

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF  
THE GOVERNMENT'S MOTION TO STRIKE THE CLAIM OF  
AVOINE - SERVICIO DE CONSULTADORIA E MARKETING, LDA**

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- of counsel -

## **PRELIMINARY STATEMENT**

Because claimant Avoine - Servicio De Consultadoria E Marketing, LDA ("Avoine" or "Claimant"), through its claim and answer, has established that its purported ownership of the assets of Absolute Poker is in name only, its claim should be stricken. Indeed, Avoine's supplemental factual contentions in its opposition to the motion to strike and accompanying documents further demonstrate that Avoine was a mere straw owner.

Alternatively, if the Court were to determine that the supplemental factual contentions and documents Avoine relies on in its opposition bolster Avoine's standing allegations sufficient to survive a motion to strike at this stage, the Government requests permission to supplement the motion to strike after taking standing discovery pursuant to Rule (G)(6) of the of the Supplemental Rules for Certain Admiralty and Maritime Claims.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Avoine's Claim and Answer**

Avoine filed a claim on January 5, 2012, contesting the forfeiture of the following:

1. The domain name AbsolutePoker.com and any other domain names that include the word "absolutepoker" or any variation thereof (the "Domain Names") and
2. All property and other assets claimed to have been assigned to Avoine by SGS (BVI) Inc. ("SGS") in or about 2007, including without limitation: (a) all tangible and intangible property, including computer hardware and software, developed and/or used in the operation of the Absolute Poker online

poker business as of the date of such assignment (the "AP Intellectual Property"); and (b) stock and/or other equity interests in (i) Fiducia Exchange Ltd.; (ii) Momentum Technologies, Inc.; and (iii) Panora Tech Belize Inc. (the "Subsidiaries").

In its March 9, 2012, answer, Avoine asserts that:

In or about 2006 or early 2007, in a reorganization of its affairs, SGS assigned and transferred the AP Assets, along with all of SGS's equity in the Subsidiaries, to Avoine and, at substantially the same time SGS's shareholders became shareholders in Avoine's parent company, a Norwegian company called Madeira Fjord AS ("MFAS").

(Avoine Answer ¶ 27(b)). Avoine further alleges that the AP Assets were then transferred to Absolute Entertainment S.A., a transfer that was subsequently rescinded. (Id. ¶ 27(c)-(d)). According to Avoine: "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 contractors and/or assignees (e.g., Blanca Games), as express or implied licensees, and not by Avoine." (Id. ¶ 27(e)).

Avoine also alleges that: "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." (Id. ¶ 27(f)). Thus, although Avoine alleges that it rescinded the transfer of the AP Assets in 2007, Avoine never actually regained those assets and the assets

continued to be held by and managed exclusively by Absolute Poker.

**B. The Motion to Strike**

On or about July 9, 2012, the Government moved to strike Avoine's claim pursuant to pursuant to Rule 12(b) and (c) of the Federal Rules of Civil Procedure and Rule G(8)(c) of the Supplemental Rules because Avoine, by its own pleadings, established itself as essentially a straw owner that exercised no dominion or control of the assets in question and therefore lacks standing.

**C. Avoine's Opposition and Supplemental Factual Contentions**

On or about August 13, 2012, Avoine opposed the motion to strike. Accompanying Avoine's opposition brief is an attorney declaration attaching several documents that purport to relate to the transfer of the AP Assets and the rescission of that transfer. According to Avoine, these documents "prove[] that at all relevant times, Avoine exercised its rights as owner, security interest holder, or licensor" of the Absolute Poker assets in question. (Avoine Br. at 5). Avoine did not seek leave to amend its claim to include these documents or to incorporate them by reference into its claim.

The agreements Avoine relies on appear to demonstrate, inter alia, that on or about December 12, 2008, Avoine and AE entered into an agreement rescinding the transfer of the AP

Assets from Avoine to AE. Paragraph 4(A) of this rescission agreement, entitled "Operations," states, in part, that:

Until the earlier of the transfer by Avoine of the Assets to a third party, the determination by Avoine itself to assume the use of the Assets for business operations or one year of the date hereof [December 12, 2008], AE shall continue to manage the Assets and operate the business to which the Assets apply as the licensee of Avoine for the use of the Assets solely for such purposes[.]

This paragraph further provides that: "The parties shall proceed with respect to management and operations under this Paragraph in such manner as they may agree and deem appropriate and shall make such reasonable arrangements as they may from time to time agree for the use and distribution of the proceeds of the management and operation of the Assets and business."

Notwithstanding the rescission agreement's provision that any license from Avoine to AE to operate the AP Assets would terminate, at the latest, on or about December 12, 2009, Avoine concedes that Absolute Poker continued at all relevant times to maintain control and operation of the Absolute Poker Defendant Property. (Avoine Answer ¶ 27(e)).

#### **ARGUMENT**

The Government has moved under both Rule 12(b) and Rule 12(c) to strike the claim of Avoine. "It is well ingrained in the law that subject-matter jurisdiction can be called into question either by challenging the sufficiency of the allegation

or by challenging the accuracy of the jurisdictional facts alleged.” United States v. All Funds on Deposit at Citigroup Smith Barney Account No. 600-00338, 617 F. Supp. 2d 103, 112-113 (E.D.N.Y. 2007) (quotation omitted). If parties present factual evidence that is relevant to the jurisdictional issue, the court may consider such evidence. Id. at 112-113.

