UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

x

UNITED STATES OF AMERICA,

Plaintiff,

- against -

11 Civ. 2564 (LBS)

POKERSTARS; FULL TILT POKER; ABSOLUTE POWER; ULTIMATE BET, *et al.*,

Defendants.

ALL RIGHT, TITLE AND INTEREST IN THE ASSETS OF POKERSTARS; FULL TILT POKER; ABSOLUTE POKER; ULTIMATE BET, *et al.*,

Defendants-in-rem.

x

MEMORANDUM OF LAW OF CLAIMANT ADAM WEBB IN OPPOSITION TO GOVERNMENT'S MOTION TO STRIKE CLAIM AND DISMISS COUNTERCLAIM

Steven L. Kessler
LAW OFFICES OF STEVEN L. KESSLER
122 East 42nd Street Suite 606
New York, N.Y. 10168-0699
(212) 661-1500

Attorneys for Claimant Adam Webb

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES AND RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Claimant Adam Webb ("Claimant", "Mr. Webb") respectfully submits this Memorandum in opposition to the motion to dismiss Mr. Webb's claim to certain property he entrusted to defendants Full Tilt Poker and Absolute Poker ("defendants"). The government asserts that Claimant lacks standing and that he is no more than a mere general creditor of the defendants. In fact, however, Mr. Webb's claim meets the "very forgiving" standard of demonstrating a "colorable interest" in the property sought to be forfeited. *United States v. One-Sixth Share Of James J. Bulger In All Present And Future Proceeds Of Mass Millions Lottery Ticket M246233*, 326 F.3d 36 (1st Cir. 2003).

Significantly, the government asserts that "Webb *does little more than* assert a debt allegedly owed to him by Full Tilt Poker and Absolute Poker, rather than any specific or cognizable interest in the specific property sought to be forfeited." Gov. Mem. at 2 (emphasis added). As this contention implicitly acknowledges, Claimant's property interest is, in fact, "more than" that of a mere unsecured debt. As the government's Amended Complaint acknowledges, Claimant entrusted specific funds in connection with specific transactions that the defendants promised to keep "segregated." In fact, Claimant exercised all of the trappings of ownership – dominion and control – with respect to the funds he entrusted with the defendants. He was free at any time to add to or withdraw from these funds, just as any account holder who maintains an account with a bank or investment broker. Further, Claimant has an equitable interest in the defendant property – regardless of whether defendants breached their contractual and fiduciary duty to keep Claimant's funds segregated at all times – on the ground of constructive trust under New York law, as defendants gained their interest in Claimant's property "in such circumstances that [they] may not in good conscience retain the beneficial interest."

Sharp v. Kosmalski, 40 N.Y.2d 119, 121, 386 N.Y.S.2d 72, 74 (1976).

The government also seeks dismissal of Claimant's counterclaim for attorney's fees, costs and interest should be dismissed as procedurally defective, barred by sovereign immunity, or redundant. The government's contentions, however, are contradicted by the plain language of Federal Rules of Civil Procedure that govern this proceeding as well as the plain language of the fees statutes. Accordingly, both branches of the government's motion should be denied.

FACTS

Adam Webb is a professional gambler. He earned his BSB in Finance from the University of Minnesota's Carlson School of Management in 2006. He plies his trade both in 'bricks and mortar' casinos and at legal online gambling. In 2010, the latter included the online poker sites operated by defendants Full Tilt Poker and Absolute Poker.

The defendants represented on their websites, and Claimant reasonably believed, that these sites were operated in a similar manner to bricks and mortar casino poker tables. In a casino, the player purchases chips and wagers those chips at the gaming tables. They are the player's specific property. If the player loses, of course, the chips are forfeited to the casino. If the player 'draws', the player retains the chips he purchased. If the player wins, he retains the chips he purchased and acquires additional chips, which also become his specific property. If, for some reason, a casino were 'raided' by law enforcement and all of the property seized, the government would be obligated to segregate and separately bag each player's seized chips and label those bags according to their ownership. If the seized property were forfeited, each player would have standing to assert a claim to his or her specific seized chips.

Here, the defendants represented to Claimant and other players that their funds were kept "in segregated accounts" and "would be available for withdrawal . . . at all times." Amended Complaint ¶ 64. In other words, these were represented to be the player's specific funds, just like a PayPal account or an online bank account in the name of that particular player. The defendants, like PayPal or online banks, represented that they were the administrators of these accounts which they maintained and operated for a fee.

Indeed, the Full Tilt Poker website refers to "your Full Tilt Poker account" and clearly conveys to customers that they have the trappings of ownership, dominion and control over 'their' funds, also using banking phrases such as "deposit" and "credited to your . . . account." The following statement from the website's archives regarding "eCheck" withdrawals from customers' bank accounts to their Full Tilt Poker account is illustrative of such representations:

> Instant eCheck allows you to make safe, secure electronic fund transfers directly from your bank account to *your Full Tilt Poker account*. Instant eChecks works the same way a paper check does. When making a *deposit* using Instant eChecks, the amount of your *deposit* is requested from your bank. Once authorized, the funds are *credited to your Full Tilt Poker account.* (http://web.archive.org/web/20090504230332/http://www.fulltiltpoker.com/deposit-real-money) (emphasis added).

