UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

10 Cr. 336 (LAK)

-v.- :

CHAD ELIE and :
JOHN CAMPOS,

:

Defendants.

- x

GOVERNMENT'S RESPONSE TO
DEFENDANTS' PRE-TRIAL MOTIONS

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The United States of America, by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, Arlo Devlin-Brown and Niketh Velamoor, of counsel, submits this omnibus opposition to motions to dismiss Superseding Indictment S3 10 Cr. 336 (LAK) (the "Indictment") filed by defendants Chad Elie ("Elie") and John Campos ("Campos") (collectively, "defendants").[1] The motions should be denied.

PRELIMINARY STATEMENT

Playing poker for money has, since the birth of the game in the 1800s, been treated both in American culture and law as a form of gambling. Historically, states legislatures enacted laws that have either prohibited the operation of gambling businesses outright or subjected them to significant regulation, and state courts have regularly applied these gambling laws to poker

[1] Defendant Campos filed a single motion to dismiss the counts against him. Campos' memorandum in support of that motion is referred to herein as "Campos Brf." Defendant Elie filed separate motions to dismiss certain of the counts against him. Elie's memorandum pertaining to the UIGEA counts is referred to herein as "Elie UIGEA Brf.", his memorandum pertaining to the IGBA and money laundering counts is referred to herein as "Elie IGBA Brf." and his memorandum pertaining to the bank and wire fraud conspiracy count is referred to herein as "Elie Fraud Brf."

rooms. New York courts, for their part, have treated poker as illegal gambling in reported opinions dating back 100 years. Federal regulation of gambling is more recent, and has been explicitly crafted to build upon – not replace or alter – pre-existing state law. Both the Illegal Gambling Businesses Act of 1970 ("IGBA"), 18 U.S.C. § 1955, and the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C §§ 5361-67 ("UIGEA"), incorporate by reference the gambling laws of states where the business at issue operates, and federal law too has therefore routinely been applied to poker businesses.

The 2006 enactment of UIGEA, which specifically criminalized the use of the United States. financial system to accept payments from gamblers, gave rise to the core of the conduct alleged in this Indictment. The leading internet poker company of the pre-UIGEA era shut down its U.S. operation, and the founders of the gambling industry's dominant payment processor were arrested. The poker companies who rushed to fill the void encountered a daunting obstacle: there was no legitimate or easy way to obtain the billions of dollars from United States residents that was the lifeblood of their businesses. So they engaged Elie and Campos, among others, to perform an indispensable service: find ways, by hook or crook, to move money from United States residents, through the United States financial system, to the offshore accounts of the poker companies. They did so in violation of IGBA, the UIGEA and other federal statutes.

Yet defendants argue in their motions to dismiss that the Indictment's detailed allegations do not in fact allege the commission of any crime at all. They claim that IGBA simply does not apply to poker, or at least is "ambiguous" in its application, notwithstanding longstanding precedent to the contrary at the state and federal levels. Defendants then read UIGEA, which applies if anything more broadly than IGBA, to contain an implicit exemption for internet poker

companies -- or, if not for the poker companies, for those who conspire with them to process payments -- based on a tortured construction of the statute at war with its plain language and clear legislative intent. Elie, who is charged with a conspiracy to commit bank and wire fraud involving tricking banks into processing illegal transactions without their knowledge, nevertheless contends that this is not a federal crime since the banks earned fees and were thus not harmed by being deceived. These conveniently cramped constructions of the statutes at issue are nothing more than exercises in wishful thinking. If proven, the conduct alleged in the Indictment – a scheme through which the charged defendants abused the U.S. financial system in order to fund their illegal operations – amounts to clear violations of the statutes charged.

