UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

Plaintiff,

8 GILCREASE LANE, QUINCY, FLORIDA 32351,

ONE CONDO LOCATED ON NORTH OCEAN BOULEVARD IN MYRTLE BEACH, SOUTH CAROLINA

and

ALL FUNDS, INCLUDING APPROXIMATELY $53 MILLION HELD ON DEPOSIT AT BANK OF AMERICA ACCOUNTS IN THE NAMES OF (1) THOMAS A. BOWDOIN, JR., SOLE PROPRIETOR, DBA ADSURFDAILY, (2) CLARENCE BUSBY, JR. AND DAWN STOWERS, DBA GOLDEN PANDA AD BUILDER, AND (3) GOLDEN PANDA AD BUILDER,

Defendants, and

ADSURFDAILY, INC., THOMAS A. BOWDOIN, JR., AND BOWDOIN HARRIS ENTERPRISES, INC.,

Claimants.

Case: 1:08-cv-01345

Hon. Rosemary M. Collyer

**EMERGENCY MOTION FOR RETURN OF SEIZED FUNDS TO SAVE BUSINESS AND JOBS WITH OVERSIGHT AND MONITORING AND/OR FOR EVIDENTIARY HEARING, AND MOTION TO DISMISS AND SUPPORTING POINTS OF LAW AND AUTHORITIES**

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Claimant, AdSurfDaily, Inc. ("ASD") hereby submits this Emergency Motion for Return of Seized Funds to Save Business and Jobs With Oversight and Monitoring and/or For Evidentiary Hearing, and Motion to Dismiss, and says:[1]

## I. INTRODUCTION

ASD needs emergency relief. Without it, the company will soon collapse completely. Its member base, its most important asset, will disappear, and its employees will be out of work.

The United States (the "Government") has rushed in and seized ASD's bank accounts (10 of them, with total balances of approximately $53 million) and has filed this *in rem* civil forfeiture action. It has also seized a residential home and condominium apartment, but ASD's survival, and the economic consequences to its employees, do not turn on the seizure of these two real properties.[2]

In a matter of a few days, ASD has gone from a vibrant internet advertising business with approximately 100,000 members to a hollow shell without a working office and without the means to resume its business. It has been left a massive number of frustrated and concerned members, more than 3,000 of whom have sent supporting emails to an email address established by the undersigned law firm. It has also been unable to pay its bills (to creditors, such as its landlord) and is hurtling down into a steep financial tailspin. To provide one concrete example, on August 14, 2008, ASD's hosting company threatened to shut down the company's servers

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[1] This motion is, in many respects, similar to a motion for release of property pursuant to 18 USC § 983 (f). But it is not *identical* to a motion under that statute, especially because ASD is proposing a release of funds pursuant to a compliance program with oversight and monitoring. In an abundance of caution, ASD is also designating this motion as one for immediate release of property under 18 USC § 983(f).

[2] The Government also has taken the presumptively punitive step of executing warrants which resulted in the wholesale seizure of ASD's basic infrastructure – more than 75 computers, several monitors and printers, and critical business and financial records. The Government has informally advised undersigned counsel that it will be amending this forfeiture lawsuit to add the computers – but that it is likely willing to permit the computers to be returned with an agreement that they will not be sold, conveyed or transferred. If the Government adds the computers (and monitors and related peripherals) to the forfeiture case and does not agree to a Court order authorizing their return, then this emergency motion will include them, as well.

because its bill is unpaid. *See* August 14, 2008 email from Juan Fernandez, the CEO of ASD (Exhibit "A.").

This motion is an emergency because the business will fold, and its member base will disappear, and more than 70 employees will be out of work, if the funds are not returned soon and if the business is not allowed to now resume. ASD cannot wait two years to litigate this lawsuit with its assets frozen and its business shuttered. It can't wait one year. It can't even wait 3 months. It likely cannot wait even one month for a trial. ASD is an internet advertising business and its valuable asset – advertiser/members who place, watch and use ads – will be long gone by the time of any trial. Regardless of the outcome of any trial, there will be no business left to return to and because ASD would need to start rebuilding from scratch its base of advertising members and its place in the market. Even a trial win would be a loss.

ASD is not unmindful of the Government's concerns – which is why we are proposing in this motion that ASD's funds be returned as a component of **compliance and monitoring procedures** which represent "best practices" for this industry. These procedures will provide reasonable assurances to the Court that ASD is being operated in an ethical and legal manner.

At bottom, ASD's emergency proposal is for the return of seized funds with less-drastic measures than the freezing of its funds. Thus, ASD is willing to resume its business, with the return of the seized funds, under oversight conditions designed to address the Government's perceived concerns (incorrect or exaggerated as they may be):

1. Imposition by the Court and adoption by ASD, management and each employee of compliance and monitoring procedures ("Compliance Procedures") and such other requirements as the Court may deem appropriate;

2. Membership requirement of full compliance with the Terms and Conditions of membership agreement, including member representation that the member offers for sale bona fide products or services or that it has other bona fide need for traffic to its website;

3. Approval and appointment by the Court of an independent monitor to supervise ASD's business operations, the implementation of Compliance Procedures, and adherence to other requirements of the Court;

4. Submission of timely [monthly?] financial reports to the Court and the Government;

5. ASD agreement to not transfer any of its funds offshore; and

6. Agreement to permit reasonable inspections by the Government, including Federal Trade Commission staffers and investigators, upon reasonable notice.