The transactions conducted by the Claimant on the defendants' websites amounted to bailments of Claimant's funds being entrusted to defendants for a fee. Further, during the time Claimant was engaging in transactions on defendants' websites, the defendants represented that they were "conduct[ing] their banking and financial affairs in accordance with generally accepted standards of internationally recognized banking institutions" and that they "follow[ed] and adhere[d] to applicable laws pertaining to transaction reported and anti-money laundering laws and regulations." See http://web.archive.org/web/201005260 . . . m/security.php; see also

http://www.ubpoker.eu/support.secuirty/banking-security ("UB [Ultimate Bet/Absolute Poker] conducts banking and finance in accordance with generally accepted international standards. Your funds are safe and secure at UBH and are held at a leading European financial institution").

Indeed, the Amended Complaint makes clear that customers like Claimant had a reasonable expectation that their accounts would be *their* accounts, and when these customers began to get wind that the defendants might be commingling account funds and operating funds, there was an outcry on the internet. See Amended Complaint ¶¶ 100-104. In fact, this is the heart of the government's fraud case against the defendants and the primary basis for the forfeiture of the funds in issue. Thus, integral to the government's case is the fact that customers of the defendants like the Claimant have been defrauded by defendants' actions. Accordingly, the government must necessarily concede that, to the extent Claimant's interest in specific property has been compromised by the defendants' actions, it is only by virtue of the defendants' acts of fraud, not by the inherent nature of the interest in specific property, that the defendants promised Claimant and that Claimant relied upon in entering into transactions with the defendants.

ARGUMENT

POINT I

CLAIMANT HAS STANDING TO LITIGATE HIS CLAIM

Claimant has standing to litigate his claim to the property in issue. As demonstrated below, Claimant more than meets the "very forgiving" standing test of demonstrating a "colorable interest in the property." Standing to contest a forfeiture has both a constitutional and a statutory component. Claimant satisfies both. He has Article III standing because he has been injured in fact and has an actual stake in the outcome of this forfeiture proceeding. He has statutory standing because he timely filed his Verified Claim and his claim complies with the formal and substantive requirements of Rule G of the Supplemental Rules for Certain Admiralty and Maritime Claims ("the Supplemental Rules").

The government's attempt to analogize Mr. Webb's interest in the property to a depositor of funds in an account owned by a third person is inapposite, as Mr. Webb has a claim to specific property entrusted with the defendants that was represented to be kept "segregated" from all other property in a personal "account" over which Claimant was promised to be able to exercise all of the indicia of ownership, including dominion and control.

Finally, to the extent that Claimant's property was not, in fact, segregated, but instead commingled with other funds, as alleged in the Amended Complaint, such commingling constitutes fraudulent misuse of the funds, and a breach of the defendants' express promises and legal and fiduciary duties as a paid bailee of Claimant's property. As a result, under New York law, Claimant also has an equitable interest in the property in issue under the principles of

constructive trust, which has been recognized and recently reaffirmed by the Second Circuit as constituting a sufficient basis to confer standing to assert a claim to property sought to be forfeited. Accordingly, although Claimant need not establish the merits of his claim at this juncture, he has more than sufficiently satisfied the minimal showing necessary to establish standing in a civil forfeiture case. The government's motion to dismiss must therefore be denied.

A. Claimant Has Article III Standing

Plaintiff's motion notes that establishing standing "is a threshold issue" that "rests with the claimant", and that "claimants must have both standing under the statute or statutes governing their claims and standing under Article III of the Constitution . . .." Gov. Mem. at 7 (citations omitted). The government fails to explain, however, exactly what kind of showing will satisfy this onerous-sounding two-part burden.

Claimant submits that the government's failure to address the specifics of this burden is no accident. Neither burden is difficult to satisfy. With regard to constitutional standing, it is well-established that, "[a]t the initial stage of intervention, the requirements for a claimant to demonstrate constitutional standing are very forgiving. In general, any colorable claim to the defendant property suffices." *United States v. One-Sixth Share of James J. Bulger in All Present and Future Proceeds of Mass Millions*, 326 F.3d 36, 41 (1st Cir. 2003) (citations omitted); *see United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1013 (8th Cir. 2003) (Article III standing burden in "[i]n a forfeiture case . . . is not rigorous"); *see also United States v. One 1998 Mercury Sable*, 122 Fed. Appx. 760 (5th Cir. 2004) ("only 'owners' have standing to contest a forfeiture, but that term should be broadly construed to include any person with a recognizable

legal or equitable interest in the property seized") (quoting *United States v. $38,570 U.S. Currency*, 950 F.2d 1108, 1111-12 (5th Cir. 1992) (internal quotations omitted)).