In its claim and answer, Avoine has alleged nothing more than mere legal ownership and has affirmatively alleged that it had no involvement in or control over the operation of those assets for at least the last several years. Accordingly, its claim should be stricken. Alternatively, if the Court were to consider the additional factual contentions and the documents submitted by Avoine outside the pleadings and determine that they are sufficient to overcome Avoine’s pleading deficiency, the Government should be permitted to supplement its motion after taking standing discovery pursuant to Rule (G)(6) of the of the Supplemental Rules. Accord Fed. R. Civ. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.”).

**I. AVOINE'S ALLEGATIONS DEMONSTRATE AN OWNERSHIP IN NAME ONLY**

**A. Relevant Law**

"In order to contest a governmental forfeiture action, claimants must have both standing under the statute or statutes governing their claims and standing under Article III of the Constitution as required for any action brought in federal court." United States v. Cambio Exacto, S.A., 166 F.3d 522, 526 (2d Cir. 1999). Standing is a threshold issue. If the claimant lacks standing, the court lacks jurisdiction to consider his challenge of the forfeiture. The burden of proof to establish sufficient standing rests with the claimant. Mercado v. U.S. Customs Service, 873 F.2d 641, 644 (2d Cir. 1989); United States v. One 1986 Volvo 750T, 765 F. Supp. 90, 91 (S.D.N.Y. 1991); United States v. One 1982 Porsche 928, 732 F. Supp. 447, 451 (S.D.N.Y. 1990) (abbreviated title). Where the claimant's own allegations are insufficient to demonstrate standing, a motion to strike his claim should be granted. See United States v. \$38,570 U.S. Currency, 950 F.2d 1108, 1111-13 (5th Cir. 1992) ("Unless claimant can first establish his standing he has no right to put the government to its proof"). When consider the adequacy of a party's pleadings, the Court should accept the allegations contained in the complaint as true, but does not need to "accept conclusory allegations or legal conclusions masquerading as factual conclusions." Rolon v. Henneman, 517 F.3d 140, 149 (2d

Cir. 2008) (internal citations and quotations omitted).

"[P]ossession of mere legal title by one who does not exercise dominion and control over the property is insufficient even to establish standing to challenge a forfeiture." United States v. Nava, 404 F.3d 1119, 1130 n.6 (9th Cir. 2005) See also United States v. Contents of Accounts Nos. 3034504504 & 144-07143 at Merrill Lynch, Pierce, Fenner & Smith, Inc., 971 F.2d 974, 985 (3d Cir. 1992) (upholding district court's ruling that corporate claimant was a straw owner that lacked standing and stating that "[c]ourts have uniformly rejected standing claims put forward by nominal or straw owners").

## **B. Discussion**

Under these established legal principles, Avoine has failed to plead facts adequate to demonstrate standing. Avoine alleges an ownership interest in the assets in question, but then goes on to expressly plead that since 2007, despite Avoine being the legal owner, "all operation of the Absolute Poker online poker business has been carried out by employees and/or agents of Absolute Entertainment or its contractors and/or assignees (e.g., Blanca Games), as express or implied licensees, and not by Avoine." (Avoine Answer ¶ 27(e)).

Thus, according to its own pleadings, Avoine has exercised no possession of, control over, or involvement in the operations of the Absolute assets even following the rescission



of the transfer of those assets to Absolute Entertainment. Avoine seeks to overcome this by alleging that it had licensed the assets to AE pursuant either to an "express or implied license." Any express license terminated at the latest by the end of 2009, and Avoine cannot rely on the bare legal assertion of an implied license. Accord Cornell University v. Hewlett-Packard Co., 609 F. Supp. 2d 279, 290 (N.D.N.Y. 2009) (in patent context, stating that "[t]he existence of an implied license is a question of law reserved for the court"). Avoine cannot seek to convert its straw ownership into an implied license arrangement by naked ipse dixit.

**II. THE DOCUMENTS SUBMITTED BY AVOINE SUPPORT THE CONCLUSION THAT AVOINE'S OWNERSHIP INTEREST WAS IN NAME ONLY**

In an effort to overcome its failure to adequately plea standing, Avoine seeks to supplement its pleadings with additional documents and factual contentions. As explained below, even considering these documents, Avoine has not met its burden to establish standing. Indeed, the documents further support the conclusion that Avoine's ownership is in name only. In the event, however, that the Court concludes that these additional materials are sufficient for Avoine to cure its standing allegations, the Government requests that it be permitted to supplement its motion to strike after taking standing discovery pursuant to Rule (G)(6) of the of the Supplemental Rules.

Avoine relies on the purported rescission agreement attached as Exhibit E to its counsel's declaration to support the contention that Avoine owned the assets in question and that the Absolute Poker companies were licensees of Avoine. Paragraph 4(A) of the agreement, entitled "Operations," however, provides that the purported license from Avoine to AE would expire upon the earlier of a number of events, including the passage of one year from the date of the agreement. Thus, by on or about December 12, 2009, at the latest, Avoine's purported license to AE expired. Absolute Poker nonetheless at all relevant times has continued to exercise possession and control over the assets, without any provision in the rescission agreement for the payment of license fees from Absolute Poker to Avoine or requirement that Absolute Poker share profits with Avoine.

Thus, these documents actually support the conclusion that Avoine's purported ownership of the assets was in name only. Accordingly, the Government's motion to strike Avoine's claim should be granted.