7. Required use of "know your customer" checklist for all new ASD members.

ASD invites the Government to propose other ethics, compliance and oversight measures for consideration.

* * *

The linchpin of the Government's case is its bold theory is that ASD is an illegal Ponzi scheme. According to the August 1, 2008 affidavit (Exhibit "B," attached, at ¶ 12) submitted in support of the seizure warrants, the Government did not even start to investigate this case until July 3, 2008. Based on an investigation lasting less than four weeks, the Government asked for seizure warrants which would, in effect, render ASD inoperable. Now that ASD's bank accounts have been seized, the company is effectively shut down and will be unable to ever recover unless the funds are released (and its computers returned).

The Government claims (§14, affidavit) that "there is probable cause to believe that [ASD] is in fact operating a paid auto-surfing program and that the program is, in reality, merely a Ponzi scheme." Its verified forfeiture complaint (§16) contains similar allegations, only bolder: it contends that "ASD *is in fact* operating a paid auto-surfing program and that program is, in reality, merely a Ponzi scheme." The verification was signed on August 2, 2008, the day after the affidavit was signed. The Government does not explain what facts it learned overnight to justify the significant beefing up of the critical Ponzi allegation.

Regardless of how the Government has worded its affidavit and forfeiture complaint, they both suffer from critical and fatal flaws:

1. ASD's internet advertising program is **not** a Ponzi scheme, illegal or otherwise, as clearly explained in the attached declaration (Exhibit "C") of Gerald Nehra, Esq., one of the country's leading experts on multi-level marketing, unlawful pyramid operations and Ponzi schemes. Mr. Nehra's declaration explains exactly why ASD's business plan is not an illegal Ponzi scheme, and he provides several reasons for the conclusion.

2. The Government's theory, outlined in both the seizure warrant affidavit and forfeiture lawsuit, is riddled with incorrect, misleading and exaggerated representations.

3. The Government's opinion is incorrectly premised on a cursory comparison of ASD to *other* companies, in other cases, with different facts. The Government even attached copies of complaints from other cases, filed by the SEC, as exhibits to this forfeiture lawsuit – as if allegations made in other civil lawsuits are somehow binding in *this* case.

4. The required verification on the forfeiture complaint is carefully drafted in a way to provide a safety valve to the special agent signing it if the theories outlined in the lawsuit are

wrong. However, the result of this carefully crafted wordsmithing is that the verification is defective, subjecting the lawsuit to dismissal.

5. The Government will likely try to justify its hurried investigation and extreme measures by saying it needs to protect "victims." But it is the *Government*, not ASD, which is to blame if there are victims. It is the Government's seizure of ASD's bank accounts which prevents the ASD members from continuing to advertise. It is the seizure which deprives the members of the sales and marketing benefit of increased traffic to their webpage. It is the Government which is seizing the money, in the form of checks sent to ASD by its members. And it is the seizure which prevents ASD from paying all of its general creditors, including the members who wanted to cash out their ASD memberships.

## II. FACTUAL BACKGROUND

The Government's seizure affidavit begins with page after page of boilerplate language, including basic explanations of how the Internet works, how connections between computers cross state borders, the definitions of words (such as internet service providers and a website), how computers can be used in crime and a hornbook definition of a Ponzi scheme. Presumably, these generalized allegations appear in many affidavits and do not discuss the specifics of the particular case in which they are submitted.

Following seven pages of boilerplate background, the affidavit then, on page 7, starts to discuss *other* cases. Specifically, in pages 7 through 9, the Government summarizes the allegations in SEC lawsuits against "12DailyPro" and "Phoenixsurf."

After a few additional pages, the affidavit then (§ 20) tries to insinuate that ASD *itself* is engaged in some type of nefarious criminal activity because the operators of unrelated digital currency *payment systems* used by ASD (and countless other Internet businesses) were criminally indicted and later entered guilty pleas. The affidavit explains that ASD's original

website accepted e-Gold and Virtual Money as payment, that their operators were indicted and later convicted and that ASD , "shortly after publicity surrounding the investigation into e-Gold appeared, … "discontinued using the e-Gold system as a means for receiving member funds."

The Complaint alleges (§ 17) that "*most* of the so-called advertisers are not paying ASD for advertising services at all; instead they are paying ASD with the expectation that ASD will provide a full rebate and additional revenue." (emphasis added). The affidavit (§ 15) parrots the same sweeping statement.

The verified and sworn-to statements are **amazing.** ASD has approximately 100,000 members. "Most" means 50,001 members. Perhaps the Government has, in fact, communicated with 50,001 members who advised that they are not really interested in advertising. Perhaps. But highly unlikely. In fact, it seems as though the Government's Task Force agents spoke to *very few* members, and it appears as though the actual number of ASD members interviewed (in phone or in person) by Task Force Agents is --- *6 persons.* Even if we give the Government the benefit of the doubt by adding in the few so-called complaints received by *other* state and local agencies and the "several participants" who made comments at a Miami rally (§ 26, Complaint) , the total would be *18*.

Thus, the Government has contended, under oath, that "*most*" of the 100,000–plus members are not interested in ASD's advertising services – based on interviews or comments or complaints received involving 18 persons. 18 out of more than 100,000. That is not "*most*." That is nowhere close to being "*most*." Rather than reaching the level of "*most*," it constitutes a mere *.00018 percent* – less than one thousandth of one percent.

