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.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE GOVERNMENT'S MOTION TO STRIKE THE CLAIM AND DISMISS THE COUNTER CLAIM OF ADAM WEBB

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PRELIMINARY STATEMENT

The Government respectfully submits this reply to Claimant Adam Webb's ("Claimant" or "Webb") response to the Government's Motion to Strike his Claim and Dismiss his Counter Claim pursuant to Rule 12(b) of the Federal Rules of Civil Procedure and Rule G(8)(c) of the Supplemental Rules for Admiralty and Maritime Claims. Under well-settled law, the general, unsecured debt that Webb contends is owed to him by certain poker companies is not does not rise to a legal interest in specific property subject to forfeiture and does not confer constitutional standing on Webb to pursue a claim in this matter. While Webb may seek to take action against the poker companies, or, to the extent applicable, seek relief through the Attorney General's discretionary authority to provide forfeited funds to crime victims through the petition and remission process, he simply lacks constitutional standing to assert a claim in this action. Accordingly, his claim should be stricken.

In his opposition to the motion to dismiss, Webb asserts a variety of new theories, not referenced in either his claim or answer, including a bailment and a constructive trust. Mr. Webb has put absolutely no facts before the Court supporting either theory, either in his claim or through an affidavit. But even taking the unsupported factual assertions in his opposition brief at face value, these arguments fail as a matter of law. Webb's assertions still show nothing more than a debt allegedly

owed to him by Full Tilt Poker and Absolute Poker, rather than any legal interest in the specific property sought to be forfeited.

Finally, even if Webb did have standing to file a claim in this matter, his counter claim has no basis in law and is barred by sovereign immunity.

BACKGROUND

On or about July 15, 2011, Webb filed a claim (the "Claim") (Docket Entry 37), asserting that Webb has "an interest in the defendant funds as the owner of $58,917.90 in the possession of Full Tilt Poker and of $36,531.73 in the possession of Absolute Poker." The Claim does not identify any specific accounts or specific funds in which Webb allegedly has an ownership interest. Nor does the Claim identify whether the amounts allegedly owed represent the value of funds that he transferred to the poker companies (through third-party payment processors), the value of winnings from online gambling transactions, promotions or other credits to his online gambling accounts, or all of the above.

On or about August 4, 2011, Webb filed an answer to the Complaint, which included allegations that he labels as affirmative defenses and a counter claim for costs, pre- and post-judgment interest, and attorneys' fees. (Docket Entry 41). On or about October 3, 2011, the Government moved to strike

Webb's claim on the ground that he lacks constitutional standing to assert a claim and to dismiss his counter claim as barred by sovereign immunity and lacking in legal basis. On or about October 17, 2011, Webb filed an opposition to the Government's motion to strike (the "Webb Br.").

DISCUSSION

I. WEBB'S ALLEGATIONS ARE INSUFFICIENT TO ESTABLISH STANDING TO FILE A CLAIM

A. The Law

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).

Webb cites 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, 41 (1st Cir. 2003) (hereafter "One-Sixth Share"), among other cases, for the proposition that courts apply a "very forgiving" standard in assessing whether facts sufficient to demonstrate standing have been alleged. As One-Sixth Share demonstrates, however, this standard is nevertheless real and enforced by Courts in order to ensure that they consider only controversies properly before them. In One-Sixth Share, for example, the First Circuit in fact

affirmed the district court's order striking the claims of various claimants, including the claims of two claimants on the grounds that they were, at best, unsecured general creditors of Whitey Bulger. One Sixth Share, 326 F.3d at 44.

