UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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.	11 Civ. 2564 (LBS)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF GOVERNMENT'S MOTION FOR ENTRANCE OF STIPULATED ORDER OF SETTLEMENT AND ORDER FOR THE INTERLOCUTORY SALE OF PROPERTY

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PRELIMINARY STATEMENT

The Government respectfully submits this Memorandum of Law in further support of its motion for (1) the entry of the proposed stipulated order of settlement between the Government and the Absolute Poker Settlement Group (as defined in the Government's memorandum in support of its motion), and (2) an order, pursuant to Rule G(7) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (the Supplemental Rules"), permitting the United States Marshals Service (the "USMS") to conduct an interlocutory sale of all assets of the Absolute Poker Settlement Group (the "Absolute Poker Assets"), with the net sale proceeds to be held by the Government as substitute res for ongoing litigation with the two claimants asserting an interest in the Absolute Poker Assets, Avoine - Servico De Consultadoria E Marketing, LDA ("Avoine") and the Commonwealth of Kentucky ("Kentucky").

Avoine has put forward no evidence contesting that (i) the value of the Absolute Poker Assets is deteriorating; and (ii) the longer these assets remain unused and unsold, the less they will be worth. Avoine's contention that the Court lacks the authority to order an interlocutory sale under these circumstances runs counter to common sense and has no support in the relevant statutes, rules, or case law.

Similarly, Avoine's objection to the entry of the Absolute Poker settlement stipulation based on Avoine's desire to

take party discovery (as opposed to non-party discovery) from an entity with no further standing in this matter, that has no claims against Avoine, and against which Avoine has no claims in this action, is nonsensical. Rule 41 of the Federal Rules of Civil Procedure provides no basis for Avoine's objection.

DISCUSSION

I. The Proposed Interlocutory Sale Falls Squarely Within Rule G(7) and Is Critical to Maintaining the Value of the Absolute Poker Assets

A. The Absolute Poker Assets Are Deteriorating in Value

It is uncontested that the Absolute Poker Assets are deteriorating in value, and the more time that passes the more the assets will be diminished. The deterioration in value is set forth clearly in the uncontested Declaration of Jaime d'Almeida (the "d'Almeida Declaration"), a Director at the valuation firm Duff & Phelps. The value of the Absolute Poker Assets includes the Absolute Poker brand, its name recognition in the market place, its customer base, and its software and related intellectual property. As d'Almeida explains, the value of the intangible assets of the Absolute Poker Settlement Group will continue to decline the longer that the Absolute Poker-branded business does not operate. (d'Almeida Decl. ¶ 11).[1]

[1] This deterioration has become especially acute since June 2, 2012. On that date, the license held by the Absolute Poker Settlement Group with the Kahnawake Gaming Commission expired, and the servers supporting the Absolute Poker online platform were disconnected. All Absolute Poker customers around the world

The acute depreciation and deterioration of value of the customer list relating to Absolute Poker is especially clear. The customer list has value to the extent that it is up-to-date and accurate. (d'Almeida Decl. ¶ 11). As information on the customer list, including player history and even contact information, become stale, its value to any possible purchaser diminishes. (Id. ¶ 12). Moreover, because Absolute Poker is not currently operating, the players on the customer list are not playing online poker on the Absolute Poker website and their familiarity with Absolute Poker and loyalties to the brand and the platform are weakening with the passage of time and their likely play on other sites. Similarly, the value of related items such as brand names, trademarks, and domain names, also deteriorates. (Id. ¶ 12). The market value of Absolute Poker's software and related intellectual property is also deteriorating as the software ages without being updated or upgraded.

B. Rule G(7) Gives the Court Authority to Order the Interlocutory Sale of Assets Deteriorating in Value

Rule G(7) authorizes an interlocutory sale of defendant in rem property when, inter alia, "the property is perishable or at risk of deterioration, decay, or injury by being detained in

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could no longer play any poker, whether for "real money" or not, or access their online player accounts. They could do nothing other than view the inactive home pages affiliated with Absolute Poker. See Declaration of Jerry Bernstein (the "Bernstein Decl.") ¶ 3 (attached as Exhibit A to the Declaration of AUSA Jason Cowley (the "Cowley Decl.")).

custody pending the action;" or "the court finds other good cause." Rule G(7)(b)(i)(A) & (D). "The purpose of an interlocutory sale of property in a civil forfeiture action is to preserve the monetary value of the seized property." United States v. $1,133,648.97 seized from Bank of Hawaii, 2008 WL 687337, at *3 (D. Hawaii March 11, 2008) ("Bank of Hawaii"). As a number of courts have held, the "risk of deterioration" includes the depreciation in value of the property (and also provides "good cause" to order the sale). See, e.g., id. at *5.

