UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MIKE COLLINS,
FRANK GREENE, and
NATURES DISCOUNT, INC.,
Individually and on behalf of all others similarly situated,

Plaintiffs,

v.

ADSURFDAILY, INC.,
BANK OF AMERICA, N.A.,
THOMAS ANDERSON BOWDOIN, JR.,
WALTER CLARENCE BUSBY, JR., and
ROBERT GARNER,

Defendants.

Case No. 1:09-cv-00100
Hon. Rosemary M. Collyer

DEFENDANT BUSBY, JR.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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Defendant Rev. Walter Clarence Busby Jr. ("Rev. Busby"), by counsel and pursuant to Federal Rule of Civil Procedure 12(b)(6), hereby requests that this Court dismiss all claims in this action against him. The claims against Rev. Busby are precluded by the United States' civil forfeiture action[1] under the doctrine of *res judicata*. Plaintiffs are barred from relitigating issues resolved against Busby on behalf of the United States and all residents, citizens, and taxpayers concerning matters adjudicated which are of public interest. As a matter of policy, permitting the plaintiffs to circumvent the doctrine of *res judicata* would open the floodgates to redundant litigation and chill claimants' motivation to negotiate settlement in civil forfeiture cases. In addition, the Plaintiffs lack standing to assert claims against Rev. Busby because no Plaintiff has asserted a cognizable injury arising from business transacted with Rev. Busby or his now defunct company Golden Panda. The Plaintiffs have sued the wrong defendant in Rev. Busby. As the record cited by Plaintiffs in their Complaint confirms, Golden Panda was a separate entity from ASD at all times and, therefore, the alleged injuries arising from ASD conduct do not give rise to standing against Rev. Busby. Furthermore, the Plaintiffs have failed to state a claim under RICO because plaintiffs have not alleged under Federal Rule of Civil Procedure 9(b) specific facts needed to support predicate acts of fraud and have not alleged a cognizable injury caused by Rev. Busby to "business or property." *See* 18 U.S.C. § 1964(c). Moreover, the plaintiffs did not allege sufficient facts to establish that Rev. Busby was involved in a common enterprise with ASD. Finally, the Plaintiffs have failed to state a claim against Rev. Busby concerning an alleged breach of fiduciary duty because they have not alleged sufficient facts to demonstrate that Rev.

[1] *See United States of America v. 8 Gilcrease Lane, Quincy, Florida 32351, et al.*, D.D.C. No. 1:08-cv-01345-RMC (filed Aug. 5, 2008) (hereinafter "U.S. Forfeiture").

Busby owed such a duty to the Plaintiffs or any class member.[2] Accordingly, this Court should dismiss plaintiffs' claims against Rev. Busby on all counts; the claims are (1) barred by *res judicata*; (2) fail to state a claim under civil RICO upon which relief can be granted; (3) lack requisite Article III standing; and (4) fail to allege a breach of fiduciary duty.

I. BACKGROUND

In their complaint, Plaintiffs cite to, and incorporate, the pre-existing record in the Government's civil forfeiture action against Defendants including Golden Panda Ad Builder ("Golden Panda") and Reverend Walter Clarence Busby, Jr. ("Rev. Busby") among others. In acting on a motion to dismiss, this Court may take judicial notice of the entire pre-existing record and is not limited to examination of only those parts selectively excerpted by the Plaintiffs in Plaintiffs' Complaint. *See Lipton v. MCI Worldcom, Inc.*, 135 F.Supp. 2d 182, 186 (D.D.C. 2001); *see also* Complaint at 17, 27-30 (extensively quoting and referencing materials from forfeiture record). Rev. Busby respectfully requests that this Court take judicial notice of the record excerpts he offers below. *See Philips v. Bureau of Prisons*, 591 F.2d 966, 969 (D.C. Cir. 1979) (noting that consideration of matters that are of general public record is appropriate in a motion to dismiss).[3]

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[2] Rev. Busby does not waive his right to challenge the certification of the class if this case proceeds.

[3] Under Federal Rule of Evidence 201, judicial notice may be taken for facts "not subject to reasonable dispute in that it is (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* FRE 201(b). The elements for judicial notice are satisfied concerning the record in the forfeiture proceeding. It cannot

Rev. Busby is a resident of Acworth, Georgia where he has been a Protestant minister for thirty years. He has resided in Georgia since the age of two. *See* Affidavit of Rev. Busby, D.D.C. No. 08-1345, Dkt. 17-3, at 2 (hereinafter "Rev. Busby Affidavit"). Golden Panda commenced operations on July 24, 2008 and ceased operations eight days later on August 1, 2008, the day that the United States seized all Golden Panda accounts in the U.S. Forfeiture action. *Id*. at 2-3. Now defunct (as of September 2008), Golden Panda was a privately held corporation with 1 shareholder, Rev. Busby. *Id.* at 2. Rev. Busby was Golden Panda's President and Chief Executive Officer. *Id*. at 6.

The action before this Court is the second proceeding against Rev. Busby within the past year involving the same nucleus of operative facts. Complaint at ¶10. The present action contains allegations that mirror those in the U.S. forfeiture action filed in August of 2008.

On August 5, 2008, the Department of Justice filed an *in rem* civil forfeiture action against ASD and Golden Panda's respective assets, none commingled. It sought Rev. Busby's assets that were derived from the operation of Golden Panda, an internet advertising company. *See* U.S. Forfeiture, Complaint at 1 (D.C.C. No. 08-2205, Dkt. 1) (incorporated by reference in Plaintiff's complaint at 17, ¶ 58). As grounds for forfeiture the Government alleged that Golden Panda received consumer funds through, *inter alia*, wire fraud (18 U.S.C. § 1343). *See* U.S. Forfeiture, Complaint at 6. The Government also pursued Golden Panda's assets under the RICO statute, 18 U.S.C. § 1961 *et seq.*, and sought the forfeiture of assets based upon allegations of "specified unlawful activity" as

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reasonably be disputed that the parties filed materials with the trial court in the U.S. forfeiture action. Moreover, this court may accurately determine that the content of those pleadings are properly referenced through a search of the public docket.

referenced in 18 U.S.C. § 1981(c) and defined in 18 U.S.C. § 1956(c)(7)(A). *See* 18 U.S.C. § 1956(c)(7)(A) (incorporating § 1961(1)).

Associated with that action, the U.S. Department of Justice (DOJ) notified interested consumers of the forfeiture proceedings, and published continuing updates on the status of the forfeiture action. *See, e.g.,* US DOJ Victim Witness Assistance, Notice to Consumers Concerning Golden Panda Forfeiture;[4] US DOJ Golden Panda Consumer Claim;[5] January 23, 2009 US DOJ Golden Panda Consumer Update.[6] The DOJ also provided an avenue for consumers to seek return of their payments held by DOJ as funds seized from, respectively, Golden Panda and ASD. Despite the DOJ restitution procedures, several consumers opted to intervene and represent their interests directly under Federal Rule of Civil Procedure 24. *See* D.D.C. No. 08-2205, Dkts. 43, 44, 45, 46. None of the named Plaintiffs in this action moved to intervene in the Government forfeiture proceeding.

On August 25, 2008, Rev. Busby filed a Verified Claim under Supplemental Rule G(5) of the Supplemental Rules for Certain Admiralty or Maritime Claims and Asset Forfeiture Actions. Rev. Busby claimed an interest in specific assets seized by the Government belonging to or derived from Golden Panda Ad Builder but made no claim to the specific assets seized by the Government belonging to or derived from ASD. *See*

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[4] *Available at,* http://www.usdoj.gov/usao/dc/Victim_Witness_Assistance/files/September%2023,%202008%20-%20golden%20panda%20ad%20builder%20update.pdf.

[5] *Available at,* http://www.usdoj.gov/usao/dc/Victim_Witness_Assistance/adsurfdailyinformationform.html.