Webb also relies on cases discussing the role of economic injury in assessing constitutional standing, in connection with the standing requirement that the alleged injury can be "redressed by the requested relief." United States v. Cambio Exacto, S.A., 166 F.3d 522, 526 (2d Cir. 1999). But Webb misapplies the economic injury inquiry. The question is not whether actions of the owner of property subject to forfeiture have caused economic injury to the putative claimant; the question is whether the claimant has a legal interest in property sought to be forfeited. In Cambio Exacto, for example, the court noted that the claimant at issue did not allege an injury that would be redressed by "a successful challenge to the forfeiture of the defendants funds, which would result in their return to [another company], not [the claimant]." Id. at 529. Similarly, in this case, absent a forfeiture judgment the subject property would remain under the control of the poker companies and payment processors at issue, not Webb.

In reality, recognizing standing for alleged unsecured creditors such as Webb would essentially transform this forfeiture proceeding into something akin to a bankruptcy or

liquidation matter in which assets of certain companies are transferred to creditors of those entities. As Webb himself concedes, this would be an improper subversion of forfeiture actions. Webb Br. at 16 (citing One-Sixth Share, 326 F.3d at 44).[1]

B. Claimant Is At Best A General Creditor Who Lacks Standing

Under well-established legal principles, Webb's allegations are insufficient to demonstrate standing in this matter. By Webb's own allegations, Full Tilt Poker and Absolute Poker, and the deposit institutions they utilize, took possession of the funds he refers to in his Claim, and the Claimant does not allege that he retained any security interest in money he transferred to Full Tilt Poker and Absolute Poker. Even accepting the factual assertions in Webb's opposition as true, any ownership interest Webb had in any particular funds that he transferred to the poker companies was lost, as a matter of law, when he caused the funds to be withdrawn from his account by a payment processor, deposited into processor accounts, and then possibly transferred to overseas accounts belonging to Full Tilt Poker and Absolute Poker.

[1] See, e.g., Docket Entry 77 (claim of putative class of U.S. players).

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

Webb seeks to avoid this well-settled line of cases by relying on allegations in the Amended Complaint to argue that the poker companies at issue functioned like banks and that Webb essentially had "bank accounts" at the poker companies in his

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

name. Webb argues that he therefore has an ownership interest in those "accounts."[3]

Webb's argument fails on several levels. First, his argument that Full Tilt Poker represented to players that their funds were each kept in segregated accounts *from other players' funds* is simply not accurate. Webb Br. at 3. The Amended Complaint alleges that Full Tilt Poker represented that player funds in the aggregate were kept segregated from operating funds of the company. See, e.g., Amended Complaint ¶ 5. There was no allegation that Full Tilt represented that it maintained individually segregated deposit accounts for each player.

Second, online player gambling accounts are not the legal equivalent of deposit accounts with a financial institution, and a number of courts have stricken claims by individuals who had funds or assets "on deposit" with various types of non-bank businesses. In Khan, federal law enforcement officials seized multiple bank accounts held by money remitting businesses when the owner of the money remitters was charged with money laundering. Clients would bring funds to the business and have them transferred to family members and the like overseas. Approximately 53 customers who had funds "deposited" with the businesses asserted claims to the funds in the seized accounts.

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[3] The allegations Webb relies on pertain only to Full Tilt Poker, not Absolute Poker.

Khan, 955 F. Supp. at 24-25. The Court granted the Government judgment on the pleadings and noted that the individual claimants "retained no signatory authority over the accounts nor any sort of authority that would have allowed them any power of the disposition of the funds in the accounts." Id. at 27.

Webb placed himself in the same situation in relation to the poker companies when he entrusted his funds with them. While he could make requests to the companies for the return of these funds, he had no signatory authority over the poker companies' bank accounts and surrendered any legal authority or control over those funds. As the Second Circuit explained in upholding Khan, "the appellants all are essentially unsecured creditors of the owner's seized property, and as such do not have standing to challenge the seizure." United States v. Khan, 129 F.3d 114, 1997 WL 701366, at *1 (2d Cir. Nov. 10, 1997) (table, unpublished). See also DSI Associates, LLC v. United States, 496 F.3d 175, 184 (2d Cir. 2007) (a general creditor does not possess a "legal right, title, or interest in the property that was forfeited as required for standing under § 853(n)(6)(A)"); Cambio Exacto, S.A., 166 F.3d at 529 (person to whom a money transmitter owes money lacks standing as a general creditor to contest forfeiture of money transmitter's account).[4]