Article III standing merely asks whether the claimant has shown a "facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement." *Torres v. $36,256.80 United States Currency*, 25 F.3d 1154, 1158 (2d Cir. 1994). It "requires only that a claimant allege, *inter alia*, a personal stake in the outcome of the controversy, *i.e.*, an actual or threatened injury." *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491 (6th Cir. 1998). The purpose of the "personal stake in the outcome" requirement is to "assure that concrete adverseness which sharpens the presentation of issues upon which the court depends . . .." *United States v. United States Currency, $81,000.00*, 189 F.3d 28, 34 (1st Cir. 1999). A claimant "need not prove its interest is superior to the Government's interest to have a stake in the outcome of the forfeiture proceedings. *United States v. Premises Known as 7725 United Ave. North, Brooklyn Park, Minn.*, 294 F.3d 954, 957 (8th Cir. 2002).

Thus, "while ownership and possession generally may provide evidence of standing, it is injury to the party seeking standing that remains the ultimate focus." *United States v. Cambio Exacto, S.A.*, 166 F.3d 522, 527 (2d Cir. 1999). As a result, "[t]he claimant need only show a colorable interest in the property, redressable, at least in part, by a return of the property." *United States v. 7725 United Ave. N.*, 294 F.3d 954, 957 (8th Cir. 2002); *see United States v. One-Sixth Share of James J. Bulger,* 326 F.3d at 41 ("Courts generally do not deny standing to a claimant who is either the colorable owner of the *res* or who has any colorable possessory interest in it") (quoting *United States v. United States Currency, $81,000.00*, 189 F.3d at 35).

As the United States Supreme Court has explained, the standing inquiry is also informed

by "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (quoting *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)); *see Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 129 (2d Cir.), *cert. denied*, 540 U.S. 1012 (2003) (same).

In the forfeiture context, as the Second Circuit and other Courts of Appeals have recognized, "[t]he legislative history of the forfeiture law indicates that a rather expansive 'zone of interests' is protected by the innocent owner provision." *Torres v. $36,256.80 U.S. Currency*, 25 F.3d at 1157 (citing Joint Explanatory Statement of Titles II and III, 95th Cong., 2d Sess. (1978) (innocent owner provision to "broadly interpreted"), *reprinted in* 1978 U.S. Cong. & Cong. Admin. News, 9518, 9522); *United States v. 5 S 351 Tuthill Road, Naperville, Ill.*, 233 F.3d 1017, 1023 (7th Cir. 2000) (same); *United States v. U.S. Currency $81,000*, 189 F.3d at 34-35 (same).

Further, at least one court has noted that the standing requirements should be even more broadly interpreted after the enactment of the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), which "recognized the potentially draconian reach of the civil forfeiture laws" and took numerous steps to alleviate the harshness of those laws, including increasing the government's burden of proving the connection between the property and the offense, and enacting specialized provisions awarding successful claimants 'market rate' attorneys' fees and pre- and post-judgment interest. *See United States v. 5 S 351 Tuthill Road*, 233 F.3d at 1023 ("In light of the other branches' calls for rational application of the useful tool of civil forfeiture, we think it particularly imprudent to adopt without a specific reason a [standing] test that appears to

increase the harshness of the forfeiture remedy. So we will hew to the traditional 'actual stake in the outcome' test in analyzing whether [a claimant] has standing to challenge the government in this case. The facts suggest that he does have a sufficient interest in the land to give him a actual stake in the outcome of this dispute, even though he may not own, dominate or control the land").

Claimant "claims an ownership interest in" $58,917.90 seized from the possession of Full Tilt Poker and in $36,531.73 seized from the possession of Absolute Poker – a total of $95,449.63. If Claimant "indeed owns [$95,449.63] of the funds, he will suffer a palpable injury – deprivation of the [$95,449.63] – as a direct result of what he alleges would be an illegal forfeiture." *United States v. $421,090.00 in United States Currency*, 2011 WL 3235632 (E.D.N.Y. July 27, 2011) (citing *Mercado v. United States Customs Service*, 873 F.2d 641, 644-45 (2d Cir. 1989)). That "palpable injury", "redressable, at least in part, by the return of the funds", is more than sufficient to establish Claimant's Article III standing to maintain his claim to the property in issue. *United States v. 7725 United Ave. N.*, 294 F.3d at 957.

Accordingly, Claimant has Article III standing to proceed with his claim at this early stage of the proceedings.

B. <u>Claimant Has Statutory Standing</u>

Statutory standing is yet another litmus test that is, in reality, far less onerous than it sounds – even less 'rigorous', and far more straightforward, than Article III standing. Statutory standing simply "requires the Claimant to comply with certain procedural requirements." *United States v. Premises and Real Property at 4492 South Livonia Road, Livonia, New York*, 889 F.2d

1258, 1262 (2d Cir. 1989), *reh'g denied*, 897 F.2d 659 (1990).