Moreover, the allegation is inherently at odds with the tangible fact that more than 1,000 emails extolling the advertising benefits of ASD's program were received in the week following

the seizure. ASD is attaching a representative sample of 25 of these emails as Exhibit "D." It is also attaching the declaration of attorney Andrew Schwartz, who reviewed 1,241 of the 3,005 emails received as of mid-day August 15, 2008. He determined that 646, or 52%, praised ASD's advertising benefits, and that an additional 509 expressed support for ASD. Mr. Schwartz's declaration is attached as Exhibit "E." ASD did not want to create havoc in the Court Clerk's Office by filing more than 3,000 emails as a massive exhibit, but they are all available for review by the Court.

Equally as troubling is the notion that the Government can somehow know, and represent to the Court in an affidavit for a seizure warrant, what is in the minds of more than 100,000 members without speaking with them. The Government cannot know this. And interviews of less than two dozen is nowhere close to being an acceptable statistical sampling.

The Government's wildly exaggerated representation of the "expectations" of "most" of ASD's more than 100,000 members ignores the important point that members may have *multiple* motivations – and the advertisers may enjoy the increased traffic to their internet websites *and* the possibility of earning rebates and commissions. That hardly means that the advertising is illusory.

The Government also contends, in both the affidavit and the Complaint, that ASD **"promised"** to rebate 125% of its revenue. *See, e.g.,* § 17 ("to fulfill its promise") and § 23 ("the payouts that members were promised") of the Complaint and § 21 of the affidavit ("rebates that members would receive").

But the Government knows full well that ASD's "Terms Of Service" do not promise or guarantee rebates. To the contrary, the official terms of service unequivocally say that "ASD

**does not guarantee** any earnings and/or rebates." (emphasis added). The Terms of Service are attached to the Government's Complaint as Exhibit 3.

The Government's Complaint loudly trumpets, in a provocative headline, that ASD has "Few Legitimate Advertisers." Apparently, this strident allegation is based on the internet surfing experience of a few Task Force agents who periodically logged onto the ASD website. But neither the Affidavit nor the Complaint explain how long the Task Force agents were logged onto their account and they do not even give a hint as to how many websites are at issue when the agents viewed "several" members' websites. (§ 37, Complaint). Likewise, the Government's submissions are repeatedly vague, such as the allegation (§ 35, Affidavit) that the agents saw "few" websites selling proposed services or products.

When the Government's Task Force agents encountered websites selling products, they criticize the products and imply that the websites are a sham because the products happen to be involved in a multi-level marketing program, such as "Acai Berry Juice" and "Bio Petro Improver." (§ 35, Complaint). An ASD member involved in marketing juice or health products has a legitimate product to advertise, but the Government tries to smear the advertiser by improperly implying the existence of some type of criminality merely because the products are sold through multi-level marketing programs – which are *legal.*

The vague allegations about "few" websites with actual products or services are belied by the 500-plus emails from ASD members explaining their satisfaction with increased advertising traffic to their websites. One telling illustration is an August 10, 2008 letter from Dr. Jim Will, a Ph.D (Exhibit "F"). In this letter, Dr. Will says that ASD has generated "hundreds and hundreds of hits on my web site and have made numerous sales for my Power of Self Talk Toolkit." Pointing out that he previously spent "thousands of dollars trying to get my message out to the

masses," Dr. Will notes that "nothing, I say nothing, has worked as effectively as your company AdSurfDaily."

Under a headline entitled "Illusory Customer Service" (pg. 27, Complaint), the Government recounts the "numerous occasions" when agents unsuccessfully attempted to contact ASD's customer service number. Not surprisingly, the Government does not say how many efforts were made to reach the nebulous level of "numerous." But regardless of the inherent vagueness of the allegation, the "Illusory Customer Service" headline is flat-out incorrect.

As succinctly explained in the declaration of Charles John Osmin (Exhibit "G"), ASD has (or had, until the Government effectively shut down the business) two customer service departments: a traditional one, with approximately 20 to 30 employees, and a special one, called CSI, which served as a bridge between the accounting and the customer service departments. In fact, the customer service department had three shifts, and was open from 7:00 a.m. to 11:30 p.m. The mere fact that few agents did not get through to customer service hardly means that there was no service department. But the Government makes this huge leap in logic, without sufficient inquiry during a hasty investigation, and represents to this Court that ASD had no customer service department because it was totally "illusory."

In both the Affidavit and the Complaint, the Government attempts to prop up its Ponzi scheme theory by referring to the "FTC Opinion" (page 31, Affidavit) and the "Economist Opinion" (page 34, Complaint). But regardless of what the Government calls the opinion, it is inherently vague and suspiciously free of any significant detail.

The economist providing the opinion is not named. The economist's credentials are not provided. The economist's resume or c.v. is not provided or referenced. The economist's

professional experience is not discussed. The Government says that "a" Task Force Agent (unidentified) had "consulted" with this anonymous, mysterious economist. The Government does not say whether this so-called consultation was in person or over the phone. Given the lack of detail, it seems safe to assume that the consultation was not an in-person discussion.

Everything about the unidentified economist's opinion is vague. The Government does not explain what materials were provided to the economist. In fact, neither the Complaint nor the Affidavit explain whether *any* materials were actually provided to the economist. Instead, the agent who signed both the affidavit for the search warrant and the verification for the Complaint said that he "*described the details* of ASD to the economist." Because of the phrasing, it seems safe to assume that *no* materials were provided and that the Secret Service agent merely told the unnamed economist some information in a phone conversation.