[6] *Available at,* http://www.usdoj.gov/usao/dc/Victim_Witness_Assistance/files/January%2023,%202009%20-%20civil%20forfeiture%20proceedings%20update.pdf.

D.D.C. No. 1:08-cv-02205-RMC, Dkt. 10. The Government responded to Rev. Busby's motion for release on September 10, 2008. *See* D.D.C. No. 08-1345, Dkt. 19.

Rev. Busby entered into negotiations with Government counsel following Golden Panda's Motion to Release Funds. *See* Sept. 15, 2008 Golden Panda Consent Motion for Extension of Time, D.D.C. No. 08-1345, Dkt. 22 ("[o]ngoing negotiations may render Golden Panda's Reply moot"); Sept. 12, 2008 Government Consent Motion for Enlargement of Time, D.D.C. No. 08-1345, Dkt. 21 ("[p]laintiff needs additional time to discuss/review information from claimants that may render the Motion to Sever and Transfer unnecessary or moot").

The parties exchanged additional information concerning issues raised in the Motion for Release. *See* Govt. Consent Motion for Enlargement of Time, D.D.C. No. 08-1345, Dkt. 21. Negotiations culminated in a resolution on the disposition of Golden Panda assets. Golden Panda agreed to forfeit permanently to the Government all monies received by Golden Panda from its customers. Golden Panda agreed to terminate its defense in the U.S. Forfeiture action, produce records to enable identification of Golden Panda customers and transactions, release all right, claim, and interest in funds paid to Golden Panda including those in the Golden Panda's specific Bank of America Accounts seized by the Government, and disclaim any right to all funds in the custody of the Department of Justice for its discretionary future repayment to Golden Panda customers. *See* Consent Dismissal, D.D.C. No. 08-1345, Dkt. 24. Golden Panda consented to dismissal under the understanding that the DOJ would reimburse Golden Panda customers not complicit in any wrong-doing.

On September 22, 2008, through a consent motion to dismiss claims, Golden Panda explained that "having discontinued its operations upon receipt of notice that the United States had seized Golden Panda's funds, Golden Panda now has made that cessation permanent." *Id.* at 2. The Court formalized the consent dismissal in its September 23, 2008 Minute Order. *See* D.D.C. No. 08-1345, September 23, 2008 Minute Entry Order (granting consent motion to dismiss). The Minute Order accepted the relinquishment by Golden Panda of any right, title, and interest to the funds seized and turned over to the government. In addition to his permanent transfer of all right, title, and interest in the seized funds, Rev. Busby volitionally transferred to the U.S. Secret Service all outstanding checks, customer materials, and related Golden Panda assets he possessed before dissolving the corporation. *Id.*

Aside from Golden Panda's representatives, no other party claimed an interest in the seized assets. Without additional claimants to the Golden Panda assets, the funds seized from Golden Panda have effectively been forfeited to the United States pending the government's disposition of them, which is expected to include reimbursement to those who paid monies to Golden Panda who are themselves blameless. On April 24, 2009, Government counsel represented that the United States intends to file a default motion for the Golden Panda assets in the near future. Golden Panda's consent motion to dismiss, however, already relinquished ownership and control over the funds to the Government; the default motion would yield an order of forfeiture from the Court. No additional claimants have alleged an interest in Golden Panda assets within the time period permitted by statute. *See* 18 U.S.C. § 983 (providing time limit to assert claim to seized property). Accordingly, this Court's Minute Order disposed of any right, title, or

interest of Golden Panda in the funds Golden Panda relinquished to the government. The Minute Order is certain, final, and dispositive.

The Plaintiffs in this case were customers of AdSurfDaily ("ASD"), not of Golden Panda, and paid cash amounts into ASD's online advertising system. *See* Complaint at ¶11-13. Plaintiffs did not pay any amount to Golden Panda. Golden Panda was operational for only eight days. *Id.* The named plaintiffs did not intervene in the U.S. Forfeiture proceedings. Plaintiffs did not name Golden Panda as a defendant but, rather, named Rev. Busby individually. Plaintiffs conclude without pleading requisite facts that Rev. Busby had any ownership in, operated, or controlled ASD. That presumption is incorrect, contradicted by the same record that Plaintiffs incorporate by reference in their complaint. *See* Affidavit of Rev. Busby, D.D.C. No. 08-1345, Dkt. 17-3, at 2-11; *see also* Complaint at 17, 27-30.[7]

Rev. Busby has never been an officer of ASD. *Id.* He has never had any role in the conduct of ASD business operations or affairs. *Id.* Golden Panda has always been independent of ASD, and no ASD representative ever held a financial interest in Golden Panda. *Id.* Indeed, Golden Panda filed a motion to sever the forfeiture proceedings wherein Golden Panda stated that the joint proceeding unfairly prejudiced Golden Panda because no connection existed between Golden Panda and ASD. *see* Aug. 29, 2008 Golden Panda Memo in Support of Motion for Severance and Transfer, D.D.C. No. 08-1345, Dkt. 17-2, at 1 ("Golden Panda is not affiliated with ASD, has not received any

[7] Because Plaintiffs expressly incorporate parts of the pre-existing judicial record into their complaint, it is within the province of this Court to examine that whole record when acting on Rev. Busby's motion to dismiss. *See Lipton*, 135 F.Supp. 2d at 186 (the court may take judicial notice of documents even though such documents were not included in, or attached to, the complaint); *see also infra*, Part II(B).

funding from ASD or its principals, and is independently owned, operated, and controlled"). Golden Panda further stated that it was "not responsible for, had no foreknowledge of, and never was involved in the making of claims alleged in the [Government's] complaint that give rise to wire fraud." *Id.* at 7.

In his supporting affidavit, Rev. Busby stated that ASD representatives had "no involvement in forming Golden Panda." *See* Affidavit of Rev. Busby, 08-1345, Dkt. 17-3, at 6. The Government never contested Rev. Busby's statements that ASD and Golden Panda were unassociated. *See* Plaintiff's Opposition to Claimant's Emergency Motion for Return of Seized Funds, D.D.C. No. 08-1345, Dkt. 19, at 3. Rather, the Government focused on Golden Panda's business model and argued that Golden Panda, even if distinct from ASD, did not operate a lawful business. *See id.* at 3-4 (arguing that "[l]ike Bowdoin, Busby should be prepared to explain how a company that promises to return 125% of its revenue is a profitable advertising company"). Accordingly, the Government defended its case against Golden Panda by analogizing Golden Panda to ASD, not by arguing post-complaint that Golden Panda was an extension of ASD. *See id.* at 6.

In the U.S. Forfeiture action Rev. Busby claimed an interest only in assets seized from Golden Panda Ad Builder, not to those seized from ASD. *Id.* Representatives for ASD filed claims to seized assets on August 15, 2008. *See* D.D.C. No. 08-1345, Dkt. 5. Significantly, none of the ASD representatives claimed an interest in assets seized from Golden Panda. *Id.* On August 29, 2008, Golden Panda filed its Motion for Release of Funds. *See* D.D.C. No. 08-1345, Dkt. 19-2. In support of its motion, Golden Panda again stated that it was not affiliated with ASD. *Id.* at 1. In an uncontroverted declaration, Rev. Busby stated that "[n]o ASD or Bowdoin funds were ever deposited

into Golden Panda accounts or relied upon to run Golden Panda. ASD owner Andy Bowdoin publicly declared his non-affiliation with Golden Panda weeks before Golden Panda became operational." *Id.* The uncontroverted record from the Government's forfeiture proceeding reveals that Golden Panda was independently owned and operated, and that ASD representatives never held a financial interest in Golden Panda. *Id.*

ASD and Golden Panda independently defended the forfeiture action. Both corporations filed separate motions for relief, claimed separate interests to seized property, and, aside from the Government's initial complaint, neither Golden Panda, the Government, nor ASD claimed a nexus between ASD and Golden Panda. Indeed, as stated above, the uncontroverted record is that the two were independent sharing no common ownership, no common controllers, and no common funds.

