(7)(b)(i), based on his express finding that "[t]he cost and expense of storing and maintaining some of the Subject Defendant Properties, most especially the Defendant Vehicles, is excessive and disproportionate to their fair market value." Here, the Government relies only on subparagraph (A) of Rule G(7)(b)(i). It neither invokes Rule G(7)(b)(i)(B), nor presents any storage-cost-vs.-market-value analysis.

While the court in *Bank of Hawaii* does use the word "depreciation" a few times, there is nothing in the decision to suggest that that usage was anything other than shorthand for the statutory language. Certainly, the *Bank of Hawaii* court cites no authority for the proposition that the risk of "depreciation" alone – without either "deteriorating condition" or excessive storage expense – would satisfy Rule G(7) preconditions for sale.[1]

Accordingly, the Government's motion, having failed to demonstrate the existence of grounds for interlocutory sale under Rule G(7)(b)(i)(A), should be denied.

II. Even Assuming There Were A Risk Of "Deterioration," The Court Should, In the Exercise Of Its Discretion, Refrain From Authorizing A Premature Sale

Rule G(7) does not require an interlocutory sale if the Government provides proof of one of the statutory grounds. Rather, Rule G(7) states only that a court "may" in the exercise of its

[1] Even respecting the alleged "depreciation" of the AP Assets, the Government has not demonstrated that that depreciation is or will be caused "by being detained in custody." Rather, the Government claims only that the depreciation is portended by the dormancy of the Absolute Poker website. Indeed, we understand that the Government has, during the pendency of this case, permitted all three poker sites implicated in the case to be operated (with conditions and restrictions) – thereby forestalling "depreciation" notwithstanding that the property was "detained in custody."

discretion order a sale. *See United States v. Approx. 81,454 Cans of Baby Formula*, 560 F.3d 638, 641 (7th Cir.2009) (district court's discretion under Rule G(7) is "considerable"). Here, even assuming that the Government had presented in its moving papers proof of "deterioration, decay or injury by being detained in custody" (which it has not), this Court should nonetheless decline to exercise its discretion to order a sale of the AP Assets.

Avoine's research indicates that no federal court has ever granted a motion for a Rule G(7) interlocutory sale of ***intellectual property***. Respectfully, this Court should not be the first to do so.

Intellectual property, unlike the cars at issue in the *Bank of Hawaii* case relied on by the Government, produces revenue indefinitely. In the case of the AP Assets, Avoine can expect – once it quiets its title to those assets in this case and finds a suitable and strong licensee run by competent management – to restart a stream of revenue that will last for many years. And, that revenue will be formidable, if the experience of Avoine's precedessor in interest, SGS (BVI), Ltd. ("SGS"), is any indication. For example, in 2005, based in part on the quality of its intellectual property (including trademarks, domain names, and the AP Software), SGS generated revenue in excess of $25 million. More importantly, it was experiencing phenomenal growth, having ***quintupled*** its revenues in just one year.

Here, if the Court permits the Government to sell the AP Assets, Avoine's property will be lost, and even if it should successfully defend the remainder of the case, it will never get back its rights to an increasing revenue stream of indefinite duration. Instead, it will receive the net proceeds of a fire sale administered by third parties whose objectives do not even recognize the interests of Avoine's shareholders and creditors. In short, an interlocutory sale of the AP Assets will with certainty cause irreparable injury to Avoine, while the risks of "depreciation" in the

event no interlocutory sale takes place are uncertain (and certainly not quantified, or even explained, in the Government's moving papers).

While the specter of irreparable harm as a result of court order should always be reason for pause, this Court should be all the more reticent to permit such harm here – where the Government's case has been cast in serious doubt by the recent decision of District Judge Weinstein in the case of *U.S. v. DiCristina*, 2012 WL 3573895 (E.D.N.Y. Aug. 21, 2012).

The Government's forfeiture claim rests substantially on allegations of "illegal gambling" under 18 U.S.C. § 1955 ("IGBA"). *See* the Government's Verified First Amended Complaint (D.E. 53), *passim*. But in *DiCristina*, the Court held that poker is a game of skill, and not a game of chance, and therefore that poker does not constitute "illegal gambling" within the meaning of IGBA. Assuming that this Court were to agree with *DiCristina* (or that *DiCristina* were to be affirmed by the Second Circuit), the Government's case against the AP Assets would likely fail. It would seem imprudent to order a premature sale of Avoine's income producing intellectual property in such circumstances.

Finally, as already noted above, the Government is not even in a position to maximize value from the AP Assets – because it has not obtained custody of the most important component of those assets: the AP Software. Without the software, the bidders for the other AP Assets will be fewer, and will pay less, than would be the case if the Government were in custody of, and in a position to sell, *all* of the AP Assets as a *package*.

III. Dismissal of the Blanca Entities Should Be Conditional

Nowhere in the Government's moving papers will the Court find any reference to Fed.R.Civ.P. 41 ("Dismissal of Action"). Yet, the "settlement" that is the subject of the Government's so-called motion "for entry of proposed order of stipulated settlement between the

Government and Absolute Poker-affiliates entities" (see D.E. 237, "Notice of Motion") does contemplate the dismissal of the Blanca Entities from this case, and is therefore a dismissal subject to the requirements of Rule 41.

Dismissal "by court order" is governed specifically by Rule 41(a)(2), which states in pertinent part: "an action may be dismissed at the plaintiff's request only by court order, *on terms that the court considers proper*." (Emphasis added).