Continuing with its penchant for vagueness, the Government does not say pinpoint or even suggest the length of the so-called "consultation" with the economist. Was this a cursory 15-minute phone chat or a 4-hour, in-depth discussion? Given the lack of detail, it seems safe to assume that the self-described "consultation" was brief.

Setting aside the massive amount of critical information missing in the Government's allegations about the economist's opinion, the "opinion" itself is equivocal. It does not conclude that ASD's business *is* an illegal Ponzi scheme.[3] Instead, the Government wraps the opinion in wishy-washy language, saying that the economist "*indicated* (another weak word) that ASD *bore all the characteristics* of a Ponzi operation."

## III. POINTS OF LAW AND OTHER AUTHORITIES

### A. The Verification is defective, subjecting the Complaint to Dismissal

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[3] The term "ponzi" originated following litigation that involved "the remarkable criminal financial career of Charles Ponzi." *Cunningham v. Brown,* 265 U.S. 1, 7 (1924).

The verification of the Complaint is purportedly based on 28 U.S.C. § 1747, which permits a statutory substitute for an affidavit if the person signing uses the language set for the in the statute: "I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct."

But the Government's verification here includes a "to the best of my knowledge and belief" qualifier. This type of equivocal language is inappropriate in an Affidavit or declaration under penalty of perjury, and renders it meaningless. In fact, courts and leading commentators brand this type of language as insufficient to demonstrate that the affiant or declarant has sufficient information to submit an affidavit on the personal knowledge which is required for an affidavit. *See, e.g., Hahn v. Frederick,* 66 So. 2d 823, 825 (Fla. 1953)(affidavit "to the best of his knowledge, information and belief" was insufficient, and noting that it violated the "well-settled rule that the facts of an affidavit must be stated in a positive, and not a qualified manner"). *Cf., Malek v. Martin Marietta Corp.,* 859 F. Supp. 458, 460 (D. Ka. 1994)(statements in affidavit described as "true and correct to the best of my knowledge and belief" were deficient because "it is the plaintiff's personal knowledge, and not his beliefs, opinions, rumors or speculation" which are "the proper subject of any affidavit"). *See generally, Trawick, H.,* ***Florida Practice & Procedure*** *§* 9-5, at 171 (affidavit on "information and belief" will not suffice).[4]

Given the exaggerations and incorrect statements in the Complaint, it is not surprising the Government is seeking protection by adding conditional language into the verification required for an *in rem* civil forfeiture complaint. But the Government's desire to protect its agents does not mean that it is excused from complying with Rule G(2)(a), Supplemental Rules for

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[4] The special agent who provided this non-compliant declaration is Roy Dotson, a Secret Service based in Orlando, Florida. ASD is based in Quincy, Florida.

Admiralty or Maritime Claims and Asset Forfeiture Actions, which governs *in rem* forfeiture actions and which requires verification of the Complaint.

The Complaint must be dismissed on this procedural ground.

**B. <u>ASD Is Not An Illegal Ponzi Scheme</u>**

As explained in the Nehra declaration, which does contain his c.v. and which does explain what information he reviewed, ASD is not an illegal Ponzi scheme. ASD will not repeat and rehash the entire Nehra declaration here, as it is an attached exhibit and can be reviewed. For purposes of this section of the memorandum, however, ASD notes that Mr. Nehra, in reaching the conclusion that ASD's business is not an illegal Ponzi scheme, found several things significant about the ASD business model (1) it lacks a promised return, (2) it does not use return on investment language, (3) it provides a service to its customers (internet advertising) and that the advertising works, and (4) new participants are not needed to keep the business afloat.

Therefore, as explained by Mr. Nehra, the ASD business plan "is a **legitimate** multi-level direct selling business model." (emphasis supplied).

The legitimate service being sold to ASD members is internet advertising. The advertising members purchased the ASD ad packages to increase business traffic to the web sites of their own companies and causes. By increasing web traffic, they extended the exposure of their business offerings on an international stage, thereby enhancing their potential customer basis.

As established by the e-mails (samples of which are attached as Exhibit "D"), the advertising worked and created a devoted customer base for ASD. The advertisers paid for, and received, the service they paid for.

Further, ASD is an advertisement business, not an investment fund or "scheme." ASD did not promise or guarantee returns or earnings on monies paid by members. The members paid

solely for ASD's advertising services. The fees received from members paid for an advertisement placement -- similar to paying for a billboard or a magazine ad. These fees, which paid for an advertising service, did not earn interest or returns. The operative contractual language in the ASD Terms of Service contains no promises or guarantees in exchange for the fees for advertising paid by members. These features of the ASD business model are distinct and different from the features of a Ponzi scheme, in every way.

Ponzi schemes are fraudulent business ventures in which investors' "returns" are generated by capital from new investors, rather than from the true success of the underlying business venture. *In re Armstrong*, 291 F.3d 517, 520 n.3 (8th Cir. 2002). "This results in a snowball effect as the creator of the Ponzi scheme must then recruit even more investors to perpetuate the fraud." *Id.* (*citing United States v. Mathison,* 157 F.3d 541, 546 (8th Cir. 1998) ). "The fraud consists of funneling proceeds received from new **investors** to previous investors in the guise of **profits** from the alleged business venture, thereby cultivating an illusion that a legitimate profit-making business opportunity exists and inducing further investment." *In re United Energy Corp.*, 944 F.2d 589, 590 n. 1 (9th Cir. 1991)(emphasis supplied).