THE INDICTMENT

I. General Allegations And The UIGEA Conspiracy Count (Count One)

The Indictment, unsealed on April 15, 2011, charges eleven individuals associated with Pokerstars, Full Tilt Poker, and Absolute Poker (the "Poker Companies") in a total of nine counts. Count One charges all eleven defendants with conspiring to violate the UIGEA, in violation of 18 U.S.C. § 371 and 31 U.S.C. § 5363. Specifically, it charges that principals from each of the Poker Companies, together with certain "payment processors," employed various methods to receive payments from United States-based gamblers, contrary to the UIGEA's prohibition on doing so.[2]

The primary method was lying. As alleged in Count One, the conspirators "arrang[ed]

[2] Most of the description that follows is based on specific facts alleged in the Indictment, as the citations and quotations reflect. However, because certain of the motions to dismiss raise issues related to Congressional intent, particularly with respect to construing UIGEA in connection with aiding and abetting and conspiracy statutes, the description in some cases references additional facts that the Government will seek to prove at trial in order to provide context.

for the money received from United States gamblers to be disguised as payments to hundreds of non-existent online merchants and other non-gambling businesses." Indictment ¶ 2. "To accomplish this deceit" conspirators "lied to United States banks about the nature of the financial transactions they were processing and covered up those lies through the creation of phony corporations and websites to disguise payments to the Poker Companies." *Id.* at ¶ 3. "Because Visa and MasterCard sought to identify and block attempts to circumvent their rules requiring internet gambling transactions to be correctly identified – so that banks could decline to accept them if they wished – the Poker Companies were unable to process credit card transactions consistently, even through their use of fraudulent means," *id.* at ¶ 21, as detailed in paragraphs 17 through 20 of the Indictment. Accordingly, the Poker Companies "increasingly focused their payment systems on e-checks," a method "that allowed for electronic fund transfers to and from United States bank accounts." *Id.* at ¶ 22. The conspirators accessed the e-check system – which "required the merchant to open a processing account" at a U.S. bank (*Id.* at ¶ 23) – typically by opening the accounts in the names of "dozens of phony corporations and corresponding websites so that the money debited from U.S. customers banks would falsely appear to United States banks to be consumer payments to non-gambling related businesses" *Id.* at ¶ 25b.

In what should have been no surprise, the Poker Companies quickly learned that the people who lied to banks to obtain access to the U.S. financial system were not, to put it mildly, reliable business partners. "[F]rom mid-2007 through March 2009," the Poker Companies relied primarily on "Intabill, an Australia-based payment processing company" to process over $500 million in e-check transactions in the United States. *Id.* at ¶ 26(a). Elie "worked with Intabill to

establish processing accounts for internet gambling that were disguised as accounts set up to process repayments of so-called 'payday loans,' which were high-interest, high-risk loans unrelated to gambling transactions." *Id.* at ¶ 26(b). But Intabill collapsed in March 2009, owing the Poker Companies "tens of millions of dollars for past processing." *Id.* With no good options, the Poker Companies turned to numerous of Intabill's former employees and associates to find new processing relationships, all of which ended badly. *See, e.g., id.* at ¶ 26(c).

The manner in which the Poker Companies came to deal with Elie directly is particularly revealing. As Intabill was collapsing, Elie took it upon himself to transfer approximately $4 million from a poker processing account at the National Bank of California (that had been misrepresented as "payday loan" processing) to himself, prompting defendant Isai Scheinberg, the founder of Pokerstars, to pursue Elie for stealing the money and then (after Elie repaid some of it) hiring Elie as a payment processor. *Id.* at ¶ 28. Elie also served as a processor for Full Tilt Poker and Absolute Poker, though his processing came to a temporary end in September 2009 when Fifth Third Bank learned that accounts Elie had claimed were being used to process payments for internet marketing companies were in fact being used to process payments for Absolute Poker. *Id.* at ¶ 26(b). The bank issued a freeze on Elie's accounts, which "were subsequently seized by U.S. law enforcement through a judicial warrant." *Id.* at ¶ 26(b).

It was around the same time, "following the collapse of multiple e-check processing operations and the judicially ordered seizure of funds," that principals of Pokerstars and Full Tilt Poker "begin exploring a new payment strategy – so called 'transparent processing,'" which meant "at least where possible, processing solutions that did not involve lies to banks." *Id.* at ¶ 27. Notwithstanding their experience to date, Full Tilt Poker and Pokerstars selected Elie to find

such banks, *id.*, and Elie, notwithstanding the fact that a federal judge had issued a warrant seizing the last bank accounts he used for processing, *id.* at ¶ 26(b), or his awareness that two of his former partners had both been arrested in the Southern District of New York in connection with processing payments for the Poker Companies, accepted the proposition.