It is well-settled that the court must consider the interests of all parties remaining in the case and mitigate the prejudice which may be caused by such dismissal prior to allowing the voluntary dismissal of a party. *See, e.g., Beaver Associates v. Cannon*, 59 F.R.D. 508, 510 (S.D.N.Y. 1973) (Fed.R.Civ.P. 41(a)(2) "calls for the exercise of judicial discretion to avoid an unfair effect on anyone else incident upon such a termination of the suit. The fact that the suit will be dismissed with prejudice to the plaintiff is not the only consideration before the Court; the possible effect on others must be considered.") (citations omitted); *Scandinavian Airlines Sys. v. Reactive Metals, Inc.*, 1972 WL 123078 *2, 16 Fed. R. Serv. 2d 1058 (E.D.N.Y. Nov. 15, 1972) ("The thrust of the rule is primarily to prevent voluntary dismissals which unfairly affect the defendants, and to permit the imposition of curative conditions. There is no absolute right to a voluntary dismissal even if plaintiff agrees to the imposition of conditions. The prime consideration for the court in the exercise of its discretion is to insure substantial justice to all parties. Decision is to be made in accordance with what would be fairest and cause the least hardship to the parties.").

In order to mitigate the prejudice that may be caused by a dismissal, courts may and often do impose conditions on the parties seeking the voluntary dismissal. *Scandinavian Airlines Sys. v. Reactive Metals, Inc., supra*, *2 (Voluntary dismissal "rests in the discretion of the court,

which may impose conditions"). The rule expressly states that the court will only issue a dismissal order "on terms that the court considers proper." Fed.R.Civ.P. 41(a)(2).

In fact, this Court and others often condition dismissal of a party on its compliance with discovery demands, as a way to mitigate prejudice to the other parties to the case. *Varnelo v. Eastwind Transp., Ltd.*, 2003 WL 230741 *23 (S.D.N.Y. Feb. 3, 2003) *adhered to sub nom. Varnelo ex rel. Estate of Varnelo v. Eastwind Transp., Ltd.*, 2004 WL 103428 (S.D.N.Y. Jan. 23, 2004) ("Nevertheless, to alleviate any difficulty in obtaining such discovery, this Court will condition any dismissal order on defendants' agreement to make any relevant Greek witnesses they control, such as Captain Lekkos, available in the Russian forum"); *Gallagher v. Donald, III***,** 1993 WL 488215 *1 (S.D.N.Y. Nov. 16, 1993) ("production of documents may be required as a precondition to dismissal without prejudice in such instances. *Hudson Engineering Co. v. Bingham Pump Co.*, 298 F.Supp. 387 (SDNY1969)"); *Eaddy v. Little*, 234 F. Supp. 377, 380 (E.D.S.C. 1964) ("Defendant argues that dismissal would prejudice its rights heretofore noticed as to the production of certain documents pursuant to Rule 34 of the Federal Rules of Civil Procedure. The Court therefore finds it proper, for protection of defendant that the production of such documents be a prerequisite to a voluntary dismissal without prejudice; under such circumstances defendant can lose no substantial right by the dismissal.").

Avoine respectfully submits that the Government's Rule 41(a)(2) motion for an order, *inter alia*, dismissing the Blanca Entities from this case should be conditioned on the Blanca Entities' compliance with discovery requests of remaining parties with an interest in the AP Assets.

None of the Blanca Entities is an involuntary participant in this case; none is a defendant. To the contrary, the Blanca Entities elected to participate here as claimants, pursuant to a verified

claim filed October 31, 2011 (D.E.85). Pursuant to that claim (the "Blanca Claim"), the Blanca Entities have, under oath, asserted an ownership interest in the AP Assets.

The Blanca Claim irreconcilably conflicts with Avoine's verified claim to the AP Assets, filed on January 5, 2012 (D.E.150). Avoine filed its verified answer on March 9, 2012 (D.E.168), and soon thereafter served interrogatories and document requests ("Avoine's Discovery Requests") on Blanca Entities' counsel of record, Blank Rome. Rodes Aff., Exhs. A-B. In part, those discovery requests sought information relevant to the conflicting ownership claims of the parties. To date, Blanca Games has not objected to, or otherwise responded to, Avoine's Discovery Requests.

Not only have the Blanca Entities flouted Avoine's Discovery Requests, the Government has taken action that, intentionally or not, would assist them in that evasiveness. Thus, the Government has both moved to dismiss Avoine's claim (D.E.197) based on the argument that it is a mere "straw owner" of the AP Assets (and that the Blanca Entities are the true owner), and moved for an order dismissing the Blanca Entities from this action.

In other words, while the Government argues that the Blanca Entities' rights trump Avoine's rights, it simultaneously seeks an unconditional dismissal that would excuse the Blanca Entities from producing proof of its rights or their superiority to Avoine's rights.

An unconditional dismissal of the Blanca Entities from this case would unduly and unfairly prejudice Avoine as it tries to prepare its defense to the Government's claim that it is merely a "straw owner" of the AP Assets.

Finally, it is no answer to say that Avoine may subpoena the same information from the Blanca Entities. All of the Blanca Entities are foreign entities beyond the subpoena power of this

Court. Several of them are organized and/or based in countries where international discovery mechanisms are unavailable and/or severely limited.

Accordingly, Avoine asks that this Court to condition the dismissal of the Blanca Entities on Blanca Games' cooperation and completion of its discovery obligations.

CONCLUSION

In conclusion, Avoine respectfully submits that the Government's motion seeking (1) unconditional dismissal of the Blanca Entities; and (2) an order permitting the Government to conduct an "interlocutory sale" of the AP Assets, should be denied in all respects.

Dated: New York, New York
September 4, 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