Another court described a "Ponzi scheme" as:

> [A] fraudulent investment arrangement in which **returns** to investors are not obtained from any underlying business venture but are taken from monies received from new investors. Typically, investors are **promised** high rates of **return** and initial investors obtain a greater amount of money from the ponzi scheme than those who join the ponzi scheme later. As a result of the absence of sufficient, or any, assets able to generate funds necessary to pay the promised returns, the success of such a scheme guarantees its demise because the operator must attract more and more funds, which thereby creates a greater need for funds to pay previous investors, all of which ultimately causes the scheme to collapse.

*In re C.F. Foods,* 280 B.R. 103, 110 n.15 (E.D. Pa. 2002)(emphasis added)(citing *In re Taubman*, 160 B.R. 964, 978 (Bankr. S.D. Ohio 1993); see also *Eberhard v. Marcu***,** 530 F. 3d

122, 132 n.7 (2nd Cir. 2008). In a Ponzi scheme, "[t]he **promised** rates of return, because they are in excess of any real investments, render a Ponzi scheme operator insolvent from the inception of the scheme." *Taubman*, 160 B.R. at 978 (emphasis supplied)(*citing Cunningham v. Brown,* 265 U.S. 1, 7, 44 S. Ct. 424, 425 (1924) (detailing the "remarkable criminal financial career of Charles Ponzi")). None of these critical elements of a Ponzi scheme ever existed at ASD.

Here, in stark contrast, the customers of the ASD business venture purchased advertising on a successful, internationally-known website, which was experiencing remarkable growth. Persons participating in the ASD business venture were able to both advertise and participate at four levels. All advertisers could participate as free or paying members. Free members were able to earn the ability to advertise by "surfing" the websites of other ASD members. Paying members immediately obtained certain benefits, but could surf other members' websites to renew or sustain their advertising. All members could participate in the referral program and the rebate program, but significantly, they were **not** required to participate. In this case, the success of the advertising business was thriving and provided sufficient revenues, through legitimate multi-level marketing, to sustain the business.

Significantly, ASD never promised "returns on investment." Indeed, the funds received from members were expressly **not** investments; they were fees paid for advertisements. And, the earnings were never promised or guaranteed to the members at all, at any level.

Courts and legislatures have recognized distinctions between legitimate multi-level marketing programs and illegal schemes. *See U.S. v. Gold Unlimited, Inc.*, 177 F.3d 472, 479-80 (6th Cir. 1999) (citing *In re Amway Corp.*, 93 F.T.C. 618, 716 (1979) among others sources). As the court in *Gold Unlimited* explained:

> [L]egal multilevel marketing (referred to as "MLM" in some documents) programs akin to Amway. MLM programs survive by making money off product sales, not new recruits. In contrast, "pyramid schemes" reward participants for inducing other people to join the program; over time, the hierarchy of participants resembles a pyramid as newer, larger layers of participants join the established structure. Ponzi schemes operate strictly by paying earlier investors with money tendered by later investors. No clear line separates illegal pyramid schemes from legitimate multilevel marketing programs; to differentiate the two, regulators evaluate the marketing strategy (e.g., emphasis on recruitment versus sales) and the percent of product sold compared with the percent of commissions granted.

*Id.* at 475 (footnote omitted).

With ASD, the first order of business and the primary marketing strategy always emphasized the sale of advertisement packages, in strict accordance with federal and Florida law. *See, e.g.,* Fla. Stat. § 849.091(2) (2007) (defining illegal pyramid schemes as programs with rewards that are "not primarily contingent" on sales of goods or services).

The elements of the legal multilevel marketing program are: (1) a product or service being sold to the consuming public **(here, advertising services)**; (2) a distribution channel choice of independent contractor representatives, selling away from fixed business establishments **(here, the more than 100,000 ASD members)**, and (3) a two-part compensation plan that both rewards the representative for generating business volume **(here, voluntary referrals and sponsorships)**, and gives the representative an incentive to introduce more representatives, by rewarding them, not for recruiting the second representative, but on the business volume generated by the second representative **(here, a graduated percentage that could potentially be earned as a commission)**. *See In re Amway Corp.*, 93 F.T.C. 618, 670-679 (1979).

In summary, the ASD business model begins with a valuable service sold to the consuming public, accessible internet advertising. The ASD channel of distribution choice consists of independent contractor representatives, called members. And, the ASD members can

earn commissions and rebates, based solely on their own motivation and participation, knowing that no earnings are ever promised or guaranteed. Thus, ASD is not a Ponzi scheme, as inaccurately alleged by the Government. Rather, ASD is a successful, legal, multi-level marketing internet-based program that grew rapidly because of its unique business model.

### C. **The Court Should Order The Government to Return the Seized Funds With Safeguards**

As outlined above, ASD is not, contrary to the Government's conclusory allegations, operating an illegal Ponzi scheme. Rather, it is a bona fide business providing beneficial advertising to its member advertisers – or *was* a bona fide operating business until the Government effectively stopped it from doing business by freezing its bank accounts. The Government's retention of the seized funds has jeopardized ASD's business existence and relief is required.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides that "no person shall …be deprived of life, liberty, or property, without due process of law." The United States Supreme Court has described the tactic used here – the pre-trial restraint of assets – as the "nuclear weapon" of the law." *Grupo Mexicano de Deasarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 332 (1999).

