

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 11-24008-CIV-ALTONAGA/Simonton

TODD DISNER, et al.,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, et al.,

Defendants.

ORDER

THIS CAUSE comes before the Court on Defendant, Rust Consulting, Inc.’s (“Rust[’s]”) Motion to Dismiss Complaint . . . (“Motion”) [ECF No. 14], filed on March 2, 2012. The Court has carefully reviewed the parties’ written submissions and applicable law.

I. BACKGROUND

On August 8, 2008, the United States seized property belonging to an internet advertising and marketing company, Ad Surf Daily (“ASD”), pursuant to a verified complaint seeking forfeiture *in rem* under 18 U.S.C. section 981, *et seq.*, as ASD was allegedly used by its principal to perpetrate a Ponzi scheme. (*See* Compl. ¶¶ 3–4 [ECF No. 1]). The property included money, un-cashed checks, unendorsed checks, books, computers, and other assets and records. (*See id.* ¶ 1). Some of the confiscated property included Plaintiffs, Todd Disner’s and Dwight Owen Schweitzer’s property, such as tax ID numbers and income and expense records which were kept on servers that were in the care and custody of ASD. (*See id.* ¶¶ 1, 5; *id.* 1¹). Rust, acting as the government’s remission administrator, sent Plaintiffs remission forms to complete and return to

¹ The first three pages of Plaintiffs’ Complaint include facts in unnumbered paragraphs.

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submit claims for property seized from ASD. (*See id.* ¶¶ 14, 75). Plaintiffs could not submit the forms because they lacked personal account information stored on ASD's seized computers necessary to complete the forms. (*See id.* ¶ 75).

Plaintiffs filed their *pro se* Complaint against the United States and Rust for declaratory relief on November 7, 2011. Plaintiffs assert that they

are before this court simply to ask that this court rule on whether the defendants' complaint,^[2] the affidavits and the verification supporting it, in the context of an application to authorize a search and seizure warrant for the plaintiffs [sic] property, assets and business records, meet the standards and legal requirements of the Fourth Amendment to the United States Constitution and the added requirement of Rule G(2)(f) that the governments' pleading contain "sufficiently detailed facts to support a reasonable belief (by the reviewing Magistrate) that the government will be able to meet its burden of proof at trial" as opposed to mere conclusory allegations unsupported by documented expert opinions or actual facts, coupled with distorted facts and outright lies.

(*Id.* ¶ 34). The demands made by Plaintiffs at the end of their Complaint that refer either to Rust or to an unnamed defendant are:

(c.) That a judgment be entered requiring the defendant to return all of the property of the plaintiffs obtained as a result of the actions by the government on August 8th 2008, in its' [sic] possession or control including all records, cash, and other items belonging to the plaintiffs' [sic] and seized pursuant to the execution of the search and seizure warrant and the government's verified complaint.

.....

(e.) That the defendants provide an accounting of what they have done with the property of the plaintiffs including the cash balances of record on August 8th 2008.

(f.) That the defendant Rust, disclose all information in its possession or available to it pertaining to the plaintiffs, including but not limited to the basis it would use to verify the contents of the remission form, if tendered to it by the plaintiffs.

(*Id.* 28–29³).

² The Complaint alleges no facts relating to a complaint lodged by Rust against Plaintiffs.

³ Plaintiffs' demands at the end of their Complaint are listed in unnumbered paragraphs.

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Rust filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), asserting that the Court lacks subject matter jurisdiction over this action because Plaintiffs have failed to allege an “actual controversy” between them and Rust. (*See* Mot. 4–7).⁴

II. LEGAL STANDARD

A defendant may contest subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) in two ways — a facial attack or a factual attack. A facial attack asserts that a plaintiff has failed to allege a basis for subject matter jurisdiction in the complaint. *See Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980). In a facial attack, the plaintiff’s allegations are taken as true for the purposes of the motion, *see id.*, and the plaintiff is afforded safeguards similar to those provided in challenging a Rule 12(b)(6) motion. *See Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990).

By contrast, a factual attack “challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings such as testimony and affidavits, are considered.” *Menchaca*, 613 F.2d at 511. In a factual attack, courts are free to weigh the evidence to satisfy themselves they have the power to hear the case. *See Lawrence*, 919 F.2d at 1529. No presumption of truth attaches to the plaintiff’s allegations, and the existence of disputed material facts does not prevent the trial court from evaluating for itself the merits of the jurisdictional claim. *See id.* Moreover, “[i]n the face of a factual challenge to subject matter jurisdiction, the burden is on the plaintiff to prove that jurisdiction exists.” *OSI*,

⁴ In the alternative, Rust contends that Plaintiffs fail to state a claim upon which relief can be granted because this action is an impermissible collateral attack on the government’s seizure action, and therefore should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). (*See* Mot. 8–11). The Court does not reach this alternative argument.

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Inc. v. United States, 285 F.3d 947, 951 (11th Cir. 2002) (citations omitted).

III. ANALYSIS

Although not specified in their Complaint, it appears Plaintiffs are pursuing relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. (*See* Resp. 3–4 (discussing why their Complaint should be permitted to proceed under the Declaratory Judgment Act)). Section 2201(a) provides that “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a). “The purpose behind the Declaratory Judgment Act is to afford a [] form of relief from uncertainty and insecurity with respect to rights, status and other legal relations.” *Advanced Fluids Solutions, LLC v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, No. 6:11–cv–16–Orl–22KRS, 2011 WL 3627413, at *4 (M.D. Fla. July 26, 2011) (quoting *Sierra Equity Grp., Inc. v. White Oak Equity Partners, LLC*, 650 F. Supp. 2d 1213, 1230 (S.D. Fla. 2009)).