As explained in greater detail by the Court of Appeals for the Third Circuit:

> The statutory standing procedures with which a forfeiture claimant must comply are set forth in [what is now Rule G of the Supplemental Rules], and involve the timely filing of a verified claim. The purpose of statutory standing is to force claimants 'to come forward as quickly as possible after the initiation of forfeiture proceedings, so that the court may hear all interested parties and resolve the dispute without delay', and to minimize the danger of false claims by requiring claims to be verified or solemnly affirmed.

United States v. $8,221,877.16 in United States Currency, 330 F.3d 141, 150 n.9 (3d Cir. 2003) (citing *United States v. Various Computers and Computer Equipment*, 82 F.3d 582, 589 (3d Cir.), *cert. denied sub nom., Lundis v. United States,* 519 U.S. 973 (1996).

Both the procedural requirements of statutory standing and the underlying purposes of those requirements are more than satisfied here. It is undisputed that Mr. Webb's claim was timely filed, properly sworn to and verified, and that the claim complies with the formal requirements of Rule G of the Supplemental Rules. Further, although the government challenges Claimant's legal standing, it does not challenge the veracity of his claim – *i.e.*, that in the more than $50 million seized from the defendants was Mr. Webb's $95,449.63. Nor does the government challenge the legitimacy of the source or purpose of those funds or Mr. Webb's status as an innocent owner under 18 U.S.C. § 983(d).

Thus, the government does not contest the factual validity of Mr. Webb's claim. Rather, its sole argument is the purely legal contention that Mr. Webb's ownership interest in the funds is insufficient to confer standing. However, it is undisputed that Mr. Webb came forward "quickly" and, like this Court, wants to "resolve the dispute without delay." Mr. Webb has been diligent, honest and thorough in asserting his claim to the funds. Accordingly, Claimant more than meets

both the letter and the spirit of the statutory standing requirements associated with the assertion of a claim to property in a civil forfeiture case.

As Claimant has both Article III and statutory standing, the government's motion to strike his claim should be denied. Further reasons for denying the government's motion are set forth below.

C. <u>The Equities Support Claimant's Standing</u>

The equities also strongly support the exercise of the Court's jurisdiction over Mr. Webb's claim. There is little harm to the government if Claimant is permitted to proceed with his claim, and substantial harm to the Claimant if his claim is dismissed. If his claim is dismissed, Claimant will be deprived of his day in Court to be heard on the validity of his claim, a particularly repugnant result where, as here, there is no dispute that he has alleged "a distinct and palpable injury to himself, fairly traceable to the 'putatively illegal conduct of the defendant.'" *United States v. United States Currency, $81,000*, 189 F.3d at 34 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979); *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *see United States v. $515,060.42 in United States Currency*, 152 F.3d 491, 499 (6th Cir. 1998) (where there is no dispute that the Claimant "had some involvement with" the seized property, the claim should be heard on the merits) (citing *United States v. 3340 Stallcup*, 794 F. Supp. 626, 633 (N.D. Tex. 1992)).

Conversely, there is little harm to the government if Claimant is permitted to pursue his claim. First, Claimant is seeking the return of only about $95,000 from the more than $50 *million* the government already has in its possession. Second, Mr. Webb is the only person, other

than a named defendant, to file a claim for the return of his funds. Third, if Claimant is permitted to pursue his claim, "the government is always free . . . to challenge a claimant's factual allegations, develop information through interrogatories, and flush out would-be claimants with no real interest in a defendant property." *United States v. $515,060.42 in United States Currency*, 152 F.3d 491, 499 (6th Cir. 1998). Thus, if discovery does not bear out Claimant's claim to the funds in issue, the government is free to seek dismissal at that time on a motion for summary judgment.

The government apparently believes it can knock out Mr. Webb's claim for lack of standing because there are many cases dismissing claims on that ground. That does not make that case law applicable here. The government attempts to take advantage of general principles of prudential limitations on federal jurisdiction, appealing to the Court's 'gatekeeper' function. However, the courts have also recognized that a dismissal for lack of standing can present an 'easy way out' of considering a potentially valid claim on its merits, a temptation that more and more courts are resisting with greater frequency in recent decisions, particularly after CAFRA. *See*, *e.g.*, *United States v. $421,090.00 in United States Currency*, 2011 WL 3235632, at *5 (E.D.N.Y. July 27, 2011) (Gleeson, J.) ("The government disregards 'that what is adjudicated in a judicial civil forfeiture proceeding is the *government*'s right to the property, not the claimant's.' Standing is a preliminary question, used to determine only whether a claimant has a personal stake in the forfeiture proceeding such that he is a proper party to challenge the government's right to the property") (quoting *United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 77 (2d Cir. 2002) (emphasis in original)); *see Raines v. Byrd*, 521 U.S. 811, 818-19 (1997) ("The standing inquiry focuses on whether the plaintiff is the proper party to bring this

suit" which turns on whether the plaintiff has alleged "*personal injury* fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief") (emphasis in original) (*cited in United States v. $421,090.00 in United States Currency*, 2011 WL 3235632, at *5).