II. STANDARD FOR FAILURE TO STATE A CLAIM

A. Rule 12(b)(6) Motion to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face. Although a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007) (internal citations omitted). The facts alleged within the plaintiffs' complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 547. The court must not accept as fact legal conclusions cast as factual allegations. *See Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Mere allegations are insufficient to state

a claim without supporting facts. *See Chandamuri v. Georgetown University*, 274 F.Supp. 2d 71, 78 (D.D.C. 2003). The Court must not accept "inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint, nor legal conclusions cast in the form of factual allegations." *Browning*, 292 F.3d at 242.

The Court may consider only "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F.Supp. 2d 191, 196 (D.D.C. 2002).

B. The Record "Incorporated by Reference" in Plaintiffs' Complaint Is Properly Considered Without Converting Rev. Busby's Motion to Dismiss Into a Motion for Summary Judgment

When ruling on a Motion to Dismiss, this Court may consider supplemental materials that the plaintiffs incorporate by reference in their complaint without converting the motion to dismiss into one for summary judgment. *See Lipton v. MCI Worldcom, Inc.*, 135 F.Supp. 2d 182, 186 (D.D.C. 2001). This Court may take judicial notice of documents and facts under Federal Rule of Evidence 201, even though such supplemental information is not included in, or attached to, the complaint. *See id.*; *Marcus v. AT&T*, 938 F.Supp. 1158, 1164-65 (S.D.NY. 1996). In addition, this Court may consider matters that are within the public record without converting a motion to dismiss into a motion for summary judgment. *See Philips v. Bureau of Prisons*, 591 F.2d 966, 969 (D.C. Cir. 1979) ("when passing on a motion attacking the legal efficacy of the plaintiff's statement of his claim, the court may properly look beyond the complaint … to matters of general public record"). "[T]he court may take judicial notice of matters of a general public nature, such as court records, without converting the motion to dismiss into one for

summary judgment." *Baker v. Henderson*, 150 F.Supp. 2d 17, 19 n.1 (D.D.C. 2001) (emphasis added).

Given the Plaintiffs' reliance on the Government's forfeiture complaint and underlying documents in *8 Gilcrease Lane* (*see* Complaint at 17, 27-30), this Court may consider the entire record evidence from the forfeiture proceeding in evaluating Rev. Busby's motion to dismiss. The Plaintiffs have incorporated by reference documents from the underlying forfeiture proceeding. *See* Complaint at 17, ¶ 58 ("[a]ccording to a verified Complaint filed by the United States Attorney for the District of Columbia …"); *id.* at 27-30 (discussing the "Related Seizure and Forfeiture Proceeding"); *id.* at 28-29 (quoting the Court's Memorandum Opinion from the forfeiture proceeding, D.D.C. No. 08-1345, Dkt. 35; *id.* at 28, ¶ 98 (citing ASD Motion for Release of Seized Funds); *id.* at 30, ¶ 102 (stating that "[t]he facts and alleged offenses in the related forfeiture proceeding are the same or similar to the predicate offenses in the current action"). Indeed, the Plaintiffs quote from the Court's Memorandum Opinion extensively. *See id.* at 28-29.

Plaintiffs rely on the Government's forfeiture complaint for facts concerning an alleged relationship between Golden Panda and ASD. However, record evidence produced during the forfeiture action demonstrated that Rev. Busby and Golden Panda did not have any common ownership, controllers, or funds. *See supra*, Background at 2-7. This Court may consider that uncontroverted record evidence produced during the forfeiture proceeding when assessing plaintiffs' claims in this action under the motion to dismiss standard

III. PLAINTIFFS' SUIT IS BARRED BY THE DOCTRINE OF RES JUDICATA

Res judicata is an affirmative defense that may be properly brought in a pre-answer Rule 12(b)(6) motion when "all relevant facts are shown by the court's own records, of which the court takes notice." *Evans v. Chase Manhattan Mortgage Corp.*, 2007 U.S. Dist. LEXIS 20773, *11, No. 04-2185 (D.D.C. Mar. 23, 2007)(citations omitted); *see also Stanton v. Dist. of Columbia Ct. of Appeals*, 127 F.3d 72, 76-77 (D.C. Cir. 1997) (noting that courts have permitted parties to assert res judicata under Rule 12(b)(6)).

The doctrine of *res judicata* precludes future actions based on the same cause of action by the privies of the original litigants. *See Apotex, Inc. v. Food & Drug Admin.*, 393 F.3d 210, 217 (D.C. Cir. 2004) ("a judgment on the merits in a prior suit bars a second suit involving identical parties or their privies based on the same cause of action") (emphasis added). As the Supreme Court has explained, "'to preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.'" *Apotex*, 393 F.ed at 217 (citing *Montana v. United States*, 440 U.S. 147, 153-154 (1979)). A claim will be "barred if there has been prior litigation (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction." *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006); *see also Blonder-Tongue Labs, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 323-24 (1971); *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 597 (1948).

A. Plaintiffs' Action Is Barred Because it Involves "the Same Claims or Causes of Action" as the Government's Case in *United States of America v. 8 Gilcrease Lane, Quincy, Florida 32351, et al.*, D.D.C. No. 1:08-cv-02205-RMC

For purposes of *res judicata*, the identity of the cause of action stems from the facts. The legal theory asserted by the original parties is immaterial. "Identical causes of action implicate the same nucleus of operative facts; it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies." *Moment v. Reardon*, 2007 U.S. Dist. LEXIS 37297, *4-5 (D.D.C. Mar. 22, 2007) (quoting *Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984)); *see also Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 66 (D.C. Cir. 2002). Two causes of action arise from the same operative facts if "the facts are related in time, space, origin, or motivation …" *Apotex*, 393 F.3d at 217; *see also I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 949 n.5 (D.C. Cir. 1983); see also *Evans*, supra, at *13-14 (citing *Restatement (Second) of Judgments* § 23(2)(1982) ("[t]he DC Circuit has 'embraced the Restatement (Second) of Judgments' pragmatic, transactional approach to determining what constitutes a cause of action' for *res judicata* purposes.") (citation omitted)).

Plaintiffs admit that their case "grows out of the same events and transactions" as the US Forfeiture action. Complaint at 5, ¶10. Their cause of action in this case is identical to the cause of action in the Government's forfeiture proceeding. *See* Complaint at 30, ¶102 ("[t]he facts and alleged offenses in the related forfeiture proceeding are the same or similar to the predicate offenses in the current action") (emphasis added). Indeed, the Plaintiffs' complaint provides a fact statement that is lifted directly from the Government's Verified Complaint filed in the forfeiture proceeding. *Compare* Plaintiffs'

Complaint at 5-30 *with* Government Verified Complaint, D.D.C. No. 08-2205, Dkt. 1 at 7-38. The Plaintiffs cite to the Government's Verified Complaint in support of their recitation of facts. *See* Complaint at 17, ¶ 58.

The facts the Plaintiffs rely upon are identical to those litigated in the Government's civil forfeiture proceeding. Both matters require the court to review the operation and business practices of AdSurfDaily and Golden Panda. Both matters require an assessment of internet ad package sales under the federal wire fraud and money laundering statutes. Both matters relate to the promise of rebates and a return on investment through the sale of ad packages. Both cases require that the court assess whether the parties misrepresented their business backgrounds. Finally, both cases cover the same time period of business operations. As stated above, the plaintiffs admit that the facts listed in their complaint are identical to those litigated in the earlier Government forfeiture proceeding. *see Leh v. General Petroleum Corp.*, 382 U.S. 54, 65 (1965) (the determination of whether a private action is based on matters "complained of" in a prior government action generally is based on "a comparison of the two complaints on their face"). Accordingly, the causes of action are identical for purposes of *res judicata* because the two proceedings present the same nucleus of operative facts and concern the same transactions. *E.g.*, *Moment*, 2007 U.S. Dist. LEXIS 37297 at *4-5 (citations omitted), Evans supra at *13-14(citations omitted).