Avoine contends that the Court lacks the authority to order an interlocutory sale based on depreciation of value, rather than physical deterioration. (Avoine Mem. at 4). This argument is meritless -- first, it runs flatly contrary to the purpose of the interlocutory sale provision. Second, a number of courts have held that "deterioration" is not limited to physical deterioration, but includes the deterioration or depreciation of market value. Third, the argument ignores that the Court in any event has authority to order an interlocutory sale for "other good cause."

Avoine attempts to characterize Bank of Hawaii's discussion of depreciation as "shorthand" without legal meaning (Avoine Mem. at 5), but fails to note that the order in that case included the interlocutory sale of, among other things, stock warrants that the court found were "deteriorating and their []

values are depreciating with the passage of time." Bank of Hawaii, 2008 WL 687337, at *5. A number of other courts have also approved the interlocutory sale of assets based on depreciation in value. See, e.g., United States v. Hailey, 2011 WL 6202787, at * 1 (D. Md. Dec. 8, 2011) (granting interlocutory sale motion, including for computers and other electronic equipment, because of the "risk of depreciation in value"); United States v. Dean, 835 F. Supp. 1383, 1385-86 (M.D. Fla. 1993) (pre-CAFRA, granting motion for interlocutory sale of restaurant property "because its value was rapidly depreciating"); United States v. One 1979 Peterbilt, VIN: 111677N, 1993 WL 543059, at *2 (E.D. La. Dec. 28, 1993) (pre-CAFRA, holding that the phrase "liable to deterioration" in a provision governing interlocutory sales includes depreciation and authorizing the sale because "the value of the defendant vehicle is depreciating").

The cases cited by Avoine do not hold otherwise. In United States v. Real Properties Situated at 105 Graff Lane, Quarry Creek, Charleston, Kanawha County, W. Va., 2011 WL 5975820 (S.D. W.Va. Nov. 28, 2011), while the court noted that the word "depreciation" did not appear in Rule G(7), it did not hold that depreciation was an invalid basis for interlocutory sale. Indeed, it expressly noted Rule G(7)(b)(i)(D), which provides for the interlocutory sale based on "other good cause." Id. at *2.

Instead, it denied the motion because (1) the Government sought authority to sell the vehicle at issue for under its appraised value, (2) the Court found the Government's argument regarding the depreciation of the vehicle was too speculative and vague, and (3) the case had been stayed, which counseled against the requested relief. Id. None of those factors exist in the present case. Likewise, in United States v. $6,787.00 in U.S. Currency, 2007 WL 496747, at *2 (N.D. Ga. Feb 13, 2007), the court did not reach any legal conclusion that depreciation or deterioration in value could not serve as the basis for an interlocutory sale motion. Rather, the Court simply noted that the cases relied upon by the Government in that action involved the interlocutory sale of real property under different statutory provisions and circumstances and that the Court would not grant the motion in "the absence of more convincing authority." Id. at *2 & n.1.

C. Avoine's Arguments Relating to the Custody of the Absolute Poker Assets Are Without Merit

Avoine also argues that the Court should not permit an interlocutory sale of the Absolute Poker Assets because the Government does not have possession of Absolute Poker's software. (Avoine Mem. at 3). On or about September 18, 2012, the USMS received a disc from Quad Dimensions, Ltd., a software company that developed and maintained Absolute Poker's software, containing the source code for the software. (Cowley Decl. ¶ 5).

The disc includes the "client program" software developed by Quad Dimensions for Absolute Poker that created the player interface for Absolute Poker's online poker platform (the "Absolute Poker Software") (Cowley Decl. Ex. B (Declaration of Young Jae Lee) at ¶¶ 1 & 3), and other software to facilitate the use and operation of the Absolute Poker Software. (Id. at ¶ 4). Quad Dimensions expressly disclaims any claim to the Absolute Poker Software and has agreed to delete any retained copies of the Absolute Poker Software upon request. (Id. at at ¶¶ 1 & 3). Accordingly, Avoine's argument should be rejected.

D. The Court Should Approve the Sale

Avoine urges a number of other reasons for the Court to allow the Absolute Poker Assets to languish, rather than preserve their value through an interlocutory sale. Each is without merit.

1. The Interlocutory Sale of Assets that Can Be Used Commercially to Generate Revenue is Not Novel

First, Avoine argues that intellectual property should be treated differently from all other types of assets, because "it produces revenue indefinitely." (Avoine Mem. at 6). Avoine seems to argue that assets with the ability to generate revenue should not be subject to interlocutory sale. Avoine further argues that an interlocutory sale would deprive Avoine of future profits if Avoine is ultimately successful in this action and can restart the company. (Id.)