As the Court of Appeals for the Sixth Circuit noted:

> Standing as a constitutional and common law doctrine should not be used as an easy substitute for a decision on the merits or, as is so often the case, a way to manipulate and dismiss a case because of the weakness of the underlying cause of action. In the Supreme Court's language, standing requires only a 'personal stake in the outcome . . . to assure that concrete adverseness which sharpens the presentation of issues' in a judicial setting, and 'some direct injury . . . both real and immediate, nor conjectural or hypothetical.' Violations of common law rights protected by the common law of property, contract, torts and restitution are sufficient for standing purposes.

United States v. Real Property, All Furnishings Known as Bridwell's Grocery, 195 F.3d 819, 821 (6th Cir. 1999) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962) and *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)). Certainly, Claimant's "common law rights" have been violated here.

Thus, the balance of equities strongly favors denial of the government's motion.

D. <u>Claimant Has an Interest in Specific Property</u>

The government takes the position that, even if Claimant satisfies the "stake in the outcome" test for Article III standing and has complied with the procedures necessary to establish statutory standing, his claim should still be stricken because he is a mere 'general creditor' of the defendants, allegedly lacking an interest in any specific property sought to be forfeited. Although the government cites a legion of cases supporting this proposition, none involve facts remotely

similar to the facts here and are simply inapposite to this case.[1]

While the government's argument on this issue is not entirely clear, the upshot appears to be that where the government seizes a bank account in the name of a criminal defendant, and a claimant asserts that some of the funds in fact belong to the claimant, not the defendant, the claimant is a mere general creditor of the defendant, and has no interest in any specific property subject to forfeiture.[2] The government combines this contention with an assertion that Claimant

---

[1]Interestingly, although the government cites numerous cases for the proposition that a general creditor lacks standing to prosecute a civil forfeiture claim as an innocent owner, the government omits the *statute* that codified that case law with the enactment of CAFRA in 2000. Perhaps this odd omission is due to the fact that if that provision is considered *in the context* of the statute, it becomes clear that Congress did not intend to encompass defrauded account holders like the Claimant herein within the prudential jurisdictional limitations governing the assertion of third party claims in civil forfeiture proceedings:

> [T]he term 'owner' . . . does not include –
>
> (i) a person with only a general unsecured interest in, or claim against, the property or estate of another;
>
> (ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or
>
> (iii) a nominee who exercises no dominion or control over the property.

18 U.S.C. § 983 (d)(6)(B)(i)-(iii).

[2]The government further confuses its arguments by repeatedly citing a non-forfeiture case – *Peoples Westchester Sav. Bank v. FDIC*, 961 F.2d 327, 330 (2d Cir. 1992) – which addresses the completely unrelated proposition that an *account holder* is nothing more than a general creditor of a bank holding funds in an account in his own name. See Gov. Mem. at 10, 11; see also *id.* at 11 (citing a second non-forfeiture case, *Swan Brewery Co., Ltd. v. U.S. Trust Co. Of New York*, 832 F. Supp. 714, 718 (S.D.N.Y. 1993), as well as a banking law treatise).

Certainly all of the *forfeiture* cases cited by the government acknowledge that the person *in whose name the account is held* has standing to challenge its forfeiture. Even more misleading is the fact that the courts have *rejected* the principle set forth in *Peoples Westchester Sav. Bank* and its ilk in the forfeiture context. *See*, *e.g., United States v. $4,224,958.57*, 392 F.3d 1002, 1005 (9th Cir. 2004) ("That a bank depositor is only a general creditor is meaningful when the bank holding the account is insolvent and there is not enough to go around. . . . But that is not the situation here. The money from the . . . accounts has already been given over to the control of

does not have "any secured interest in the funds he seeks." Gov. Mem. at 10.

The secured interest contention is quickly dealt with. While secured creditors certainly have standing, neither Article III nor Rule G limit standing to claimants with secured interests in the property sought to be forfeited, as the previous discussions should make clear. The only requirement for being an "owner" is to be "a person with an ownership interest in the specific property sought to be forfeited . . .." 18 U.S.C. § 983(d)(6).

The government's 'general creditor' argument is equally unavailing under these facts. As the government concedes, an account holder "has the power to exercise dominion and control over the funds in his account." Gov. Mem. at 11. The government acknowledges that the defendants represented to Claimant that his funds were kept "in segregated accounts" and "would be available for withdrawal . . . at all times." Amended Complaint ¶ 64. Indeed, the Full Tilt Poker website refers to "your Full Tilt Poker account" and clearly conveys to customers that they have the trappings of ownership, dominion and control over 'their' funds, also using banking phrases such as "deposit" and "credited to your . . . account."

Thus, defendants represented, and Claimant reasonably believed, that Claimant's accounts with the defendants were just that – *his* accounts. It was, in essence, no different than a PayPal account or an account with an online bank. The account was in his name, and Claimant could make deposits and withdrawals at will. If the government's argument that the only 'real' banking was that being done 'behind the scenes' between the defendants and the financial institutions with whom they dealt, then all of the PayPal and online bank accounts would have to

---

the United States government. The issue here is whether the Appellants have a claim against these . . . funds. From the perspective, the Appellants are far from being depositors in a failed bank of general unsecured creditors").

be dismissed as illusory interests in a third party's property. That, however, is not the way business is conducted or how such transactions are handled or perceived. Further, if the government's contentions were correct, a claimant who was defrauded by a lawyer who misused his retainer funds in an IOLA account would lack standing to pursue a claim to those funds simply because the client's name was not on the bank account.

