

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

)
) **CLAIMANT'S REPLY TO PLAINTIFF'S**
) **OPPOSITION TO EMERGENCY**
) **MOTION FOR RETURN OF SEIZED**
) **FUNDS, AND TO PLAINTIFF'S**
) **OPPOSITION TO CLAIMANT'S**
) **MOTION TO DISMISS**
) **AND REQUEST FOR EVIDENTIARY**
) **HEARING**
) **(WITH INCORPORATED**
) **MEMORANDUM OF LAW)**

Claimant, AdSurfDaily, Inc. ("ASD") hereby submits its reply to the two responses filed by the United States (the "Government"). [DE #13 & #14] On August 18, 2008, ASD filed Claimant's Emergency Motion for Return of Seized Funds to Save Business and Jobs With Oversight and Monitoring and/or Evidentiary Hearing, and Motion to Dismiss and Supporting Points of Law and Authorities (hereinafter "Emergency Motion"). [DE #7] On August 25, 2008, the Government filed two separate responses in opposition to ASD's consolidated pleading.¹ [DE #13 & 14] In reply, ASD files this one reply that addresses both responses filed by the Government, and states:

INTRODUCTION

First, in its Opposition to Claimants' Emergency Motion for Return of Seized Property [DE #14], the Government complains that ASD has not complied with certain particular procedures established in 18 U.S.C. § 983(f)(2), which requires that the claimant first seek release of the seized property from the appropriate official. [*Id.* at 2] The Government implies that counsel for ASD never contacted counsel for the Government, prior to the filing of ASD's Emergency Motion. That is not correct. ASD's counsel did have a forthright and comprehensive conversation with Government's counsel regarding the status of the seized property. In fact, the Emergency Motion itself references this discussion, as it mentions the Government's position concerning the return of computer equipment. [*See, e.g.*, DE #7, at 1, n.2]

Moreover, as explained in ASD's motion, the corporation needs emergency relief if it is to survive as a business. ASD also distinguished the relief it seeks here from the relief available under § 983. Specifically, ASD explained in its Emergency Motion that it does not seek an

¹ ASD's Emergency Motion was filed solely by Claimant ASD. [DE #7, at 1] However, the Government incorrectly asserts that the Emergency Motion was filed by "several of the current 'claimants'" [DE #14 at 1], and refers specifically to Claimant Bowdoin throughout its Response.

unfettered release of seized property. ASD seeks a reasonable, court-approved, monitored compromise that would allow ASD to continue doing business while this litigation proceeds. ASD is prepared to thoroughly explain its detailed proposals for oversight and monitoring, as well as its modified business plan, at an evidentiary hearing, if permitted by this Court. In addition, ASD is prepared to propose an experienced, independent monitor, who would be available for appointment by the Court. In fact, counsel for ASD has had preliminary discussions with an attorney who has extensive background in compliance with the anti-pyramid requirements established by the Federal Trade Commission and with consumer protection law, and who indicated a willingness to act as a independent monitor .

While ASD acknowledges that § 983 provides a procedure for releasing funds in specific conditions, the relief requested here is consistent with § 983 procedures and the Due Process Clause of the United States Constitution. ASD proposes such a compromise not for self-serving reasons, as suggested by the Government, but because it is the only solution that will avoid penalizing ASD (and its members and employees) prior to, and in the absence of, any judicial finding of wrong-doing.

Second, in its Opposition to Claimants' Motion to Dismiss [DE #13], the Government responds to ASD's contentions that the Affidavit and the Verified Complaint contain material defects, misstatements and omissions. The Government asserts that no funds can be released and no allegations can be challenged until this case is tried before this Court, which is likely to be held numerous months from now. The Government also claims that no hearing should be held to examine the reliability of the affidavit and verification. If ASD must wait until the appropriate moment for the Government to carry its burden of proof at a trial, then ASD's once-thriving business will be completely destroyed – based solely on vague, conclusory and deficient

allegations contained in the Government's pleadings. This result would deprive ASD of fundamental due process rights and would be grossly inequitable.

MEMORANDUM OF LAW

In its Opposition filings, the Government has failed to address many of the points raised in ASD's Emergency Motion. For example, the Government did not rebut legal arguments asserted in Section III.B. of ASD's Motion, explaining why ASD is a legitimate multi-level marketing program, and not an illegal Ponzi scheme. Nor did the Government attempt to rebut the substance of the declaration of Gerald Nehra (Exhibit C to ASD's Emergency Motion), in which Mr. Nehra concluded that the ASD business plan is not a Ponzi scheme. Rather, the government merely denigrates Mr. Nehra.