The *ex parte* seizure practice used here by the Government "creates an unacceptable risk of error." *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). In *James Daniel Good Real Property,* the Supreme Court highlighted the dangers associated with *ex parte* seizures, such as the Government's ability to avoid presenting "potential defenses a claimant might have. to the requested forfeiture. *Id. at 55.*

Moreover, the *James Daniel Good Real Property Court* emphasized the benefits of an adversary hearing: "to ensure the requisite neutrality that must inform all governmental decision

making." In highlighting the advantages of an adversary hearing, the Supreme Court noted that the protection of a hearing is particularly important and applicable "where the Government has a direct pecuniary interest in the outcome of the proceeding." *Id. at 55-56.*

18 U.S.C. § 983(f)(1)(C) mandates the "immediate release of seized property if the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as **preventing the functioning of a business**…." (emphasis added). Indeed, federal courts have long before § 983 recognized a general equitable power to order the return of unlawfully seized property. *United States v. $8,850*, 461 U.S. 555, 569, 103 S.Ct. 2005, 2014, 76 L.Ed.2d 143 (1983), *citing Slocum v. Mayberry*, Wheat 10, 4 L.Ed. 169 (1817).

18 USC § 983 is, by its terms, inapplicable to "monetary instruments or electronic funds, unless they constitute "the assets of a legitimate business which has been seized." 18 USC § 983 (f)(8)(A). In the instant case, the assets of ASD undoubtedly have been seized. Presumably, the Government will claim that the statute does not authorize the relief of an "immediate release" of property because it will argue that ASD is "not a legitimate business."

But that likely argument begs the question. As evidence by the Nehra declaration, ASD's business is not a Ponzi scheme. The Government cannot prevent claimants from using a statutory remedy by arguing, in conclusory fashion, that the underlying business is illegitimate.

The danger in that was outlined by the Second Circuit, which explained that it:

> continue[s] to be enormously troubled by the **government's increasing and virtually unchecked use of the civil forfeiture statutes** and the disregard for due process that is buried in those statutes. The district courts, in order to preserve some modicum of due process to criminal defendants (and civil forfeiture claimants) should be vigilant in approving seizures *ex parte* only upon a showing of the most extraordinary or exigent circumstances, and **whenever possible should favor less drastic measures, such as**

> **occupancy agreements, bonds, receiverships, lis pendens, or other means for preserving the *status quo ante* seizure until the criminality underlying the claimed forfeiture can be established** in the context of a proper criminal proceeding with its attendant constitutional protections to the accused.

*United States v. All Assets of Statewide Auto Parts*, 971 F.2d 896, 905 (2d Cir. 1992)(emphasis added). "Through such courageous and sensitive application of their discretionary powers the district courts can then ensure that "due process" remains a reality and is not reduced to a mere encomium." *Id.*

This Court is presented with such an opportunity here – an opportunity to impose a less-drastic means of preserving the *status quo ante* seizure until the alleged criminality underlying the claimed forfeiture can be established. Specifically, the Court can order the return of the seized funds under a set of oversight conditions which will address the Government's concerns yet permit the business to get back on its feet. *See United States v. Undetermined Amount of U.S. Currency*, 376 F.3d 260, fn. 4 (4th Cir. 2004) ("A court may, of course, order release of liquid assets – currency, monetary instruments, and electronic funds – which probably would not be available for return in precisely the same form"); *see also, generally, United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995) ("District courts certainly have ample power to make orders for the maintenance of assets, as a condition of leaving them in the control of the government")

To do otherwise would only reward the exact conduct the Second Circuit cautioned against. The Government proceeded effectively to seize claimant's business without notice or a hearing. The seizure warrant was based on an self-serving affidavit, replete with material misstatements and omissions, exaggerations and unsupported conclusions. This is precisely the type of self-serving affidavit which courts have condemned. *See United States v. Real Property*

*Located At 110 Collier Drive*, 793 F.Supp. 1048, 1052 (N.D. Ala. 1992) (court acknowledging that it "shares some of the blame for this travesty of justice" because it "should have more closely examined" the affidavits submitted by the government). *See also, United States v. That Certain Real, Property Located At 632-636 Ninth Avenue, Calera, Alabama,* 798 F. Supp. 1540, 1551 (N.D. Ala. 1992) ("more and more courts are voicing frustration at what appears to be overreaching by the United States . . . particularly in forfeiture cases, where law enforcement agencies have a 'built-in' conflict of interest because they share in the product of the seizure").

There is nothing about the affidavit of a law enforcement agent which immunizes it from analysis. Likewise, the mere fact that the government submitted an affidavit here does not mean that it has *carte blanche* privilege to seize property without being challenged on the so-called grounds for the seizure. For example, in *United States v. 31,990 Dollars in United States Currency*, 982 F.2d 851, 855 (2d Cir. 1993), the appellate court rejected the affidavits of two experienced agents, reflecting their "belief" that there was a substantial connection between seized property and illegal activity justifying forfeiture. The court rejected the affidavits as "mere speculation." Similarly, in *United States v. All Assets of Statewide Auto Parts, Inc.,* 971 F.2d 896 (2d Cir. 1992), the appellate court held that the trial court's approval of an *ex parte*, pre-notice seizure warrant was improper -- even though the application for the seizure warrant was accompanied by a 93-page, 337-paragraph affidavit from a detective, who purported to detail a money laundering scheme.