The government cites no case with analogous facts where a court has dismissed a claimant's claim for lack of standing. While it is the government's *contention* that Mr. Webb should be regarded no differently than a general creditor of a forfeiture defendant, that does not make it so. See Gov. Mem. at 13 ("In *analogous* circumstances, courts have dismissed claims to funds in a bank account asserted by persons other than the account holder . . .") (emphasis added). Further, it is also true that one can point to other equally 'analogous' circumstances where the claimant was deemed to have established standing to assert a claim to a portion of seized funds without being the titular owner or a secured creditor. *See, e.g.*, *United States v. $421,090.00 in United States Currency*, 2011 WL 3235632, at *5 (E.D.N.Y. July 27, 2011).

Equally important to consider is that the primary purpose of the general creditor limitation is a practical one, to ensure that "the court litigating the forfeiture issue [is not] converted into a bankruptcy court [that] would not be able to grant forfeiture to the government until it determined that no general creditor would be able to satisfy its claim against the defendant." *United States v. One-Sixth Share Of James J. Bulger In All Present And Future Proceeds Of Mass Millions Lottery Ticket M246233*, 326 F.3d at 44 (citations and internal quotations omitted). Here, there is no such issue because the time for filing a claim has long closed and Mr. Webb is the *only* customer of any of the defendants to have filed a claim to

property entrusted to the defendants that was seized by the government.

Accordingly, Claimant's interest in the property is sufficiently particularized to support standing, and the government's motion should be denied.

E. Claimant also has an Equitable Interest in the Seized Property

Claimant also has an equitable interest in the property in issue sufficient to support a finding of standing under New York law under the doctrine of constructive trust. Claimant established above that defendants promised, and Claimant reasonably expected, that he was opening an actual "account" with the defendants over which he would exercise all of the trappings of ownership, including dominion and control. Although the Amended Complaint acknowledges these facts, the government nevertheless appears to contend that these facts are irrelevant because what was 'really' happening was that defendants were commingling Claimant's funds, not keeping them segregated as expressly promised, thereby causing the funds to lose their status as Claimant's specific property.

To the extent that the acts of the defendants caused Claimant's funds to no longer be discrete property, however, such acts were committed in violation of defendants' express promises to the Claimant. Essentially, the transactions conducted by the Claimant on the defendants' websites amounted to bailments of Claimant's funds being entrusted to defendants for a fee, and it is black letter law in New York that a paid bailee has a fiduciary duty to protect the funds entrusted to him. *See*, *e.g.*, *Equity Corp. v. Groves*, 294 N.Y. 8, 20 (1945); *People ex rel. Rosenberg v. Hanley*, 119 Misc. 163, 196 N.Y.S. 194 (Sup. Ct. 1922).

In failing to keep Claimant's funds segregated and utilizing those funds for their own

benefit and in violation of the law, thereby subjecting those funds to forfeiture, all to the injury of the Claimant, the defendants acquired Claimants' property "in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest. The elements of a constructive trust are: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment." *Osborne v. Tooker*, 36 A.D.3d 778, 828 N.Y.S.2d 492 (2d Dep't 2007) (citing *Sharp v. Kosmalski*, 40 N.Y.2d 119, 386 N.Y.S.2d 72 (1976)).

Claimant has established that he entrusted funds to the defendants, who agreed to segregate them and maintain them for the sole use and benefit of the Claimant. It is undisputed that defendants failed to do so, and became unjustly unenriched as a result. Thus, the elements of constructive trust are sufficiently alleged to confer standing on Claimant to assert an equitable interest in the defendant property.

An interest in property obtained by the recognition of a constructive trust is sufficiently "specific" to establish standing in a forfeiture case. The Second Circuit has recently affirmed its longstanding principle that the remedy of constructive trust is just as available in forfeiture cases as in other proceedings:

> [Defendant] misreads *United States v. Schwimmer* as instructing that 'district courts may not impose constructive trusts in forfeiture to the same degree that they may do so in non-forfeiture proceedings.' In fact, *Schwimmer* stands for the proposition that district courts may not 'relax conceptions of property rights' in identifying third-party interest in forfeiture property under the RICO forfeiture provisions. Moreover, [defendant's] reading of *Schwimmer* is at odds with [numerous decisions of this Court].
>
> Consequently, we see no 'clear reluctance to impose constructive trusts in forfeiture' in the decisions of this court . . . ..