In addition, the government provides no additional details to support inherently vague assertions made in the Verified Complaint that an unnamed economist, employed by the Federal Trade Commission ("FTC"), purportedly concluded that ASD's business activities were consistent with a Ponzi scheme. The Government provided no information regarding the extent of the involvement of this FTC "expert" in the ASD investigation, what he or she was told by the Task Force Agent, and/or what he or she reviewed (if anything) that was specifically related to ASD's business practices. The Government simply provides no additional information to answer ASD's challenges to reliance on the opinion of this mysterious "expert." Similarly, although ASD's Emergency Motion clearly expressed its objection to the Government's nebulous allegation that "most" ASD members are not interested in the advertising aspects of ASD's business, the Government's Response provides no detail – and certainly no explicit numbers – to give support to its prior vague statements. The Government's silence on such critical issues is significant.

Further, instead of candidly conceding that it has received many emails, phone calls and letters in support of ASD's advertising business, the Government attempts to belittle those contacts by suggesting that ASD solicited those contacts from its members. Even if it could be assumed that the Government had proof to support its criticism, and even if all of those comments were indeed sent at the behest of ASD, the Government cannot possibly suggest that the persons writing and calling were dishonest or disingenuous in expressing their support of ASD. The Government continues to loosely advance its cause with fact-free, sweeping rhetoric, unsupported by competent evidence.

I. ASD Seeks A Release of Funds In Accordance with a Court-Approved Plan

In an attempt to restore its business, ASD needs funds and the return of its computers. Because ASD is an internet advertising company, its computers are critical to its business operations. Additionally, ASD has numerous bills and debts that need to be paid, including employees' salaries and employment taxes that have not been fully paid for work completed prior to the Government's seizures. If ASD is permitted to remain in business, these bills will have to be paid.² ASD is willing to submit any and all invoices for payment to a court-appointed monitor, who could evaluate the necessity for and propriety of any such payments.

The Government also suggests that ASD should have to repatriate ASD funds in Antigua before funds seized by the Government should be released. With the Court's authority and with the Government's assurance that repatriated funds will not be similarly seized, ASD is willing to

² Contrary to the Government's **conjecture** that the Claimants own all ASD offices [DE #14, at 7], ASD did indeed rent office space located at 215-B Jefferson Ave, in Quincy, Florida. The Government searched that rented space on August 5, 2008. However, because of its inability to pay the rent owed for September under the lease of that location, ASD has been forced to move out of that location and has informed the Government of that move. Counsel for ASD contacted counsel for the Government and discussed this situation. However, at the time of the forced move, counsel for the Government was unwilling to offer any solution or release any funds to pay the rent that was due.

bring those funds to the United States and to use those funds to resume its business under a court-approved oversight plan.

Curiously, though invited to propose additional conditions for a monitored return to business, the Government proposed nothing and insists only that no funds be released. No computers have been returned as of the date of this filing. Nevertheless, the Government insists that ASD's business has not been "seized." The Government does not dispute that ASD's business has, for all intents and purposes, been effectively shut down by the Government's actions. The Government's Response proposes no reasonable solution and expects that ASD, its members and its employees must simply endure all of the consequences of the Government's actions: loss of advertising opportunities, loss of jobs and income in an already difficult economy and loss of a vital family-owned business in a small community.

II. The Complete Destruction of ASD Constitutes Substantial Hardship

To date, ASD has received more than 3,500 supportive e-mails from its members. By way of example, ASD attaches to this Reply a letter written by an ASD member, Will York (who describes himself as holding two masters degrees), sent to the Attorney General of Florida. [*See Exhibit A, attached*] While ASD has every reason to believe that its members would indeed return and pay for the opportunity to advertise on the ASD website, as the Government suggests in its Opposition [DE #14, at 6], it has been impossible to return to business without funds to pay its outstanding bills and without access to its computers. Indeed, ASD's mail is no longer being delivered by the U.S. Postal Service in the wake of the Government's actions. The Government's suggestion that ASD should simply open its doors again and re-open its business is specious, in light of the consequences of the Government's raid.