[4] Webb appears to cite only one case that he describes as "analogous" to the facts at hand and as establishing that a claimant has standing to assert a claim to a portion of seized

In United States v. 47 10-Ounce Gold Bars, No. CV 03-955-MA, 2005 WL 221259 (D. Or. Jan. 28, 2005), the court also rejected standing arguments similar to ones that Webb makes in the present matter. In 47 10-Ounce Gold Bars, the court addressed the forfeiture of gold bars and other items from a company called Crowne Gold, Inc. Id. at *1. Crowne Gold was a company that enabled clients to "buy, sell, store and exchange gold and silver . . . from or to individualized Crowne Gold accounts or to merchants who accept gold as a medium of exchange." Id. (quotation omitted). "A client making a gold or silver purchase through Crowne Gold must wire the necessary funds to the Crowne Gold account [at a bank]. After the receipt of the funds has been verified, Crowne Gold will 'load' the client's account with the quantity of gold or silver purchased." Id. at *2. "The gold and silver is held by Crowne Gold at a secure facility. Crowne Gold keeps track of the quantity of physical

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funds without being the titular owner or a secured creditor. Webb Br. at 16 (citing United States v. $421,090.00 in United States Currency, No. 11-CV-00341(JG), 2011 WL 3235632, at *5 (E.D.N.Y. July 27, 2011)). That case is neither analogous or stands for the proposition that Webb asserts. In that matter, the court ruled that the individual from whom two suitcases full of cash were seized could assert a claim for those funds. $421,090.00 in United States Currency, 2011 WL 3235632, at *1-5. Webb cannot allege possession of any funds at issue, as it is uncontested he surrendered possession and control of his funds to poker companies. The case he cites does not address the standing of someone to assert a claim over funds provided to a third party and held in bank accounts of those third parties over which the putative claimant exercised no control.

gold and silver allocated to each particular client at a given storage facility. At the client's request, Crowne Gold will physically deliver the client's gold or silver holdings." Id. at *3.

Two Crowne Gold customers filed claims to seek the return of gold and other assets that they had "on account" at Crowne Gold. Citing Khan, the court determined that these claimants lacked constitutional standing to assert a claim. The court noted that the claimants "allowed Crowne Gold to maintain complete control over the gold and silver in a secure location" and that Crowne Gold's assertion that "'we know precisely the quantity of physical gold and silver in each location that is allocated to each particular client' does not create the required ownership rights over the specific seized funds." Id. at *4.

Webb puts forward many of the same arguments as the would-be claimants in 47 10-Ounce Gold Bars and to equal effect. Simply because the poker companies used the term "account" for their customers does not undo the fact that Webb surrendered possession and control of his funds to other parties, who then deposited these funds in their own bank accounts. Knowing how much money or assets were owed to particular "account holders" in context of either Crowne Gold, or the poker companies at issue, does not confer the sort of interest sufficient for standing in a forfeiture matter.

C. Claimant Has Failed To Allege An Interest in Any Specific Asset Subject To Forfeiture

Webb has failed to allege any particular accounts over which he allegedly has an ownership interest. "[A]n interest 'in' property must be an interest in a particular, specific asset, as opposed to a general interest in an entire forfeited estate or account." United States v. Ribadeneira, 105 F.3d 833, 836 (2d Cir. 1997) (per curiam) (affirming United States v. Ribadeneira, 920 F. Supp. 553, 554-55 (S.D.N.Y. 1996) (Sand, J.) (as holders of checks drawn on seized account, as opposed to security interests, claimants were unable to assert rights to a particular asset or specified funds and hence lacked standing)).