The Government cannot retreat behind the warrant when ASD contests the credibility of the affidavit and the verification of the complaint. *See, e.g., United States v. 8215 Reese Road, Harvard, Ill.*, 803 F. Supp. L75, 177 (N.D. Ill. 1992) (explaining that seizure may still violate

due process rights even though the government obtained an *ex parte* seizure warrant). *See generally Jones v. Preuitt and Mauldin*, 808 F.2d 1435 (11th Cir. 1987).

Given that this Court has full and complete discretion to exempt from any freeze order assets sufficient to pay claimant's reasonable business expenses pending disposition of this matter. *United States v. Madeoy*, 652 F.Supp. 371, 376 (D.D.C. 1987), it has discretion to return all the funds subject to oversight measures, such as a monitor acceptable to the Court and financial reporting.

The Government appears to assume that it is entitled to forfeiture of all of ASD's bank accounts -- an assumption that cannot be justified at this preliminary stage of a civil forfeiture proceeding. *See Madeoy*, 652 F.Supp at 376, *citing United States v. Their*, 801 F.2d 1463, 1476 (5th Cir. 1986) ("the judicial conscience is shocked by a procedure which would leave an accused without means of support for food, housing and the like, solely on the basis of a prosecutorial accusation and affidavit")(emphasis added).

Accordingly, claimant requests that the Court enter an order requiring the Government to return all seized funds under whatever oversight terms and conditions the Court deems reasonable. ASD has already listed in this motion a healthy assortment of potential oversight measures that the Court can consider.

Alternatively, ASD requests an immediate evidentiary hearing to contest the pre-trial seizure of assets without a post-seizure evidentiary hearing -- a remedy this Court very recently required when the assets are necessary to retain counsel. *United States v. E-Gold*, 521 F.3d 411 (D.C. Cir. April 11, 2008). Without an evidentiary hearing, the Government will have deprived ASD of its property without providing ASD with an opportunity to be heard -- a problematic scenario which this Court recently found to be unlawful in a somewhat similar seizure scenario.

In *E-Gold* -- the very company and case provocatively mentioned in the affidavit (§ 20) used to support the issuance of the seizure warrant in the instant case by insinuating ASD's complicity in illegality by merely using a third party's payment processing system --, the Government[5] obtained an *ex parte* seizure warrant and a post-indictment restraining order. The Defendants moved to vacate the seizure warrant and modify the restraining order and sought an evidentiary hearing. The individual defendants argued an inability to pay for counsel of their choice in the absence of seized assets. The district court denied the motion and refused to schedule an evidentiary hearing. On appeal, this Circuit held that "where the government has obtained a seizure warrant depriving defendants of assets pending a trial upon the merits, the constitutional right to due process of law entitles defendants to an opportunity to be heard at least where access to the assets is necessary for an effective exercise of the Sixth Amendment right to counsel." *E-Gold*, 521 F.3d at 421.[6]

Similar to the defendants in *E-Gold*, ASD's due process rights have been violated by the massive seizure off its bank accounts without the opportunity to be heard. Given the sweeping, negative consequences of the seizure – the virtual closing of an entire business – ASD is entitled to an evidentiary hearing. Without one, ASD will not have an opportunity to effectively challenge the *ex-parte* seizure of its assets.

Notwithstanding the Government's problematic affidavit and its strategic decision to pursue measures which would deprive ASD of assets and effectively and quickly put it out of business, ASD continues to act in good faith. In the days following the seizure of its bank

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[5] AUSA William Cowden, the AUSA who signed the complaint in the instant case against ASD, is shown as being on the Government's brief in *E-Gold.*

[6] The *E-Gold* Court noted that it was not determining whether an evidentiary hearing would be Constitutionally required when the seized assets are not required to obtaining counsel of choice.

accounts and its computers and business records, ASD voluntarily delivered to the Government more than 560 checks, made payable to ASD and totaling more than $1.2 million, which the Government somehow overlooked in its all-day search of ASD's offices. *See* Gary Talbert Declaration (Exhibit "H").

**(1) The Affidavit Is Problematic, Requiring a *Franks v Delaware* Evidentiary Hearing**

In addition to requesting an evidentiary hearing to provide fundamental due process rights concerning a pre-trial, *ex-parte* seizure of assets, ASD has another ground to justify its request for an evidentiary hearing: to challenge the veracity of the affidavit and verification. As outlined above, the affidavit and Verified Complaint are replete with misstatements, exaggerations, incorrect allegations and vague arguments. This is not an isolated instance. Therefore, the Court should order an evidentiary hearing.

The test for reviewing an allegation that a warrant was based on a false affidavit derives from the United States Supreme Court's decision in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Specifically, the *Franks* Court concluded that:

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

*Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). So while there is a "presumption of validity" with respect to affidavits in support of search and seizure warrants, a court is required to hold an evidentiary hearing "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly

false statement is necessary to the finding of probable cause." *United States v. Jones*, 451 F.Sup.2d 71, 78 (D.D.C. 2006) (*citing Franks*, 438 U.S. at 171, 155-56).