In its Opposition to Claimants' Emergency Motion, the Government does not rebut ASD's arguments that it is a legitimate multi-level marketing program. In fact, the Government appears to hold out the possibility that the business might indeed be legitimate when it notes that "Claimants' business (legitimate or otherwise) has not been seized." [DE #14, at 5] Unless ASD is allowed to operate pursuant to monitoring, as requested in ASD's motion, it will be severely punished before any case is proven against it. This family-owned business will be decimated by the government's pre-trial actions against it.

ASD cannot politely wait several years to litigate this lawsuit with its assets frozen and its business shuttered. ASD is not unmindful of the Government's concerns – which is why we are proposing that ASD's funds be returned **as a component of compliance and monitoring procedures with all safeguards, as ordered by this Court.**

The Government proposes as "truth" that "*ASD was insolvent before the funds at issue here were seized.*" [DE #14, at 7]. The Government simply tosses out this provocative allegation, apparently believing that the mere description of it as "truth" will make it so. The Government does not include a financial report, an accountant's analysis or other competent evidence. Instead, it simply uses strident rhetoric as a substitute. ASD intends to consult with and seek appropriate financial statements from an independent accounting firm in the very near future. In that regard, the firm of Rachlin, Cohen and Holtz, a large regional accounting firm based in Miami, Florida, is ready to work with ASD in the event that ASD is permitted to move forward in the manner set forth in its Emergency Motion and this Reply. The procedures and safeguards proposed by ASD will provide reasonable assurances to the Court that ASD is being operated in a fiscally sound, legal manner.

III. The Relief Requested Is Not Precluded by Section 983

The Government suggests that there is no legal basis to support the return of any seized funds, and ignores the reasonable procedures suggested by ASD. The relief sought by ASD is not precluded by law. In fact, the relief is entirely consistent with law, reason, and due process, as already set forth in ASD's Emergency Motion. [DE #7, at 16-18] Though the Government claims that ASD's business was not seized pursuant to a seizure warrant, ASD's business has in fact been seized as a consequence of the Government's actions.

In its Response, the Government did not argue that §983(f) does not authorize an "immediate release" of property on the grounds that ASD was not a "legitimate business." [DE #7, at 17] Instead, the Government [DE #14, at 5] argues that ASD's business – whether legitimate or not – has not been "seized." The Government relies on this Court's decision in *United States v. All Funds Seized from Suntrust Account xxx8359, et al.*, No. 05-2497 (D.D.C. Mar. 17, 2006). It does not appear from the Court's Order that the property owner in that case, GSR, proposed any monitoring or supervision, as proposed by ASD, to prevent the dissipation of funds that would be potentially available *should the government prove its case at trial*. The reasonable safeguards proposed by ASD distinguish this Emergency Motion and the relief requested by ASD from the cases cited by the Government, and should reasonably provide grounds for this Court to reach a different result. Such a result would be consistent with the terms of § 983 and the Due Process Clause of the United States Constitution.

IV. A Franks Hearing Is Appropriate in a Civil Forfeiture Case

ASD's Emergency Motion requested a *Franks* hearing and made the requisite showing necessary to warrant such a hearing. [DE #7, at 22-24] *See Franks v. Delaware*, 438 U.S. 154, 171-172, 98 S. Ct. 2674, 2684-85 (1978). In its Response, the Government implies that, because

this is a civil forfeiture case, there is no right to, or purpose for, a *Franks* hearing, even if the seizure was based on a faulty affidavit or deficient verification. [DE #14, at 4 (citing *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1039-40 (1984) and *U.S. v. Parcel of Property*, 337 F.3d 225, 234 (2d Cir. 2003))]

The Government's Response, however, ignores the all-important point that the purpose of a *Franks* hearing is explicitly intended to challenge the sufficiency of the affidavit and verification used to support the seizure. *Franks* hearings are routinely and properly sought in civil forfeiture cases to attack the veracity of the statements used to establish probable cause for the seizure and *in rem* arrest warrants. See, e.g., *U.S. v. Parcel of Land and Residence Located thereon at 5 Bell Rock Road, Freetown, Mass.*, 896 F.2d 605, 607-608 (1st Cir. 1990); *U.S. v. One Parcel of Property Located at 15 Black Ledge Drive, Marlborough, Conn.*, 897 F.2d 97, 100-101 (2d Cir. 1990); *U.S. v. U.S. Currency Deposited in Account No. 1115000763247 for Active Trade Co., Located at First Nat. Bank, Chicago, Ill.*, 176 F.3d 941, 944-45 (7th Cir. 1999); *U.S. v. One 1995 Chevrolet Tahoe, VIN # 1GNEC13K3SJ398583*, 108 F. Supp. 2d 954, 956-57 (W.D. Tenn. 1999); *U.S. v. 1999 Ford Expedition*, 2001 WL 777471 (N.D. Cal. 2001).