Webb asserts nothing more than the debt allegedly owed to him by Full Tilt Poker and Absolute Poker. As this Court recently held with language equally applicable to this matter:

> The petitioners do not assert a direct nexus between their loans and these seizures of hard currency. Similarly, the petitioners do not assert that their loans to [a company] had any nexus to the [bank account] that was subject to the preliminary forfeiture order. While the Court is sympathetic to the petitioners' predicament, there is no authority to support their contention that, as 'defrauded investors,' they have standing to contest the forfeiture.

United States v. Mazza-Alaluf, No. S1 07 Cr. 403 (PKC), 2011 WL 308266 (S.D.N.Y. Jan. 27, 2011).

The Claimant has made no allegations identifying the property in which he asserts an interest. He does not point to

any particular bank account of any particular entity. Instead, consistent with his position as a general creditor, he alleges only the debt he argues is owed to him.

II. THERE IS NO BASIS TO IMPOSE A CONSTRUCTIVE TRUST

Webb seeks to avoid dismissal of his Claim by asking the Court to recognize a constructive trust over the assets subject to forfeiture. Under well-settled New York law,[5] however, the requisite elements for the finding of such a trust have not been met.

Under New York law, courts should look to the following elements when deciding whether to recognize a constructive trust: "(1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer made in reliance on that promise; and (4) unjust enrichment." In re Koreag, Controle et Revision S.A., 961 F.2d 341, 352 (2d Cir.1992) (collecting cases).

Several of these elements are missing in the present case, beginning with the lack of a confidential or fiduciary relationship. It is axiomatic that "[p]urely commercial transactions do not give rise to a fiduciary relationship." Id. at 353. Webb attempts to avoid this well-settled law by asserting that transactions with the poker companies amounted to

[5] Webb seeks the imposition of a constructive trust under New York law specifically. Webb Br. at 17.

bailments, creating a fiduciary relationship with these companies. Webb Br. at 17. This argument has several flaws, the first being that Webb alleges no facts supporting a bailment. The poker companies did not undertake to hold funds transferred to them by Webb separately from other player funds or to deliver to Webb the same funds given to them by Webb. Instead, those funds were co-mingled with other player funds, and were subject to being lost to other players, just as the funds of other players were subject to being won by Webb. The online poker players surrendered not merely possession of the money they transferred to the poker companies, but also ownership of those funds. While the poker companies kept an accounting of Webb's winnings and losses and agreed to transfer funds to him upon request, they did not agree to give him back the specific property he deposited. Accordingly, the relationship is that of creditor/debtor, rather than bailor/bailee. See, e.g., New York State Assn. of Life Ins. Underwriters v. Supt. of Insurance, 37 A.D.2d 304, 325 N.Y.S.2d 172, 175-76 (N.Y. 1971).

Additionally, the poker companies were not deposit institutions. Their own funds were kept in bank accounts with financial institutions. As the Second Circuit explained in Khan when it rejected a similar argument, a bailment ends when property is delivered to another party, such as a bank. Khan, 1997 WL 701366, at *2 (citing Chilewich Partners v. M.V.

Alligator Fortune, 853 F. Supp. 744, 756 (S.D.N.Y.1994) (bailment ends when property returned to bailor or delivered to another party)).

It is also "hornbook law that before a constructive trust may be imposed, a claimant to a wrongdoer's property must trace his own property into a product in the hands of the wrongdoer." United States v. Benitez, 779 F.2d 135, 140 (2d Cir. 1985); 1 Palmer, Restitution, § 2.14 (equitable interest must be traced to identifiable property); see also United States v. Schwimmer, 968 F.2d 1570, 1583 (2d Cir. 1992) (in forfeiture proceedings, trust beneficiaries must trace property to that held in trust). As explained above, Claimant does not trace funds that he caused to be transferred to the poker companies into any particular property subject to forfeiture.