B. Plaintiffs' Action Is Barred Because It Involves "the Same … Privies" as the Government's Case in *United States of America v. 8 Gilcrease Lane, Quincy, Florida 32351, et al.*, D.D.C. No. 1:08-cv-02205-RMC

The Government seized all of the assets that Golden Panda (and Rev. Busby) received from customers. The Government seized Golden Panda's assets for both remedial and punitive purposes. Although the Plaintiffs chose not to participate in the original government forfeiture, the Plaintiffs were nonetheless in privity with their Government because it acted on behalf of the public and all alleged victims. As the lawful owner of the seized property at the time of the seizure, Rev. Busby had a direct interest in the forfeiture proceedings. That interest was lawfully vetted through Rev. Busby's Verified Claim to the seized Golden Panda assets. Therefore, although the civil *in rem* forfeiture pursued property, Rev. Busby was legally connected to that property and in privity with it as an actual litigant during the proceedings.

"The doctrine of *res judicata* is that 'the parties to a suit and their privies are bound by a final judgment and may not relitigate any ground for relief which they already have had an opportunity to litigate—even if they chose not to exploit that opportunity…'" *Page*, 729 F.2d at 820 (emphasis added) (quoting *Hardison v. Alexander*, 655 F.2d 1281, 1288 D.C. Cir. 1981). Plaintiffs had the right to, but did not seek to, intervene in the original proceedings under Federal Rule of Civil Procedure 24(a) or (b). *See* D.D.C. No. 08-2205, Docket Sheet (showing that several interested consumers did file motions to intervene concerning ASD funds). Plaintiffs seek to recover under the same cause of action already asserted by the government. They seek damages from Rev. Busby in the form of assets that neither Rev. Busby nor the defunct Golden Panda possess, *i.e.*, the funds already transferred to the Government of the United

States and relinquished completely to the Government (with no residual claim of right). Meanwhile, Plaintiffs remain eligible to receive money from the Government as restitution, but because none has paid funds to Golden Panda, the Plaintiffs are eligible to receive money from funds they paid to ASD if the Government is successful in its case against ASD. The Department of Justice has created a mechanism for the filing of restitution claims to reimburse funds seized from Golden Panda and Rev. Busby as well as ASD. *See* US DOJ Victim Witness Assistance, Notice to Consumers Concerning Golden Panda Forfeiture;[8] US DOJ Golden Panda Consumer Claim;[9] January 23, 2009 US DOJ Golden Panda Consumer Update.[10]

The doctrine of *res judicata* bars Plaintiffs' claims because Plaintiffs were in privity with the Government during the initial forfeiture proceeding. The Supreme Court has recognized the long settled axiom that a judgment for or against a governmental body in an action brought by the governmental body on behalf of the public is binding and conclusive on all residents, citizens, and taxpayers with respect to matters adjudicated which are of general and public interest. *See e.g., City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958); *see also State of Wyo. v. State of Colo.*, 286 U.S. 494, 506-09 (1932); *Lance v. Dennis*, 546 U.S. 459 (2006); *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229 (10th Cir. 2006).

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[8] *Available at*, http://www.usdoj.gov/usao/dc/Victim_Witness_Assistance/files/September%2023,%202008%20-%20golden%20panda%20ad%20builder%20update.pdf.

[9] *Available at*, http://www.usdoj.gov/usao/dc/Victim_Witness_Assistance/adsurfdailyinformationform.html.

[10] *Available at*, http://www.usdoj.gov/usao/dc/Victim_Witness_Assistance/files/January%2023,%202009%20-%20civil%20forfeiture%20proceedings%20update.pdf.

In *Tacoma*, the Supreme Court assessed the extent citizens and taxpayers were precluded by earlier litigation on the part of state government. *Tacoma*, 357 U.S. at 340-41. The Supreme Court reviewed whether the Court of Appeals for the Ninth Circuit, in an action between the City of Tacoma and the State of Washington, had precluded the citizen taxpayers under its decision involving the City of Tacoma even though the citizen taxpayers were not directly involved in the decision. *Id.* at 339. The Court of Appeals had ruled that the City of Tacoma had legal capacity to act under a license issued by the Federal Power Commission under the Federal Power Act. *See id*. Finding that the citizens were in privity with their government for purposes of claim preclusion, the Supreme Court stated that "[t]he final judgment of the Court of Appeals was effective, not only against the State, but also against its citizens, including the taxpayers of Tacoma, for they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment." *Id.* at 340-41. Under *Tacoma*, citizens are in privity with a governmental body when that body purports to act on behalf of the public. Thus, alleged victims are in privity with the U.S. Government because that government obtains assets from an unlawful actor on behalf of the public and for the benefit of the victims.[11]

The rule in *Tacoma* is well settled. *See Lance v. Dennis*, 546 U.S. 459, 462 (2006) (analyzing *Tacoma* rule in context with *Rooker-Feldman* precedent). Sister Circuits have acknowledged that government litigation involving a matter of public concern will have a preclusive effect on subsequent litigation by citizens. *See Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 12355 (10th Cir. 2006).

[11] Under 18 U.S.C. § 1964(b), the Attorney General is empowered to institute RICO proceedings.

The Plaintiffs' claims here are identical to those raised by the Government in the forfeiture proceedings. *See* Complaint at 30, ¶ 58 ("[t]he facts and alleged offenses in the related forfeiture proceeding are the same or similar to the predicate offenses in the current action"). The Plaintiffs now attempt to assert RICO claims, and the predicate offenses that constitute the alleged RICO violations are identical to those asserted in the government forfeiture proceeding. The Government's legal theory in the forfeiture proceeding is immaterial because it is the nucleus of facts that determines the cause of action for purposes of *res judicata*. Nonetheless, the Government's action was also predicated on alleged violations of the RICO statute. *See* Government Complaint, D.D.C. No. 08-1345, Dkt. 1 at 6-7 (forfeiture based on "specified unlawful activity" as referenced in 18 U.S.C. § 1981(c) and defined in 18 U.S.C. § 1956(c)(7)(A) (incorporating § 1961(1)). Therefore, Plaintiffs cannot assert that their complaint raises private legal claims not subject to resolution in the original government action.

The government's forfeiture action was in the public interest. Civil forfeiture actions are considered both remedial and punitive. The Supreme Court recognized that civil forfeiture actions are punitive as they punish an offender for wrongful acts. *See Austin v. U.S.*, 509 U.S. 602, 619-22 (1993). However, the Court also held that forfeiture actions serve a remedial purpose. *Id.* at 610. The Court stated that "[w]e are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes …" *Id.*; *see also New Jersey Coalition for Fair Broadcasting v. FCC*, 580 F.2d 617, 619-20 (D.C. Cir. 1978) (finding that FCC forfeiture provisions served as a "critical means to enforce the public interest as it is embodied in the rules of the Commission"); *United States v. One Assortment of 89*

Firearms, 465 U.S. 354, 464 (1984) (recognizing that forfeiture actions are remedial when they remove contraband or unlawful materials from society).

The government pursued a civil *in rem* action to seize all assets obtained by Golden Panda from its customers. The Department of Justice published instructions targeted at customers informing them of the restitution process. The DOJ provides alleged victims with an avenue for receiving reimbursement of funds paid to Golden Panda. The DOJ has created a registration system for aggrieved consumers.[12] Former customers are provided under 28 C.F.R. § 8.10 with an avenue to claim funds paid to the company. Under Section 8.10(a), "any person claiming a legal or equitable interest in any property which has been forfeited … may file ... a petition for remission or mitigation of the forfeiture or a petition for restoration of the proceeds …" 28 C.F.R. § 8.10(a). In short, the Government through its forfeiture action has already accomplished what the Plaintiffs now seek to achieve. As part of the consent motion to dismiss, the Government required that Golden Panda agree "to facilitate the United States' effort to identify the persons who provided funds to Golden Panda." *See* D.D.C. No. 08-2205, Dkt. 24. Golden Panda did that. *See* Affidavit of Busby (Attachment A). The Government has ostensibly acted in the public interest and on behalf of all alleged victims. "The persons for whose benefit and at whose direction a cause of action is litigated cannot be said to be strangers to the cause. One who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an

[12] *See* http://www.usdoj.gov/usao/dc/Victim_Witness_Assistance/adsurfdailyinformationform.html. In association with former-member registration, customers are able to provide information concerning the "total amount of funds" sent to ASD with sufficient detail to facilitate reimbursement.

action in aid of some interest of his own, is as much bound as he would be if he had been a party to the record." *See Montana v. United States*, 440 U.S. 147, 154 (1979).