This, too, met with predictable complications. "Because it was illegal to process their internet gambling transactions, the Poker Companies had difficulty" in finding banks willing to accept such business. *Id.* at ¶ 29. "Chad Elie, the defendant, and his associates, were, however, able to persuade the principals of certain small, local banks that were facing financial difficulties to engage in such processing. In exchange for this agreement to process gambling, the banks received sizeable fee income for processing poker transactions as well as promises of multi-million dollar investments in the banks from Elie and his associates." *Id.* at ¶ 29. "For example, in or around September 2009, Chad Elie" and his partners "approached John Campos . . . the Vice Chairman of the Board and part-owner of SunFirst Bank, a small private bank based in Saint George, Utah. Campos, while expressing 'trepidations' about gambling processing, proposed in a September 23, 2009 e-mail to accept such processing in return for a $10 million investment in SunFirst by Elie and Elie's Partner, which would give Elie and Elie's Partner more than 30% ownership of the bank." *Id.* at ¶ 30. Campos also "sent an 'invoice' to Elie's Partner requesting that $20,000 be paid to a corporate entity that Campos controlled as a 'bonus' for 'Check and Credit card Processing Consulting.'" *Id.* at ¶ 31. "SunFirst Bank processed over $200 million of payments for PokerStars and Full Tilt Poker through on or about November 9, 2010, when, at the direction of the FDIC, it ceased third party payment processing," after earning "$1.6 million in fees." *Id.*

Although the Indictment does not describe in detail Elie's role in processing after the SunFirst Bank channel collapsed, the Government will offer evidence at trial (consistent with discovery produced to the parties and other disclosures) as to the final chapter of the UIGEA conspiracy. The evidence will show that, despite losing millions on the SunFirst Processing, Full Tilt Poker and Pokerstars encouraged Elie to make similar arrangements with similar kinds of banks. Full Tilt Poker, in fact, was growing desperate: given its illegal operation and desire for "transparent processing" it was left with virtually no access to the U.S. financial system at all. One seemingly obvious option – simply shutting down and paying United States residents the $150 million that it claimed to hold for U.S. players in "segregated accounts" – had a major problem: Full Tilt Poker had little money in the bank at all (having distributed hundreds of millions of dollars in "profits" to its owners, consisting primarily of professional poker players). So, in late 2010, Elie found two small banks in Illinois, both in financial distress, and again promised "investments" in the banks (which Elie asked Full Tilt Poker to cover in part) in return for processing. The FDIC, however, quickly put a stop to the processing by the Illinois banks. Unable to collect approximately $13 million from customer accounts that Full Tilt (justifiably or not) had anticipated that Elie would obtain through the Illinois banks -- and with no other processing channels functioning with any regularity -- Full Tilt simply continued to dig itself still deeper into the hole, crediting gamblers with deposits it had no means of actually collecting. By March 30, 2011, two weeks before the Indictment was unsealed, Full Tilt Poker's records identified nearly $400 million in funds that the company had told customers worldwide were in "segregated" "player" accounts when in fact *all* of the bank accounts in the company's control had balances of less than $60 million.

Count One's statutory allegations provide that Elie, Campos and the other nine defendants conspired so that "persons engaged in the business of betting and wagering" would "accept, in connection with the participation of another person in unlawful internet gambling, to wit, gambling in violation of New York Penal Law Section 225.00 and 225.05 and the laws of other states where the gambling businesses operated" various forms of payment specifically proscribed by the UIGEA. *Id.* at ¶ 34. Count One lists multiple "overt acts, among others" that occurred in the Southern District and elsewhere, including the acceptance of e-checks from gamblers located in the SDNY, *id.* ¶ 34(b), and the use of a credit card network with headquarters in the Southern District of New York. *Id*. at ¶ 34(l).