Next, "a constructive trust should not be imposed unless it is demonstrated that a legal remedy is inadequate." Bertoni v. Catucci, 117 A.D.2d 892, 498 N.Y.S.2d 902, 905 (N.Y. App. Div. 1986). In this case, Webb can bring suit against Full Tilt Poker, Absolute Poker, and any individuals or other entities he chooses under a variety of theories to collect the funds he alleges are owed to him.

Finally, the Attorney General's discretionary authority to remit forfeited funds to victims of crime should also be taken into account. While the remission process, codified at Title 21,

United States Code, Section 853(i)(1), is not an "adequate legal remedy" precluding the imposition of a constructive trust, see Willis Management (Vermont), Ltd. v. United States, 652 F.3d 236 (2d Cir. 2011); its existence nevertheless is relevant to a determination of whether there would be unjust enrichment in the absence of a constructive trust. Here, the poker companies will not be unjustly enriched, as proceeds of any illegal activity they committed is subject to forfeiture, and the remission program exists as a vehicle by which funds can be returned to any crime victims.

III. CLAIMANT'S COUNTER CLAIM SHOULD BE DISMISSED

Webb's counter claim is unauthorized by law and plainly barred by sovereign immunity. Indeed, Webb fails to cite a single case or statute authorizing counterclaims against the United States in forfeiture proceedings. Accordingly, in the event his claim is not stricken, his counter claim should nevertheless be dismissed.[6]

This court, and others, has been clear that "[i]nitiation of a forfeiture action does not constitute a waiver of sovereign immunity." United States v. All Right, Title and Interest in the Real Property and Buildings Known as 228 Blair Avenue, Bronx, New York, 821 F. Supp. 893, 899 (S.D.N.Y. 1993)

[6] Webb seems to at least implicitly acknowledge that if his claim is stricken then his counter claim would also be dismissed. Webb Br. at 19.

(citing United States v. Mitchell, 445 U.S. 535, 538 (1980)); United States v. 8,800 Pounds of Powdered Egg White, 04 Civ. 76 (RWS), 2007 WL 2955571, *7 (E.D. Mo. Oct. 5, 2007) (same); United States v. $10,000.00 in U.S. Funds, 863 F. Supp. at 816 (S.D. Il. 1994) (court barred FTCA counter claim stating "that the mere fact that the government is the plaintiff and has brought the forfeiture action does not constitute a waiver of sovereign immunity and authorize the bringing of a counterclaim").

Neither the Equal Access to Justice Act ("EAJA") nor the Civil Asset Forfeiture Reform Act ("CAFRA") provide a basis for a counter claim. In his response, Webb ignores the fact that the Second Circuit has explicitly held that "the EAJA and CAFRA are irreconcilably at odds" and that "CAFRA is exclusive of all other remedies." United States v. Khan, 497 F.3d 204, 211 (2d Cir. 2007). While CAFRA does include a provision providing for attorneys' fees and interest in cases in which a claimant is successful, see 28 U.S.C. § 2465(b)(1), this specific authorization is not a general waiver of sovereign immunity for the United States to be sued – indeed, the CAFRA provision is "exclusive." Khan, 497 F.3d at 211. Moreover, despite Webb's contention regarding the "main thrust" of United States v. 662 Boxes of Ephedrine, 590 F. Supp. 2d 703 (D.N.J. 2008), see Webb Br. at 24, that case specifically notes that counter claims for attorneys' fees and litigation costs are "superfluous because the

CAFRA specifically provides that a prevailing party may recover those expenses by post-judgment motion." 590 F. Supp. 2d at 705.

Webb's counter claim should accordingly be dismissed regardless of whether he is allowed to proceed on his claim.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court enter an order striking the claim and counter claim of Adam Webb for lack of standing and also strike his counter claim as barred by sovereign immunity and unauthorized by statute.

Dated: New York, New York
October 31, 2011

Respectfully submitted,

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