To properly seek a declaratory judgment, the dispute must be “‘definite and concrete, touching the legal relations of parties having adverse legal interests’; . . . ‘real and substantial’ and ‘admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.’” *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937)). The Supreme Court has summarized the declaratory judgment inquiry as “‘whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to

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warrant the issuance of a declaratory judgment.” *Id.* (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). The “controversy” may not be “conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of injury.” *Advanced Fluids Solutions*, 2011 WL 3627413, at *4 (quoting *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1347 (11th Cir. 1999)). “The concept of adverse legal interests requires that there be a dispute as to a legal right, such as an underlying legal cause of action that the declaratory defendant could have brought or threatened to bring, if not for the fact that the declaratory plaintiff had preempted it.” *Creative Compounds, LLC v. Starmark Labs.*, No. 2010–1445, 2011 WL 2519513, at *11 (Fed. Cir. June 24, 2011) (quoting *Arris Grp., Inc. v. British Telecomm. PLC*, 639 F.3d 1368, 1374–75 (Fed. Cir. 2011)).

Rust raises both facial and factual attacks to the Court’s subject-matter jurisdiction over Plaintiffs’ claims against Rust. As to Rust’s facial attack, while it appears that Plaintiffs have expressly stated their allegations as to the government, the Complaint and Response are devoid of any facts or assertions as to what “wrong” was allegedly perpetrated by Rust other than that it has access to information Plaintiffs seek. (*See* Compl. 29). For example, according to Plaintiffs, “the *government* has taken their property illegally and ... RUST has both the ability and the access to the information necessary, to return part of what was taken from the plaintiffs” (Resp. 5) (emphasis added). Yet, it is unclear with what Plaintiffs precisely take issue. On the one hand, they assert that Rust’s remission forms are an evidence-gathering tactic of the government (*see* Compl. 2), and suggest they have refused to complete the forms because to do so would amount to “legitimizing the governments’ [sic] claim . . . which the plaintiffs’ [sic]

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know to be untrue.” (*Id.* ¶ 76). On the other hand, Plaintiffs maintain they are not in possession of the information necessary to complete the remission forms to effectuate the return of their property (*see id.* ¶ 75), and demand to know “the basis [Rust] would use to verify the contents of the remission form, if tendered to it by the plaintiffs.” (*Id.* 29).

Plaintiffs’ claims are far from the “definite and concrete” dispute required for the maintenance of a declaratory judgment action. Plaintiffs do not explain how their allegations relate to their declaratory action against Rust. Indeed, the declaration Plaintiffs seek in this action relates to the government’s verified complaint for forfeiture (*see id.* ¶ 34); the Court cannot find — nor do Plaintiffs identify — anything in the Complaint indicating what declaration Plaintiffs seek with regard to Rust. Additionally, part of what Plaintiffs’ requests hinge on is Rust’s potential actions “if [a remission form were] tendered to it by the plaintiffs,” (*id.* 29), — clearly a conjectural, hypothetical, or contingent “controversy.”

Further, while Plaintiffs emphasize that their legal cause of action is rooted in the Fourth Amendment’s guarantee against unlawful searches and seizures (*see Mot.* 5; *Compl.* ¶ 1), Plaintiffs fail to explain how the Fourth Amendment applies to a dispute between Plaintiffs and Rust, a non-government entity that is not alleged to have taken part in the government’s August 8, 2008 seizure of ASD’s and Plaintiffs’ property. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (construing the protections afforded by the Fourth Amendment as “wholly inapplicable ‘to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official’” (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun,

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J., dissenting)); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614 (1989) (citing *Jacobsen*, 466 U.S. 109, 113); *see also City of Ontario Cal. v. Quon*, 130 S. Ct. 2619, 2627 (2010) (“The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government.” (quoting *Skinner*, 489 U.S. 613–14)).

Rust also presents a factual attack on the Court’s subject-matter jurisdiction in the event Plaintiffs’ claims survive its facial attack. Namely, Rust asserts that because it does not have Plaintiffs’ records or information, there is no “controversy.” (*See* Mot. 7 (citing to an email exchange between Rust and Plaintiffs attached by Plaintiffs to their Complaint [ECF No. 1-5])). Having concluded that Plaintiffs’ claims fail upon a facial attack to subject-matter jurisdiction, the Court finds it unnecessary to analyze this argument. However, the Court notes that “[i]f [a party’s] allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.” *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 764 (11th Cir. 2010) (quoting *McNutt v. Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178, 189 (1936)). Here, Plaintiffs state: “[N]owhere in the contents of plaintiffs’ exhibit 4 [ECF No. 1-5] does [Rust] even suggest that it will have to go, or point the plaintiffs to go, to any other source to verify the plaintiffs’ submission and as such the plaintiffs are entitled to the *presumption* that [Rust] can provide to the plaintiffs, that which they require the plaintiffs to provide to them.” (Resp. 3 (emphasis and alterations added)). Without more, Plaintiffs’ “presumption” is insufficient to satisfy their burden of showing “competent proof.”

The Court acknowledges that Plaintiffs appear to request other injunctive relief against Rust, such as providing an “accounting of what [Rust has] done with the property,” and

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disclosing “all information in its possession or available to it pertaining to plaintiffs” (Compl. 29). However, the form of relief requested by Plaintiffs does not change the fact that Plaintiffs have not presented a genuine dispute with Rust over a legal right, as previously discussed. “[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.” *Locke v. Bd. of Pub. Instruction*, 499 F.2d 359, 363–64 (5th Cir. 1974).

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Motion [ECF No. 14] is **GRANTED**.

Plaintiffs’ claims against Defendant, Rust Consulting, Inc., are **DISMISSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of April, 2012.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record
Todd Disner, *pro se*
Dwight Owen Schweitzer, *pro se*