Accordingly, because the forfeiture action was a matter of public interest, the Plaintiffs were in privity with the Government concerning the original civil forfeiture action against the assets of Golden Panda and Rev. Busby. *See Nevada v. United States*, 463 U.S. 110, 129-30 (1983) (holding that "when a final judgment has been entered on the merits of a case,' it is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose'") (citations omitted).

Moreover, by allowing the Plaintiffs to relitigate that which the Government already resolved, the Court would countenance precedent that chills the Government's ability to resolve matters short of costly litigation and extends the time individuals must wait to be made whole through restitution. Plaintiffs would have consumers pursue litigation on identical grounds as those asserted by the government in a forfeiture action. If private consumer actions hinge on the development of a forfeiture proceeding, claimants will be disinclined to negotiate an expeditious resolution of that proceeding.

Plaintiffs seek to recover the same assets that are now held by the government, seized in the forfeiture action and voluntarily supplemented thereafter. That action, if countenanced, creates a perverse disincentive, encouraging defendants who may face private litigation to retain assets subject to forfeiture, rather than promptly relinquish them to the Government, knowing such assets may be required to compensate private plaintiffs in subsequent litigation. Courts have recognized the need to preserve through

res judicata the efficiency that settlement provides. *See, e.g.*, *Jackson v. North Bank Towing Corp.*, 213 F.3d 885, 889 (5th Cir. La. 2000) ("the broad application of res judicata serves the purpose of fostering judicial efficiency and protecting the defendants from multiple lawsuits").

The doctrine of *res judicata* is intended to prevent redundant litigation. *See Hallco Mfg. Co. v. Foster*, 256 F.3d 1290, 1297-98 (Fed. Cir. 2001) (holding that even when parties agree to relitigate, the court "will not give parties the power … to waste the resources of the courts in revisiting … determinations that have already been made").

C. Plaintiffs' Action Is Barred Because There Has Been "a Final, Valid Judgment on the Merits"

Once a court effectively disposes of the rights of a party to a property in issue, that order becomes a final judgment on the merits. The Court's September 23, 2009 Minute Order disposed of Rev. Busby's interest in the seized property, accepting as final his relinquishment of any right, title, and interest in the funds to the Government. In his motion preceding that order, Rev. Busby permanently relinquished to the United States all right, title, and interest to all funds paid to Golden Panda. The consent dismissal of Rev. Busby's claims effected a permanent disposition of Rev. Busby's assets to the government under the RICO statutes. Without additional claimants to Golden Panda assets, nothing stands in the way of a forfeiture order following the Government's prospective filing of a consent default motion. On April 24, 2009, Government counsel represented that he will soon file such a motion. Presently, the law is settled by the Minute Order as to Rev. Busby/Golden Panda's rights to the seized funds (i.e., there is no lawful right to them that right having been relinquished by consent motion as

memorialized in the Minute Order). There remains an essentially ministerial order confirming that the funds relinquished are defaulted to the government, the forfeiture to the government thus being perfected. "A traditional judgment on the merits of a case is one that disposes of the underlying cause of action." *See Polsby v. Thompson*, 201 F.Supp. 2d 45, 48 (D.D.C. 2002) (Rule 12(b)(6) motion to dismiss for failure to state a claim is a final judgment on the merits). "[A] ruling is a judgment on the merits if it is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form." *Id.* (quoting *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939 (7th Cir. 1981). Based on the motion preceding the Minute Order, neither Rev. Busby nor Golden Panda has any right, title, or interest in any funds received from Golden Panda customers. That order is final to Rev. Busby and Golden Panda.

The modern view of a final judgment on the merits includes not only those judgments based on legal rights, but "extends to dismissals on other than traditionally substantive grounds." *Harper Plastics, Inc.*, 657 F.2d at 943. For example, federal courts now give preclusive effect to consent decrees under the doctrine of *res judicata*. *See, e.g., In re Connaught Properties, Inc.*,176 B.R. 678 (Bkrtcy.D.Conn. 1995) ("[c]onsent judgments … are entitled to res judicata effect"); *Samuels v. N. Telecom, Inc.*, 942 F.2d 834, 836 (2d Cir. 1991) (a stipulation dismissing an action with prejudice has res judicata effect); *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 858 (5th Cir. 2000) ("[a] consent judgment, also known as a consent decree, is freely negotiated by the parties and has the full effect of res judicata").

Consent dismissals "are to be construed as constituting a stipulation within the meaning of Rule 41(a), Fed. Rules Civ. Pro." *Burns v. Fincke*, 197 F.2d 165, 166 (D.C.

Cir. 1952). Such negotiated stipulations can constitute *res judicata* of the matters covered in the cause of action that was disposed through the stipulation. *Id.*

The consent dismissal contemplated the end of the litigation concerning Rev. Busby's assets. *See, e.g., Greenberg v. Board of Governors of Federal Reserve System*, 968 F.2d 164, 168 (2d Cir. 1992) ("[t]he preclusive effect of a settlement is measured by the intent of the parties to the settlement"). The consent dismissal provides that "having discontinued its operations upon receipt of notice that the United States had seized Golden Panda's funds, Golden Panda now has made that cessation permanent." *Id.* Although ASD's representatives continue to litigate the forfeiture of ASD assets, in the wake of the consent dismissal, Rev. Busby's right to continue Golden Panda business operations and his right to funds given to Golden Panda has ended. He may not continue that business, and he has abandoned any claim to monies paid to Golden Panda.

The consent dismissal represented an agreement between the Government and Rev. Busby that permits the Government to obtain uncontested possession of Golden Panda funds. The dismissal was a final act that terminated the legal challenge concerning Golden Panda assets under the RICO violations. *See Autera v. Robinson*, 419 F.2d 197, 1201 n.17 (D.C. Cir. 1969) ("a valid settlement agreement, once reached, cannot be repudiated by the parties, and after a binding settlement agreement has been made, the actual merits of the settled controversy are without consequence"). Because the consent motion to dismiss resolved the rights of the parties concerning the seized assets of Golden Panda, *res judicata* applies based on the final consent dismissal entered by the parties on September 23, 2008. Through the consent dismissal, the government settled the

forfeiture action on behalf of the victims who now stand to receive funds forfeited upon Government counsel's imminent motion for default.

D. The United States District Court for the District of Columbia Is a "Court of Competent Jurisdiction"

In the underlying forfeiture proceeding, the United States District Court for the District of Columbia had jurisdiction over the action commenced under 28 U.S.C. § 1345. Venue was proper in the District of Columbia under 28 U.S.C. § 1355(b)(1) and pursuant to 28 U.S.C. § 1395. The District Court for the District of Columbia was competent to provide the Government plaintiffs with the full measure of relief sought. *See Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 29 (2d Cir. 1986) (stating that res judicata does not bar a claim based on the same cause of action … if the forum that rendered the prior judgment did not have the power to award the full measure of relief sought in a subsequent action); *accord Thomas v. New York City*, 814 F.Supp. 1139, 1148 (E.D.N.Y. 1993). Indeed, the Plaintiffs here chose the District of Columbia as a court of competent jurisdiction. Because the District Court for the District of Columbia was a court of competent jurisdiction, the forfeiture proceedings before the Court have preclusive effect in the present action.