II. The Remaining Counts

In addition to the UIGEA conspiracy count, the Indictment charges eight other counts, all of which incorporate by reference the factual allegations set forth in connection with Count One.

The substantive UIGEA Counts. Count Two of the Indictment charges eight defendants – including Elie and Campos – with a substantive UIGEA violation relating to the acceptance of payments by Pokerstars, or "aiding and abetting" the acceptance of such funds, in connection with a gambling business that operates "in violation of New York Penal Law Section 225.00 and 225.05 and the laws of other states where Pokerstars operated," in violation of 31 U.S.C. §§ 5263 and 5366 and 18 U.S.C. § 2. *Id.* at ¶ 36. Count Three charges seven defendants – including Elie and Campos – with an identical offense concerning the operation of Full Tilt Poker. *Id.* at ¶ 38. Count Four charges six defendants – including Elie but not Campos – with a substantially identical offense involving Absolute Poker.

The IGBA Counts. Counts Five, Six and Seven mirror the UIGEA offenses charged with

respect to the operation of each of the Poker Companies, but allege the violation of IGBA, 18 U.S.C. § 1955. Count Five alleges that Elie, Campos and other defendants either "operated" or "aided and abetted the operation of Pokerstars" an "illegal gambling business . . . that engaged in and facilitated online poker, in violation of New York State Penal Law Sections 225.00 and 225.05 and the law of other states in which the business operated." Count Six charges Elie, Campos and others with a substantially identical IGBA offense relating to Full Tilt Poker and Count Seven charges Elie and other defendants (but not Campos) with an IGBA offense relating to Absolute Poker.

Conspiracy to commit bank fraud and wire fraud. Count Eight charges Elie and other defendants (excluding Campos) with conspiracy to commit bank fraud and wire fraud, in violation of 18 U.S.C. § 1349. Count Eight alleges that the object of the conspiracy involved both a scheme to "defraud a financial institution . . . and to obtain monies . . . owned by and under the custody and control of that financial institution by means of false and fraudulent pretenses, representations and promises, in violation of Title 18, United States Code, Section 1344," *id*. at ¶ 49, and a scheme involving the use of the wires, in violation of 18 U.S.C. § 1343, "to deceive financial institutions and other financial intermediaries into processing and authorizing payments to and from the Poker Companies and United States gamblers by disguising the transactions to create the false appearance that they were unrelated to gambling, and thereby to obtain money of, or under the custody and control of, those financial institutions and intermediaries." *Id.* at ¶ 50.

Money laundering conspiracy. Count Nine charges all eleven defendants – including Campos and Elie – with a conspiracy to commit money laundering by transmitting funds from

the United States to a place outside the United States with intent to promote the operation of illegal gambling businesses, in violation of 18 U.S.C. § 1956(a)(2)(A), and with engaging in monetary transactions with property of a value greater than $10,000 derived from the operation of such a businesses, in violation of 18 U.S.C. § 1957(a). *Id.* at ¶ 54.

APPLICABLE LEGAL STANDARD

In order to survive a motion to dismiss an indictment, the Government need only establish that the indictment is valid on its face. *United States* v. *Alfonso*, 143 F.3d 772, 775-776 (2d Cir. 1998); *United States* v. *Martin*, 411 F. Supp. 2d 370, 372 (S.D.N.Y. 2006). This burden is minimal. "It is well established that 'an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecution for the same offense.'" *Alfonso*, 143 F.3d at 776 (quoting *Hamling* v. *United States*, 418 U.S. 87, 117 (1974)). "'[A]n indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States* v. *Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992).