Avoine's argument is flawed on a number of levels. First, other courts have approved the interlocutory sale of business assets, including assets that can produce future revenue. See, e.g., United States v. Any and All Assets of That Certain Business Known as Shane Co., 147 F.R.D. 99, 100 (M.D.N.C. 1992) (noting the court's approval of the interlocutory sale of all assets of a trucking company); Dean, 835 F. Supp. at 1385-86 (M.D. Fla. 1993) (noting the court's approval of the interlocutory sale of restaurant real property). Items such as commercial trucks and commercial property, like the Absolute Poker Assets, are also revenue-generating items that were subject to interlocutory sale. The relief sought in this motion is far from novel.

2. Avoine's Parent Company Is In Bankruptcy Liquidation

Avoine opposes the interlocutory sale of the Absolute Poker Assets, claiming that it hopes to retain ownership of the Absolute Poker Assets and "restart" the company and its stream of revenue. (Avoine Mem. at 6). This contention, however, is belied by the fact that Avoine and its parent company are in bankruptcy liquidation proceedings in Norway. As stated in Avoine's answer:

> In or about May 2011, Madeira [Fjord AS ("Madeira"), the parent company of Avoine] was declared bankrupt by [the Norwegian Bankruptcy Court] . . . By the same order, 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. [] In addition, Mr. Brandi was contemporaneously appointed sole director of and Chairman of Avoine.

(Avoine Answer at ¶ 28). In a sworn declaration filed in an action in federal court in Illinois to take discovery relating to the Norwegian bankruptcy proceedings (the "Brandi Decl."), Mr. Brandi expressly stated that the purpose of the Norwegian bankruptcy proceedings is to liquidate and distribute assets:

> The purpose of the Norwegian bankruptcy proceeding is to marshal the assets of the debtor for orderly distribution to creditors. The proceedings in the Norwegian Bankruptcy Court are similar to those in the United States. The Norwegian Bankruptcy Court will review and admit evidence and hear testimony from witnesses in connection with the administration and liquidation of a bankruptcy estate.

(Brandi Decl. ¶ 22 (attached as Exhibit C to the Cowley Decl.) (emphasis added). Thus, Avoine's purported hopes of "restarting" Absolute Poker and realizing a stream of income from those assets is far from likely. Even if Avoine were to succeed on its claim, the end result of that success would simply be a much-delayed sale of the Absolute Poker Assets in bankruptcy proceedings.

3. Avoine's Likelihood of Success Argument is Irrelevant and Without Merit

Avoine contends that the Court should not authorize an interlocutory sale because of an order recently issued in the Eastern District of New York relating to the application of 18

U.S.C. § 1955. See United States v. DiCristina, 2012 WL 3573895 (Aug. 21, 2012). This sort of likelihood-of-success argument is irrelevant to a motion for an interlocutory sale, the point of which is to preserve the value for the res at issue. Bank of Hawaii, 2008 WL 687337, at *3. Additionally, Avoine is wrong about the implications of the order in DiCristina decision for this action. That order is not binding on this Court and the Government respectfully, but strongly, disagrees with many of the conclusions reached in that order. But, even if DiCristina were persuasive with respect to the application of § 1955, DiCristina has no bearing on the forfeiture claims for the Absolute Poker Assets premised on other statutory violations such as the Travel Act, bank fraud, and money laundering.

4. Avoine's Characterization of the Interlocutory Sale is Inaccurate

In its papers, Avoine incorrectly charges that an interlocutory sale would be a "firesale administered by third parties whose objectives do not even recognize the interests of Avoine's shareholders and creditors" (Avoine Mem. at 6), resulting in the assets being sold at a "deeply discounted price." (Avoine Mem. at 1). The goal of the United States in seeking an interlocutory sale is to maximize the value of the Absolute Poker Assets. In that respect, the interests of the Madeira/Avoine bankruptcy estate and the United States are aligned. The only difference is that the United States seeks to

liquidate the assets now, before their value diminishes further, while Avoine apparently would wait until the conclusion of these proceedings and, if Avoine were successful in its claim, seek to sell the assets in a bankruptcy liquidation.