IV. PLAINTIFFS LACK ARTICLE III STANDING TO SUE REV. BUSBY BECAUSE THEY HAVE SUFFERED NO INJURY-IN-FACT FROM REV. BUSBY

Article III of the United States Constitution restricts federal judicial intervention to "cases" and "controversies." Article III standing is only satisfied where a plaintiff can show an injury-in-fact. It is incumbent upon Plaintiffs to plead standing in their

complaints. *See Communities for a Great Northwest, Ltd. v. Clinton*, 112 F.Supp. 2d 29, 33 (D.D.C. 2000) (the elements of standing are "not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof"). The failure to plead facts requisite for standing is grounds for complaint dismissal. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 880 (1990) (observing that dismissal of complaint when plaintiffs fail to demonstrate standing in complaint); *accord Clinton v. City of New York*, 524 U.S. 417, 421 (1998) (stating that court had earlier remanded with instructions to district court with instructions to dismiss the complaint for lack of jurisdiction where plaintiffs had not "alleged a sufficiently concrete injury to have established Article III standing").

"[I]n order to have Article III standing, a plaintiff must adequately establish: (1) an injury in fact (*i.e.*, a 'concrete and particularized' invasion of a 'legally protected interest'); (2) causation (*i.e.*, a 'fairly … trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (*i.e.*, it is 'likely' and not 'merely speculative' that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing the suit." *Sprint Communications Co. v. APCC Services, Inc.*, 128 S.Ct. 2531, 2535 (2008) (internal citations omitted).

The plaintiff bears the burden of establishing that he has standing to bring suit. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It is fundamental that the plaintiff must have suffered injury caused by the Defendant. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) ("there must be some threatened or actual injury resulting from the putatively illegal action").

The Plaintiffs have sued the wrong defendant in Rev. Busby. The Plaintiffs have failed to allege any injury caused by Rev. Busby. None of the plaintiffs has transacted business with Golden Panda Ad Builder. *See* Complaint at 5, ¶¶ 11-13. The public record in the Government forfeiture action reveals uncontroverted evidence that ASD and Golden Panda were separate entities, owned and operated by different individuals, each of whom exercised influence only over their respective individual companies. Rev. Busby served as the Chief Executive Operator for Golden Panda. ASD exercised no control over Golden Panda or Rev. Busby, and ASD received no money from Golden Panda or Rev. Busby. *See* Affidavit of Rev. Busby, D.D.C. No. 08-1345, Dkt. 17-3, at 2-11. Federal Rule of Civil Procedure Rule 9(b) required that Plaintiffs allege sufficient facts to demonstrate the cause of action against Golden Panda. Plaintiffs have failed to do so.

Plaintiffs have not presented any facts, aside from unsupported conclusions, to suggest that Golden Panda and ASD were related business entities. Indeed, Plaintiffs' cause of action against Rev. Busby proceeds from an inference that is contradicted in the uncontroverted record produced during the forfeiture action. Without alleging a factual basis to suppose Rev. Busby related to ASD, the Plaintiffs simply describe the operation of Golden Panda as if the business by itself established a sufficient link. *See* Complaint at 18, ¶ 61 (plaintiffs' allegations against Rev. Busby are that "Defendant Busby is another operator of the ASD Scheme. Busby was the Chief Executive Officer and President of Golden Panda Ad Builder, Inc. until its recent dissolution"). Plaintiffs' complaint contains no factual allegations that Rev. Busby/Golden Panda was owned, operated or controlled by Andrew Bowdoin/ASD or that any Andrew Bowdoin/ASD

funds were paid to Rev. Busby/Golden Panda. To the contrary, the record below establishes no joint ownership, operation, or control and that no Bowdoin/ASD funds were paid to Rev. Busby/Golden Panda.

Because Golden Panda and ASD are distinct business operations, injuries caused by ASD cannot be imputed to Golden Panda for purposes of Article III standing. When assessing the sufficiency of the pleadings pursuant to a motion to dismiss, this Court must not accept "inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint, nor legal conclusions cast in the form of factual allegations." *Browning*, 292 F.3d at 242. Plaintiffs allege injuries that arise from transactions with ASD only. *See* Complaint at 5, ¶¶ 11-13; *see also Iyengar v. Barnhart*, 233 F.Supp. 2d 5, 10 (D.D.C. 2002) ("[c]ausation, or traceability, examines whether it is *substantially probable* that the challenged acts of the defendant, not of some absent third party, will cause or caused the particularized injury of the plaintiff") (emphasis original). In addition, class plaintiffs similarly situated will include only those plaintiffs with claims that are congruous with the named plaintiffs' claims.

Therefore, the Plaintiffs' cause of action against Rev. Busby must be dismissed for lack of Article III standing because the Plaintiffs have failed to allege an injury caused by Rev. Busby to which this court could issue relief.

V. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE REV. BUSBY AND GOLDEN PANDA WERE NEVER ASSOCIATED WITH ASD

A. Plaintiffs Claims for Declaratory and Injunctive Relief Must be Dismissed Because Plaintiffs Cannot Demonstrate that Future Harm is Likely to Occur

Plaintiffs claim for declaratory and injunctive relief must be dismissed for lack of standing. Where the relief sought by the plaintiff is declaratory or injunctive the standing doctrine requires that the plaintiff make a reasonable showing that he will again be subjected to the alleged illegality of which he complains. *City of Los Angeles v. Lyons*, 461 U.S. 95, 110 (1983). The equitable remedy of injunction is only available when the plaintiff can show a real or immediate threat that the plaintiff will be wronged again by conduct of the defendant. *Id.*

Plaintiffs acknowledge that Golden Panda Ad Builder has been dissolved and no longer transacts business. *See* Complaint at 18, ¶ 61 ("Busby was the Chief Executive Officer and President of Golden Panda Ad Builder, Inc. until its recent dissolution") (emphasis added). Golden Panda's Consent Dismissal further stated that "Golden Panda has authorized its attorneys to dissolve the Golden Panda corporation, thereby causing Golden Panda to cease its existence as a legal entity. Moreover, having discontinued its operations upon receipt of notice that the United States had seized Golden Panda's funds, Golden Panda now has made that cessation permanent." Consent Dismissal, D.D.C. No. 08-1345, Dkt. 24.

As a basis for equitable relief, Plaintiffs argue that injunctive and declaratory relief is appropriate against Rev. Busby because the Plaintiffs have no adequate remedy at law and "will … suffer irreparable harm in the absence of the Court's declaratory and injunctive relief." Complaint at 45 (Count Six). The termination of business operations and dissolution of Golden Panda obviates the possibility that plaintiffs will suffer future harm. Because Golden Panda no longer transacts business, there is no necessary factual

predicate for the suppooition that Rev. Busby will cause Plaintiffs any harm.[13] Accordingly, Count Six of the Plaintiffs' Complaint must be dismissed for failure to state a claim upon which relief can be granted.

B. Plaintiffs Failed to Allege Any Facts Demonstrating A Sufficient Injury Under RICO

A plaintiff filing suit under RICO is subject to more rigorous standing requirements than under traditional Article III standing. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 266, (2d Cir. N.Y. 2006) (citing *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 123 (2d Cir. 2003). "A RICO plaintiff 'only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the [RICO] violation.'" *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 767-69 (2d Cir. 1994) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)) (considering a bank's RICO claim arising out of fraudulently induced loans and holding that "to the extent [the bank's] complaint is predicated on loans that have not been foreclosed, its claims are not ripe for adjudication because it is uncertain whether [the bank] will sustain any injury cognizable under RICO").