In its Opposition to Claimants' Motion to Dismiss, the Government draws an analogy to criminal procedure applicable to a criminal complaint and an affidavit to support a finding of probable cause. [DE #13, at 8, n.5] ASD agrees that the procedure for determining probable cause in civil forfeiture actions is similar to that for determining probable cause in a criminal setting. As a result, the court should look at the totality of the circumstances in making its decision. *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

Hearsay and other inadmissible evidence may be used in establishing probable cause, *so long as* the evidence bears strong indicia of reliability. *U.S. Currency Deposited in Account No.*

1115000763247 for Active Trade Co., 176 F.3d at 944. Only legally obtained evidence may be used to establish probable cause in a civil forfeiture proceeding. *U.S. v. \$53,082.00 in U.S. Currency*, 985 F.2d 245, 250 (6th Cir. 1993). Further, if unreliable information, such as a false or misleading statement in an affidavit, is used to establish probable cause and there is not enough other reliable evidence to support a finding of probable cause, then the initial finding of probable cause should be vacated. *U.S. Currency Deposited in Account No. 1115000763247 for Active Trade Co.*, 176 F.3d at 944-45 (citing *Franks*, 438 U.S. 154 (1978) (search warrant must be set aside if, without the use of false statements, there is not enough evidence to establish probable cause)); also citing *United States v. One 1987 Mercedes Benz, 190E VIN: WDBDA28DXHF373152*, 1992 WL 198441 (N.D. Ill. 1992) (after finding “factual statements made in the affidavit supporting the seizure warrant consisted of a reckless disregard for the truth,” the court deemed the warrant void *ab initio*, found that the seizure and forfeiture were unlawful, and ordered the return of the car to the claimant and the dismissal of the forfeiture complaint).

As explained in ASD's Emergency Motion, the Affidavit and Verified Complaint filed by the Government in this case is replete with misstatements, omissions, nebulous and conclusory allegations and baseless hyperbole. [DE #7, at 22-24] Such statements cannot provide a solid basis for a finding of probable cause. In a criminal case, a defendant would be entitled to an immediate hearing challenging the probable cause for his or her arrest. Here, where tens of millions of dollars and real and personal property have been seized in a civil forfeiture action, a claimant has a due process right to a similar hearing. See *United States v. E-Gold*, 521 F.3d 411, 421 (D.C. Cir. 2008). Therefore, in addition to the evidentiary hearing requested by ASD to challenge the pre-trial seizure and propose reasonable safeguards for release, ASD also requests

a *Franks* hearing to challenge the veracity of statements included in the Affidavit and Verified Complaint. The *Franks* hearing need not be a separate proceeding: it can be part of the evidentiary hearing.

V. Dismissal Of Complaint Is Appropriate Due to Deficient Verification

In its Opposition to Claimants' Motion to Dismiss, the Government contends, in large part, that regardless of what else Agent Dotson says in his verification in support of the Complaint or how he says it, his verification should be found to be substantially in the same form of the exemplary clause provided in § 1746 as long it includes the buzz phrases "under penalty of perjury" and "true and correct." That is not the law. See *Huff v. UGI Corporation*, 2006 WL 2385286 at *1 n.2 (N.D. Ind. 2006) (Plaintiff's "[c]omplaint does not comply with the requirements of an unsworn declaration under 28 U.S.C. § 1746, because the 'to the best of my knowledge' formulation is insufficient"). Agent Dotson failed to comply with the statute – not by *omission*, as was the case in the authority cited by the Government in its Opposition³ – but rather, by *addition*. Adding the equivocal and conditional language "to the best of my knowledge and belief" defeats the intent of the statute and renders his verification meaningless.