United States v. Lacoff, 2011 WL 3191043, at *1 (2d Cir. July 28, 2011) (citing *Willis Mgmt. (Vt.), Ltd. v. United States*, 652 F.3d 236 (2d Cir. 2011) (recognizing applicability of constructive

trust in forfeiture proceedings), *United States v. Peoples Benefit Life Ins. Co.*, 271 F.3d 411, 416 (2d Cir. 2001); *United States v. Coluccio*, 51 F.3d 337, 340 (2d Cir. 1995) (same); *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154, 1158-59 (2d Cir. 1994) (same)); *see United States v. Schwimmer*, 968 F.2d 1570, 1584 (2d Cir. 1992).

Thus, Claimant's standing to prosecute his claim to a minimal portion of the defendant property in this civil forfeiture proceeding is further confirmed by the equitable interest in that property conferred by the New York doctrine of constructive trust.

POINT II

THE GOVERNMENT'S MOTION TO DISMISS CLAIMANT'S COUNTERCLAIM FOR FEES AND INTEREST SHOULD BE DENIED

The government also contends that Claimant's counterclaim seeking attorney's fees, costs and interest under CAFRA or the Equal Access to Justice Act ("EAJA") should be dismissed, claiming that it is either (1) procedurally defective; (2) barred by sovereign immunity, or (3) redundant. Presumably, the government is making these seemingly superfluous contentions to ensure that, if Claimant's claim is dismissed, he will not somehow be permitted to 'hang around' solely on the basis of his counterclaim. It is the government's contentions, however, that are, at best, redundant and, at worst, misleading and incorrect.

A. Claimant's Counterclaim is Procedurally Proper

The government asserts that as a blanket rule, a claimant in a civil forfeiture case can never validly assert a counterclaim against the government because the claimant is not the

defendant and only a defendant may assert a counterclaim. Whatever the validity of this dubious proposition, however, the two nearly 20-year-old Illinois cases cited by the government do not come close to establishing it. In *United States v. $10,000.00 in U.S. Funds*, 863 F. Supp. 812 (S. D. Ill. 1994), *aff'd*, 52 F.3d 329 (7th Cir. 1995), the 'claimant' did not timely file his verified claim, and thus lacked statutory standing to even appear in the proceeding. Further, his 'counterclaim' was an independent claim for damages for an illegal search and seizure, which fell under the Federal Tort Claims Act, and the claimant had not satisfied any of that statute's many procedural requirements. In *United States v. "Lady with a Parrot" by Nahl*, 1992 WL 293287 (N.D. Ill. Oct. 13, 1992), the claimant was an apparently somewhat deranged *pro se* litigant who apparently never filed *any* claim – late, defective or otherwise – and whose lengthy submission was "so plainly defective in law" with "impertinent or scandalous matter" that the court declined "to catalogue all the other deficiencies" of the submission. Further, that submission was apparently only the latest in a serious of unacceptable submissions, yet the court still contemplated permitting the claimant to submit an acceptable pleading in the future. *See id.* ("In light of the nature of what has been offered up by [claimant] before now, any attempted repleading on his part must be the subject of a duly notice motion for leave to file"). In short, these two oddball cases do not come close to establishing the government's wished-for rule of law, and have nothing to do with this case.

The government's contention that only a defendant can assert a counterclaim is belied by the entire structure of *in rem* proceedings under Rule G of the Supplemental Rules. A claimant may not technically be a defendant, but his posture in the proceeding is procedurally indistinguishable from that of a defendant, with the positive exception that, unlike a defendant,

he is not accused of any criminal activity. The government, whether it likes it or not, is merely a plaintiff, not an all-powerful deity. It files a complaint against the fictional wrongdoer, the property. *See, e.g.*, *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931) ("it is the property which is proceeding against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient"). The only humans on the other side of the caption are claimants. Although these claimants are not defendants, they must do virtually the same things as a defendant once a claim is filed. For example, Rule G(5)(b) requires the claimant to file an "answer." Yet, if the government's argument is to be accepted, that would be procedurally improper, because only a defendant files an answer to a complaint. Further, the government apparently has no quarrel with a claimant asserting affirmative defenses, as it has made no mention of the affirmative defenses set forth in claimant's Verified Answer. Indeed, a responsive pleading is *required* to assert affirmative defenses as applicable. *See* Fed. R. Civ. P. 8(c). Yet, if the government's argument were correct, a claimant would not be allowed to assert affirmative defenses because he is not a defendant.

Finally, the Federal Rules of Civil Procedure permit, and in certain cases require, parties to assert counterclaims "the pleader has against an opposing party." Fed. R. Civ. P. 13. The rule does not limit the use of counterclaims to "defendants" or the assertion of them against "plaintiffs", but deliberately uses the broader term "opposing party" to permit any party to a litigation to assert a claim against any other party. A common example is a counterclaim asserted by a third party defendant against a third party plaintiff under Rule 15. Further, Rule 13 specifically states that its provisions apply to "the right to assert a counterclaim – or to claim a credit – against the United States" so long as the claim is otherwise permitted by law. Fed. R.

Civ. P. 13(d). In sum, the government's procedural argument is without merit.