Avoine's characterization of the interlocutory sale as a "firesale" is simply wrong. The USMS is not required to conduct a firesale and would not. The sale would be managed by the Complex Assets Unit of the USMS, a group specifically purposed with managing and selling complex business assets. The USMS has the discretion to design a sale to maximize market value, including the authority to retain third-party advisers and brokers to market and sell the Absolute Poker Assets. (Cowley Decl. ¶ 6). Also, because the Absolute Poker Assets can be marketed together, the USMS and their designee are in a strong position to obtain value for the intangible assets of the Absolute Poker Group before such further assets depreciate. In short, an interlocutory sale will be far from the "firesale" strawman Avoine seeks to create.[2]

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[2] In United States v. BCCI Holdings, Luxembourg, S.A., the District Court for the District of Columbia noted the Marshals' expertise in managing and liquidating assets far more complex than those of Absolute Poker:

> In all of these instances [of interlocutory sales], the U.S. Marshals Service provided outstanding service . . . . The Marshals managed an inventory of over $1 billion in assets, including some that presented peculiar problems of investment and

II. The Court Should Enter the Proposed Settlement Regarding Absolute Poker

Avoine's request that the Court not "So Order" the settlement agreement reached with the Absolute Poker Settlement Group has no basis in the law. Rather than seek third-party discovery from the Absolute Poker Settlement Group, Avoine opposes entry of the settlement stipulation solely so that it can seek party discovery from these entities. The relief that Avoine seems to request – that a claimant can only enter a settlement in which it withdraws its entire claim if it agrees to remain in the case for the sole purpose of providing discovery to another claimant – is unreasonable on its face.

Rule 41 of the Federal Rules of Civil procedure, the rule upon which Avoine premises its unusual request, provides no basis for the relief it seeks. First, Avoine misapprehends the in rem nature of the action as it relates to the Absolute Poker Assets. While the Absolute Poker Settlement Group, as a claimant, will withdraw its claim to the Absolute Poker Assets, the Government is not seeking to dismiss the in rem action in

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> liquidation, as well as expertise in the fields of securities and bankruptcy law. The Marshals Service demonstrated a level of competence and imagination in resolving nettlesome issues for which it should feel justly proud.

69 F. Supp. 2d 36, 45 (D.D.C. 1999).

relation to the Absolute Poker Assets. Instead, in its motion papers and proposed order, the Government recognizes that Avoine's claim to those assets, or the funds resulting from the liquidation of those assets, remains to be litigated. Accord United States v. One Parcel of Property Located at 414 Kings Highway, Fairfield, Conn., 128 F.3d 125, 126 (2d Cir. 1997) (treating differently, without discussion, a "So Ordered" settlement agreement reached with one claimant and a later request, pursuant to Rule 41, for the voluntary dismissal of the in rem action). The only thing being dismissed by virtue of the proposed settlement agreement is the Government's in personam civil money laundering penalty claim against the Absolute Poker Settlement Group, a request for relief entirely irrelevant to Avoine's in rem claim.

Additionally, even assuming Rule 41 governs the Court's entrance of the proposed settlement agreement, it provides no basis for Avoine's requested relief. "The thrust of the rule is primarily to prevent voluntary dismissals which unfairly affect the defendants, and to permit the imposition of curative conditions." Scandinavian Airlines System v. Reactive Metals, Inc., 1972 WL 123078, at *2 (E.D.N.Y. Nov. 15, 1972) (emphasis added). The purpose is to prevent prejudice to the defendant against whom an action has been brought who may have already expended substantial resources defending a claim or who may have

to face the same claim in a different forum. The factors a Court considers when assessing a Rule 41 request all relate to these issues. These factors include: "[1] the plaintiff's diligence in bringing the motion; [2] any undue vexatiousness on plaintiff's part; [3] the extent to which the suit has progressed, including the defendant's effort and expense in preparation for trial; [4] the duplicative expense of relitigation; and [5] the adequacy of plaintiff's explanation for the need to dismiss." Catanzano v. Wing, 277 F.3d 99, 109-10 (2d Cir. 2001) (quotations omitted). The Absolute Poker Settlement Group, of course, consents to the proposed settlement. Avoine cites no basis for its claim that Rule 41 is meant to safeguard one claimant's ability to take discovery from another claimant in order to prove standing.

To the extent that Avoine complains that the Absolute Poker Settlement Group has not responded to discovery requests, such issue is moot as the Absolute Poker Settlement Group is seeking to withdraw its claim as part of the settlement, which would presumably constitute the ultimate sanction for failing to comply with discovery requests.[3]

[3] In any event, counsel for the Absolute Poker Settlement Group states that he discussed the requests with counsel for Avoine and was told that he could put the requests aside for future discussion. Bernstein Declaration ¶ 4. A discussion that has not occurred. Id.

CONCLUSION

For the reasons set forth above, the Government respectfully requests that the Court (1) enter the Absolute Settlement; and (2) enter an order authorizing the United States Marshals Service to take custody of the Absolute Assets and conduct an interlocutory sale of those assets.

Dated: New York, New York
September 21, 2012

Respectfully submitted,

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