In 1976, Congress passed 28 U.S.C. § 1746 for the purpose of allowing the use of unsworn declarations given under the penalties of perjury in lieu of affidavits in all federal proceedings. *Muscatell v. Muscatell*, 106 B.R. 307, 308 (Bankr. M.D. Fla. 1989). Therefore, two different documents can be used, the only difference being one document (affidavit) is subscribed and sworn to before some other person having the authority to administer an oath or

³ The Government in its Opposition relies in large part on equally dated cases that involved verifications where either a buzz phrase was omitted or where synonyms or paraphrases were used rather than the exact exemplary language of the statute. The Government also criticizes ASD for relying on cases addressing affidavits and then turns around and relies heavily on *Schroeder v. McDonald*, 55 F.3d 454 (9th Cir. 1995), which involved a verified complaint functioning as an affidavit for summary judgment purposes.

affirmation, and the other document (verification) subscribed to by the person himself and need not be notarized nor sworn to by another. *Id.* As a result, great caution should be shown when an affiant is left to tinker⁴ with the exemplary language to create wiggle room, especially when the complaint being verified is replete with misrepresentations, omissions and exaggerations. *See Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988) ("...it allows the affiant to circumvent the penalties of perjury in signing onto intentional falsehoods").

In *United States v. That Certain Real Property Located At 632-636 Ninth Avenue, Calera Alabama*, 798 F. Supp. 1540 (N.D. Ala. 1992), the government seized real property and sought its forfeiture based on alleged cocaine activity on the property. The claimant complained that the interrogatory answers provided by the government were signed only by an Assistant U.S. Attorney, not based on personal knowledge. *Id.* at 1546. Specifically, claimant complained that the government's answers to his second interrogatories contained only the following verification language:

I declare under penalty of perjury that the foregoing, based *in part on information supplied by others*, is true and correct.

Id. at 1547 (emphasis in original). Notwithstanding the AUSA's inclusion of the buzz phrases "under penalty of perjury" and "true and correct," the court found that the verification did not comply with 28 U.S.C. § 1746 because virtually all of plaintiff's purported "answers" were second hand and the court was unable to determine what answers were supplied by others. *Id.* Agent Dotson's verification likewise fails to comply. As a result, the improperly verified Complaint should be dismissed.

⁴ Pragmatically, the continued inquiry could be eliminated if only the exemplary language in the statute was used verbatim. *Muscatell*, 106 B.R. at 309.

VI. Motion to Strike Improper Statements in Government's Response

For similar reasons, ASD moves to strike unreliable and unsupported statements that are presented as "facts" in the Government's Opposition to Claimants' Emergency Motion. Specifically, the Government's counsel describes in his Response certain statements that Claimant Thomas Bowdein allegedly made "to the Secret Service." [DE 14 at 3 & n. 2]. In addition, the Government makes the sweeping assertion: "As many of ASD's followers know, including those individuals with special side agreements, Bowdoin actually promised to return even greater percentages [than 125%] to many of those who agreed to join his flock and promote his get-rich-quick scheme." [*Id.* at 8]

How does the government know what "**many** of ASD's followers know"? How many is "many"? Who heard Mr. Bowdoin "promise" anything? In addition, the Government claims that it has "received *numerous* calls, letters and emails from ASD followers. . . ." [*Id.* at 8, n. 5 (emphasis added)] Again, what is "numerous"? These statements are nothing more than hyperbole and rhetoric. They are not supported by any affidavit or verification. They do not constitute proof of anything and should be stricken as irrelevant to the determination of matters before this Court.

CONCLUSION

As argued in its Emergency Motion, unless its Motion is granted by this Court, ASD will be severely penalized before the Government ever presents any solid evidence of wrong-doing. If, at the end of the trial, the Government ultimately fails to prove its case, and ASD is found to be a legitimate multi-level marketing business, ASD will remain the victim of the Government's actions. It will never be able to re-establish its business. Indeed, with each day that passes, ASD's ability to resume business is diminished.

As a result, ASD respectfully requests that this Court enter an order:

1. 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; or alternatively

2. schedule an evidentiary hearing *as quickly as possible*, at which the disputed issues may be argued and considered and at which reasonable safeguards and monitoring parameters may be presented.

WHEREFORE, for the foregoing reasons, on behalf of Claimants, Counsel respectfully requests that the Court grant the relief described herein.

Dated: August 29, 2008

Respectfully submitted,

AKERMAN SENTERFITT

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply was served this 29th day of August, 2008 via the Court's electronic filing system upon the following counsel:

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/s/ Michael L. Fayad
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