Admittedly, the rule set forth in *Franks,* however, "has limited scope, both in regard to when a exclusion of seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded." *United States v. Jones*, 451 F. Supp. 2d 71, 78 (D.D.C. 2006) (*citing Franks*, 438 U.S. at 167). As the District of Columbia Circuit has instructed, "a defendant is entitled to an evidentiary hearing only if his attack on the accuracy of the affidavit is 'more than conclusory' and is accompanied by 'allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. *Id., citing United States v. Gaston*, 357 F.3d 77, 80 (D.C. Cir. 2004) (*quoting Franks*, 438 U.S. at 171, 98 S.Ct. 2674) (emphasis omitted). Furthermore, even if the defendant makes the requisite preliminary showing, a hearing is not required unless the alleged misstatement was material to the finding of probable cause. *Id., citing United States v. Richardson*, 861 F.2d 291, 294 (D.C. Cir. 1988).

The *Franks* standard has been extended to include allegations of material omissions of fact, not just misstatements. *Washington v. District of Columbia*, 685 F.Supp. 264 (D.D.C. 1988) (*citing United States v. Williams*, 737 F.2d 594, 604 (7th Cir. 1984) ("rational of *Franks* applies to omissions")). An omission is deemed "material" if its inclusion in the affidavit would have defeated probable cause. *United States v. Spencer*, 530 F.3d 1003, 1007 (D.C. Cir. July 18, 2008) (*citing United States v. Colkely*, 899 F.2d 297, 301 (4th Cir. 1990)). Therefore, in the case of an attack based on omission, logic dictates that the affidavit be read as if the allegedly relevant material were included to determine whether probable cause would have been undetermined. *Ogden v. District of Columbia*, 676 F.Supp. 324 (D.D.C. 1987).

Claimant challenges the veracity of certain statements or omissions made by United States Secret Service Special Agent Roy Dotson in his Affidavit in Support of Seizure Warrant ("Dotson Affidavit") and in his verification of the forfeiture Complaint. In order to successfully challenge the Dotson affidavit and verification under *Franks*, ASD must show, *supra*, that (1) the affidavit or Verified Complaint contained misstatements or omissions; (2) the misstatements or omissions were material to the issue of probable cause; and (3) the misstatements or omissions were made knowingly and intentionally, or with reckless disregard for the truth. *United States v. Richardson*, 861 F.2d 291, 293 (C.A.D.C. 1988). This is the case here.

**(2) The Affidavit and Verified Complaint Contain Misstatements and Omissions**

Agent Dotson's 37-page affidavit is replete with misstatements and omissions of a material nature. We have already outlined these.

**(3) The Misstatements and Omissions Were Material to the Issue of Probable Cause**

Agent Dotson acted improperly when he made the above misstatements and omissions in the affidavit submitted in support of the seizure warrant and in the allegations he made in the Verified Complaint. In doing so, he altered the totality of the facts presented to the judicial officers who issued the seizure warrants and the in rem arrest warrant. These problematic allegations undermined the constitutional procedure that requires a neutral and detached magistrate to render an informed determination of probable cause. *See Wright v. United States,* 963 F.Supp. 7 (D.D.C. 1997). It was objectively unreasonable for Agent Dotson to exclude information from his affidavit and in the Verified Complaint. Including accurate information would have negated probable cause.

**(4) The Misstatements and Omissions Were Made Knowingly and Intentionally, or With Reckless Disregard for the Truth.**

Even where probable cause is found to exist, however, evidence obtained or seized pursuant to a warrant may nonetheless be suppressed or returned when the affiant knowingly or with a reckless disregard for the truth, included a false statement in the affidavit, or omitted a statement that would have been material. *United States v. Eiland*, 2006 WL 516743 *11 (D.D.C. 2006). Indeed, when the facts omitted from the affidavit are clearly critical to a finding of probable cause, the fact of recklessness may be inferred from proof of the omission itself. *Washington v. District of Columbia*, 685 F.Supp. 264 (D.D.C. 1988) (*citing United States v. Thompson*, 615 F.2d 318, 329 (5th Cir. 1980)). That's the case here.

Agent Dotson omitted certain unhelpful facts while touting other facts for the sole purpose of misleading the issuing court. He mentioned only facts supporting the government's position and failed to mention facts favorable to the claimants. Therefore, one must conclude that the favorable information was deliberately withheld. Although courts have upheld searches where the affidavit included material omissions and misstatements, that should not be read to suggest that all such affidavits can survive a *Franks* challenge merely by claiming "good faith". Police officers must take care to include all evidence of probable cause available to them in their affidavits, and the affidavits must accurately reflect the facts of the particular case. *United States v. Richardson*, 861 F.2d 291, 294-95 (D.C. Cir. 1988); *see also*, *United States v. Walters*, 2008 WL 2235335 *7 (D.D.C. June 2, 2008) ("[T]he court agrees with [defendant] that the issuing judge should have been given all of the relevant information for his consideration").

ASD has made a substantial preliminary showing under *Franks* and is entitled to an evidentiary hearing.

## IV. CONCLUSION

This Court should enter an order:

1. requiring the Government to provide an expedited response to this motion, within three days of receipt of the motion.

2. requiring the seized funds to be returned within two days of entry of an order, subject to the previously-outlined seven-oversight measures (acceptable to the Court) governing ASD's resumption of business.

WHEREFORE, for the foregoing reasons, on behalf of Claimants, Counsel respectfully requests that the Court enter the attached Order.

Dated: August 18, 2008

Respectfully submitted,

**AKERMAN SENTERFITT**

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[7] Mr. Goodman has been permitted to Appear *Pro Hac Vice.*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Motion and Memorandum of Points and Authorities was served this 18th day of August, 2008 via the Court's electronic filing system upon the following counsel:

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