To demonstrate RICO standing, a plaintiff is required to show: "'(1) a violation of section 1962; (2) injury to business or property; and (3) causation of the injury by the violation.'" *Id.* at 767 (quoting *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23 (2d Cir. 1990). In addition, the plaintiff must show that the injury that Defendant has allegedly caused is "clear and definite." *Id. (*"[f]urthermore, as a general rule, a cause of action does not accrue under RICO until the amount of damages becomes clear and

[13] Indeed, without proof that Plaintiffs ever paid any money to Rev. Busby/Golden Panda, there iis no present harm either; and, so, future harm is sheer sophistry.

definite") (citing *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1106 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989).; *see also Motorola Credit Corp. v. Uzan*, 322 F.3d 130, 135 (2d Cir. 2003) ("cause of action does not accrue under RICO until the amount of damages becomes clear and definite") (internal quotation marks omitted); *AMA v. United Healthcare Corp*., 588 F. Supp. 2d 432, 441 (S.D.N.Y. 2008) ("due to the potential treble damages that are available with each RICO claim brought, it is necessary to present a 'clear and definite' monetary amount").

Plaintiffs have pled no facts that show any sums paid to Rev. Busby or Golden Panda such that relief could be had in the form of monetary damages. Accordingly, Plaintiffs have failed to state a claim for which relief can be granted under RICO. Under 18 U.S.C. § 1964(c), Plaintiff's RICO claims against Rev. Busby must be dismissed because they have failed to allege any injury to their "business or property" which resulted from purchasing advertising packages from Rev. Busby/Golden Panda. Under 18 U.S.C. § 1964(c), Plaintiffs are required to assert a compensable injury to "business or property" resulting from a defendant's violation of 18 U.S.C. § 1962. *See* 18 U.S.C. § 1964(c); *see also*, *Slattery v. Costello*, 586 F. Supp. 162, 167 (D.D.C. 1983) (requiring that plaintiffs allege an injury to "business or property" in order to "fall within that category of racketeering victims afforded a cause of action under 18 U.S.C. § 1964(c)"); *White v. Fosco*, 599 F. Supp. 710 (D.D.C. 1984) (dismissing Plaintiff's compliant for failure to allege appropriate RICO injury).

In their complaint, the Plaintiffs fail to cite even one instance where they or any of the similarly situated individuals or businesses of the class purchased an advertising package from Golden Panda. Each of the named Plaintiffs alleged a specific injury

resulting from purchases of advertising packages from ASD. *See* Complaint at 5, ¶ 11 ("in July 2008 Collins paid $1,000 to ASD for the purchase of purported advertising packages"); *id* at ¶ 12 ("[i]n July 2008 Greene paid $550 to ASD for the purchase of purported advertising packages"); *id* at ¶ 13 ("[i]n June and July of 2008, Natures Discount paid amounts totaling$7,500 to ASD for the purchase of purported advertising packages").

Golden Panda was a legally distinct entity from ASD, operated by different individuals. Unlike the ASD businesses, Golden Panda was incorporated in Georgia. No ASD representative held a financial interest in Golden Panda, or possessed authority to control Golden Panda business operations. *See* Affidavit of Rev. Busby, D.D.C. No. 08-1345, Dkt. 17-3, at 2-3. Therefore, injuries the plaintiffs suffered at the hands of ASD cannot be imputed to Golden Panda, or Rev. Busby individually, without pleading specific facts to draw that nexus. *See Trombly*, 550 U.S. at 555-56 ("a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a case of action will not do"). As a result of Plaintiff's failure to allege harm caused by Rev. Busby through the operation of Golden Panda, this court must dismiss Plaintiff's claims against Rev. Busby in counts one and two.

C. Plaintiffs Failed to State a Claim that Rev. Busby Was Involved in a "Common Enterprise" Under RICO

Plaintiffs have presented no evidence of a RICO enterprise involving Rev. Busby. *See Barlow v. McLeod*, 666 F.Supp. 222 (D.D.C. 1986) (granting summary judgment for defendant because plaintiffs could not demonstrate a pattern of racketeering acts).

"[S]imply alleging racketeering acts is not enough to allege a RICO pattern. Something more than the mere predicate acts is required." *Id.* Plaintiffs allege that Rev. Busby violated 18 U.S.C. § 1962(c), which requires that the "defendant must have not merely participated in the enterprise's affairs, but in the conduct of the enterprise's affairs which requires participation in the operation or management of the enterprise." *Hargraves v. Capital City Mortg. Corp.*, 140 F.Supp. 2d 7, 25 (D.D.C. 2000). "Evidence of an ongoing organization, formal or informal and evidence that the various associates function as a continuing unit are essential to establish the enterprise element of a RICO conspiracy." *U.S. v. White*, 116 F.3d 903, 923 (D.C. Cir. 1997). The enterprise is "established by proof of (1) a common purpose among the participants, (2) organization, and (3) continuity." *United States v. Perholtz*, 842 F.2d 343, 362 (D.C. Cir. 1988).

The Plaintiffs have failed to allege sufficient facts to demonstrate that Rev. Busby participated in a common enterprise with ASD as required by the RICO statute. *See* 18 U.S.C. § 1962(c).[14] Moreover, the uncontroverted record on which Plaintiffs rely, for

[14] Plaintiffs' complaint states that Golden Panda bank accounts originating at Bank of America may have included ASD funds. *See* Complaint at 22, ¶ 71. Plaintiffs allege that "the majority of the funds deposited into the Bank of America accounts used by Golden Panda Ad Builder, Inc. originated from one or more of the RICO Defendants' other accounts at Bank of America." *Id.* The fact that ASD and Bowdoin did *not* provide money to Golden Panda accounts has been demonstrated by uncontroverted evidence during the forfeiture proceedings. Golden Panda submitted to the Court an affidavit by an independent consultant along with Bank of America financial statements covering the period Golden Panda accounts were active. *See.*, Rev. Busby Affidavit, Attachment 3, Affidavit of Robert J. Skinner, CPA, P.C., D.D.C. No. 08-1345, Dkt. 17-3. The accountant determined that "the internal documentation provided by management, their financial reporting systems, and the company's July bank accounts do not reveal the presence of any funds coming from Andy Bowdoin or ASD Cash Generator. I have attached copies of all documents relied upon for this review." *Id.* Accordingly, if Plaintiffs are representing that ASD funds were commingled with Golden Panda accounts, Rev. Busby hereby requests that this Court demand the factual basis for which Plaintiffs base that allegation. *See* Fed. R. Civ. Pro 11(b)(3) (requiring a good faith belief

which this Court may take official notice, reveals no common enterprise with ASD. *See, e.g.*, Affidavit of Rev. Busby (and Attachments), D.D.C. No. 08-1345, Dkt. 17-3, at 2-10. Plaintiffs' entire complaint is based on alleged acts of ASD. They have pled no facts linking ownership, operation, control, and funding between Busby/Golden Panda. They have alleged no facts that suggest ASD and Golden Panda operated with a "common purpose" as required by RICO. *See Barlow*, 666 F.Supp. at 222 (finding no common purpose when defendants took steps to make sure entities "operated independently" and evidence supporting common enterprise was "innuendo at best"). Absent a fact allegation connecting Rev. Busby to ASD, the Plaintiffs' complaint lacks any basis to determine that a common enterprise existed between the owners and operators of ASD and Golden Panda. Because Plaintiffs have failed to allege a sufficient nexus between ASD and Rev. Busby, the Plaintiffs' RICO claims against Rev. Busby must be dismissed.

D. Plaintiffs' Allegations of Fraud Concerning Rev. Busby Must be Considered Under Federal Rule of Civil Procedure Rule 9(b) and Are Deficient Thereunder, Warranting Dismissal

Plaintiffs' core cause of action concerns the alleged violation of wire fraud under 18 U.S.C. §1343. Plaintiffs allege as predicate RICO offenses violations of wire fraud and money laundering. *See* 18 U.S.C. § 1956. Violation of the money laundering statute requires proof that defendants committed wire fraud. *See* Complaint at 33 (alleging money laundering resulted from "specified unlawful activity," to wit, the commission of wire fraud). Federal Rule of Civil Procedure 9(b) states that "[i]n alleging fraud or

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that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery").

mistake, a party must state with particularity the circumstances constituting fraud or mistake." *See* FRCP 9(b).