B. The Government Has Waived Sovereign Immunity to Claimant's Counterclaim

The government's second argument – that the government has not waived sovereign immunity to permit the assertion of counterclaims in civil forfeiture matters – is equally specious and unsupported. The cases cited by the government merely stand for the proposition that, if the government has not *already* waived its sovereign immunity with respect to a certain category of claim, the mere commencement of a civil forfeiture proceeding does not, in itself, constitute such a waiver. Significantly, the cases cited by the government involve independent claims not asserted under the forfeiture laws, such as the Tucker Act and the Federal Tort Claims Act. Thus, those cases are inapposite here, as Claimant's counterclaim is asserted solely under a statute that specifically waives sovereign immunity in forfeiture cases – 28 U.S.C. § 2465 – and a statute that has been repeatedly applied to forfeiture cases, 28 U.S.C. § 2412. It is absurd for the government to argue that it has not waived immunity from claims for attorneys' fees and interest under CAFRA and EAJA in light of the explicit language of these statutes and the legion of cases decided thereunder. The government *has* waived immunity from claims for fees and interest asserted by a successful claimant in a forfeiture proceeding. The government's argument is therefore without merit.

C. Claimant's Counterclaim is Appropriately Asserted

The government asserts that there is no legal basis for Claimant to assert a counterclaim for fees under CAFRA because 28 U.S.C. § 2465 does not explicitly authorize it and case law

requires the dismissal of such a counterclaim as "superfluous." The government further contends that Claimant cannot assert claims for fees under *both* CAFRA and EAJA and that, in any event, counterclaims are not authorized by the civil forfeiture statute, 18 U.S.C. § 983, or Rule G of the Supplemental Rules. The government's assertions are without merit.

First, while neither CAFRA nor the Supplemental Rules explicitly *authorize* the assertion of counterclaims, for fees or otherwise, neither do they specifically *prohibit* it. In fact, the Supplemental Rules are explicitly intended to be *supplemental to* the Federal Rules, which *do* authorize the assertion of counterclaims. *See* Supplemental Rule A(2) ("The Federal Rules of Civil Procedure also apply to [*in rem* forfeiture] proceedings except to the extent that they are inconsistent with these Supplemental Rules"). Similarly, CAFRA's procedural provisions were enacted to supplement the Supplemental Rules *See*, *e.g.*, 18 U.S.C. § 983(a)(3)(A), (a)(4)(A), (f)(7)(A)(ii).

Further, the government's reliance on *United States v. 662 Boxes of Ephedrine*, 590 F. Supp. 2d 703 (D.N.J. 2008), is misplaced, if not misleading. It is far from accurate to summarize that decision as holding that a claimant cannot assert a counterclaim for attorney's fees under CAFRA in a civil forfeiture case because such a claim is redundant. The vast majority of the decision addresses the two *primary* counterclaims asserted by the claimant – a claim for 'damages' purportedly asserted pursuant to the CAFRA fees provision, and a claim for declaratory relief under the Administrative Procedure Act relating to the underlying regulatory issues regarding prescription drugs that the claimant had allegedly violated. The court properly concluded that the first counterclaim was specifically barred by CAFRA, and the second claim was duplicative of claimant's defense that the government's regulation of the drugs was arbitrary

and capricious. In the decision's final paragraph, the court also dismissed the claimant's counterclaim for CAFRA fees on the ground that the claim could be asserted later by motion if the claimant was successful. The main thrust of the decision, however, was to make it clear that CAFRA's fees provision does not authorize counterclaims for damages and to limit the issues necessary to resolve the forfeiture case. The at worst harmless fees counterclaims under CAFRA were essentially swept up in the net with the problem counterclaims.

Here, in contrast, Claimant is not attempting to recover damages under CAFRA or assert claims against the government that will protract the forfeiture litigation or, indeed, affect it in any way. As the district court noted in *United States v. 662 Boxes of Ephedrine*, a claim for CAFRA fees will not even be considered unless and until the claimant prevails on his claim. Thus, it will do not harm. Conversely, it is a healthy reminder to the government that there is a price to pay for bringing baseless civil forfeiture claims, which is precisely why Congress enacted the statute. Finally, while Claimant acknowledges that CAFRA provides the primary source for successful claimants to recover fees in civil forfeiture cases, and of course does not seek fees under *both* CAFRA and EAJA, there is also no harm in asserting an alternative claim for fees under EAJA.

Accordingly, Claimant's claim and counterclaim should be preserved and the government's motion should be denied in all respects.

CONCLUSION

For all the foregoing reasons, Claimant Adam Webb respectfully requests that plaintiff's motion to strike Claimant's claim and dismiss Claimant's counterclaim be denied in its entirety, with costs, together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
October 17, 2011

Respectfully submitted,

LAW OFFICES OF STEVEN L. KESSLER

By: Steven L. Kessler

Steven L. Kessler
Attorneys for Claimant Adam Webb
122 East 42nd Street, Suite 606
New York, N.Y. 10168-0699
(212) 661-1500
stevenkessler@msn.com

Eric M. Wagner, Esq.
On the Memorandum