The requirement that a pleader state with particularity the circumstances constituting fraud guards against unsubstantiated claims. *See Chelsea Condominium Unit Owners Ass'n v. 1815 A. St., Condominium Group, LLC*, 468 F.Supp. 2d 136, 145 (D.D.C. 2007); *see also Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994) (observing that Rule 9(b) aims to prevent a claim filed as a pretext for the discovery of unknown wrongs). In *Chelsea*, this Court explained that "the circumstances that the claimant must plead with particularity include matters such as the time, place, and content of the false misrepresentations, the misrepresented fact, and what the opponent retained or the claimant lost as a consequence of the alleged fraud." *Chelsea*, 468 F.Supp. 2d at 146. "[A] pleading subject to Rule 9(b) scrutiny may not rest on information and belief, but must include an allegation that the necessary information lies within the opponent's control, accompanied by a statement of facts on which the pleader bases his claim." *Kowal*, 16 F.3d at 1279 n.3.

Plaintiffs' causes of action against Rev. Busby are predicated on fraud allegations. Therefore, Plaintiffs' complaint must meet the heightened standard imposed by Fed. R. Civ. Pro 9(b). Under that standard, Plaintiffs have failed to allege specified unlawful activity, including the time, place, and content of the alleged misrepresentation, the alleged misrepresented facts, and losses caused by the alleged fraud. Consequently, the fraud allegations must be dismissed for failure to state a claim.

VI. PLAINTIFFS FAILED TO STATE A CLAIM ALLEGING A BREACH OF FIDUCIARY DUTY

The plaintiffs have failed to allege sufficient facts demonstrating that Rev. Busby owed a fiduciary duty to the plaintiffs or any class member. Therefore, Count Three of the Plaintiffs' complaint must be dismissed for failure to state a claim upon which relief can be granted. *See* Complaint at 40.

Plaintiffs allege that Rev. Busby owed a fiduciary duty to customers of ASD. *See* Complaint at 40-41. They allege that Mr. Busby "gained the trust and confidence of Plaintiffs and Class members by touting the reputation" of ASD founder Andy Bowdoin. *Id.* Moreover, Plaintiffs allege that Rev. Busby developed a fiduciary duty because he allegedly "undertook to provide financial advice to Plaintiffs and Class members and to hold in trust ASD members' cash balances." *Id.*

Rev. Busby is unaffiliated with ASD and, thus, he can owe no fiduciary duty to ASD customers. *See* D.D.C. No. 08-1345, Dkt. 17-3, Affidavit of Busby, at 2. Plaintiffs' allegations rely exclusively on acts committed by ASD representatives. *See* Complaint at 41. Plaintiffs have pled no specific facts that draw a nexus between Golden Panda Ad Builder or Rev. Busby and ASD customers. Therefore, plaintiffs have failed to state a claim against Rev. Busby concerning a breach of duty owed to ASD customers. Even assuming *arguendo* that plaintiffs had properly pled sufficient facts to draw a nexus between Rev. Busby and ASD, a fact refuted by Rev. Busby and contradicted by the record upon which Plaintiffs rely (*see* D.D.C. No. 08-1345, Dkt. 17 (Claimaints' Motion for Severance and Transfer)), the plaintiffs still lack sufficient facts to state a claim for breach as a matter of law.

Regardless of whether Florida or District of Columbia law is applied, the Plaintiffs have failed to state a claim for breach of fiduciary duty.[15] In the D.C. Circuit, to state a claim for breach of fiduciary duty, "a plaintiff must allege facts sufficient to establish the following: (1) defendant owed plaintiff a fiduciary duty; (2) defendant breached that duty; and (3) to the extent plaintiff seeks compensatory damages—the breach proximately cause an injury." *Paul v. Judicial Watch Inc.*, 542 F.Supp. 2d 1, 6 (D.D.C. 2008). "As a general rule, the mere existence of a contract does not create a fiduciary duty." *Id.* A fiduciary relationship may exist "where circumstances show that the parties extended their relationship beyond the limits of the contractual obligations to a relationship founded upon trust and confidence." *Id.* For example, a fiduciary relationship exists when one party "is under a duty to give advice for the benefit of another upon matters within the scope of the relation." *Church of Scientology Intern. v. Eli Lilly & Co.*, 848 F.Supp. 1018, 1028 (D.D.C. 1994).

A fiduciary duty "simply does not lie" where two individuals conduct business "at arm's length." *Goldstein v. S & A Restaurant Corp.*, 622 F.Supp. 139, 145-46 (D.D.C. 1985). A fiduciary duty cannot exist where "special confidence [has not been] reposed" in another. *See Hopper v. Financial Management Systems, Inc.*, No. 96-456 (D.D.C. Jan. 23, 1997). As the *Hopper* court acknowledged, "to find a fiduciary relationship on the facts of this case would transform garden variety, arm's length investment transactions into fiduciary relationships …, a result … neither contemplated, nor dictated by existing law." *Id.* (citing *Diaz Vicente v. Obenauer*, 736 F.Supp. 679, 695 (E.D.Va. 1990)).

[15] Defendant Rev. Busby acknowledges that a choice of laws issue may compel this Court to apply Florida law concerning the breach of fiduciary duty. *See* BOA Motion to Dismiss, D.D.C. No. 09-100, Dkt. 5-2 at 9 n.4.

Similarly, under Florida law, "[t]o establish a fiduciary relationship, a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party." *Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp.*, 850 So. 2d 536, 540 (Fla. App. 5 Dist. 2003). Moreover, "[w]hen the parties are dealing at arm's length, a fiduciary relationship does not exist because there is no duty imposed on either party to protect or benefit the other." *Id.* (noting that "[i]n an arms-length transaction … there is no duty imposed on either party to act for the benefit or protection of the other party, or to disclose facts that the other party could, by its own diligence have discovered").

The factual record pled in the Plaintiffs' complaint demonstrates that Golden Panda contracted with internet customers for the purchase of internet advertising. None of the Plaintiffs allege having purchased Golden Panda ads. Even had they purchased Golden Panda ads, the Plaintiffs fail to allege anything beyond an arms-length association. Indeed, nothing in the Plaintiffs' complaint indicates that Rev. Busby or Golden Panda established any relationship with consumers aside from internet ad sales. Rev. Busby never personally counseled Golden Panda or ASD customers. He sold an internet advertisement to interested customers, and he advertised the success of his program. Rev. Busby and Golden Panda did not participate in ASD rallies or advertisements and, thus, are not liable for alleged ASD misrepresentations. *See* D.D.C. No. 08-1345, Dkt. 17-3, Affidavit of Rev. Busby, at 2-11. ASD's statements alone do not give rise to a fiduciary duty, particularly not for Rev. Busby. ASD's statements are tantamount to advertisements. In short, Plaintiffs' theory imposes a fiduciary duty on all advertising companies that receive money in advance for advertising space.

The Plaintiffs' cause of action would transform all advertisements into fiduciary relationships between the advertiser and consumer. In addition, the Plaintiffs' cause of action would transform all contract relationships into fiduciary relationships.

Because the Plaintiffs have not pled facts sufficient to demonstrate a unique relationship of trust between Rev. Busby and his individual customers, Count Three of the Plaintiffs claims for relief must be dismissed for failure to state a claim upon which this court may grant relief.

VII. CONCLUSION

For the foregoing reasons, Rev. Busby respectfully requests that all counts in Plaintiffs' Complaint against him be dismissed.

Respectfully submitted,

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By: _____/s/_____

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Date submitted: April 28, 2009

CERTIFICATE OF SERVICE

I, Jonathan Emord, certify that on April 28, 2009, I filed a copy of Defendant Walter Clarence Busby, Jr.'s Motion to Dismiss for Failure to State a Claim electronically with the Court's electronic filing system and caused to be served by mail a copy on the following counsel of record in the manner indicated below:

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