In evaluating a motion to dismiss an indictment, a court may not "look[] beyond the face of the indictment and dr[a]w inferences as to the proof that would be introduced by the government at trial." *Alfonso*, 143 F.3d at 776. "[S]uch an inquiry into the sufficiency of the evidence" is "premature" in a pretrial motion and must be reserved for trial. *Id.; see also Martin*, 411 F. Supp. 2d at 372-73 (analysis of a motion to dismiss the indictment is "limited to an examination of the face of the indictment . . . the sufficiency of the government's evidence . . . is not considered on a motion to dismiss the indictment"). Even with respect to a "jurisdictional element of the offense, the sufficiency of the evidence is not appropriately addressed on a pretrial

motion to dismiss an indictment" and is "part and parcel" of the issues to be determined at trial. *Alfonso*, 143 F.3d at 777 (reversing the district court's dismissal of an indictment based on its pretrial determination that the government had not adduced facts sufficient to establish the interstate nexus required under the Hobbs Act). Finally, in evaluating whether an indictment survives a motion to dismiss, it "must be read to include facts which are necessarily implied by the specific allegations made." *United States* v. *LaSpina*, 299 F.3d 165, 177 (2d Cir. 2002) (citations omitted).

ARGUMENT

I. The Defendants' Motions to Dismiss the IGBA Counts Should Be Denied

A. The Poker Companies Constitute Gambling Businesses Under IGBA

The defendants argue that the IGBA counts should be dismissed because poker does not constitute "gambling" as the term is used in the statute. IGBA, enacted in 1970, applies by its terms to anyone who "conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling business." 18 U.S.C. § 1955(a). The defendants' argument that poker is not "gambling" under IGBA finds no basis in IGBA's statutory language and runs contrary to extensive case law applying IGBA to poker.

Federal courts have repeatedly and consistently upheld the application of the IGBA to poker. For example, at least three Circuits have specifically affirmed a defendant's IGBA conviction where the sole gambling business at issue was the operation of a poker room. *See United States* v. *Rieger*, 942 F.2d 230 (3d Cir. 1991) (upholding IGBA conviction based solely on operation of a poker room); *United States* v. *Zannino*, 895 F.2d 1 (1st Cir. 1991) (same); *United States* v. *Tarter*, 522 F.2d 520 (6th Cir. 1975) (same); *cf. United States* v. *Trupiano*, 11 F.3d 769, 774-74 (8th Cir. 1993) (upholding IGBA conviction based on weekly card games

hosted at individual's home). Multiple Courts of Appeals – including the Second Circuit – have similarly upheld the application of the IGBA to gambling businesses offering video poker. *See, e.g., United States* v. *Gotti*, 459 F.3d 296, 342 (2d Cir. 2006) (affirming IGBA conviction for operating video poker machines, and specifically rejecting argument that IGBA and referenced New York gambling law did not apply to games that involved an element of skill); *United States* v. *Lanzotti*, 205 F.3d 951 (7th Cir. 2000) (affirming video poker conviction under IGBA); *United States* v. *Hill*, 167 F.3d 1055, 1064 (6th Cir. 1999) (same); *United States* v. *Grey*, 56 F.3d 1219 (10th Cir. 1995) (same). Additionally, multiple Courts of Appeals, again including in the Second Circuit, have applied IGBA to gambling operations that offered poker alongside other traditional casino games such as craps or blackjack, without the slightest suggestion that the IGBA's definition of gambling excluded poker. *See, e.g., United States* v. *Cook,* 922 F.2d 1026 (2d Cir. 1991); *United States* v. *Giovanetti*, 919 F.2d 1223, 1225 (7th Cir. 1990).

Defendants simply dismiss this unbroken line of precedent on the grounds that "no court has addressed the argument that poker is categorically different from the 'gambling' businesses enumerated in the statute." Elie IGBA Brf. at 13, n.4. The fact that no court has ever even considered the statutory construction argument the defendants are making reflects only its lack of merit: as discussed in greater detail below, it has no foundation in the plain language, structure or clear purpose of IGBA.

IGBA's plain language offers a straightforward definition of what constitutes "gambling." IGBA defines an "illegal gambling business" as a gambling business which is "a violation of the law of a State or political subdivision in which it is conducted…." 18 U.S.C. § 1955(b)(1)(i). Accordingly, for IGBA to apply to a particular type of gambling business, the gambling business must operate in violation of the law of the state (or states) in which it is doing

business. IGBA also includes a list of examples of activities that constitute "gambling." Specifically, IGBA provides that the term "'gambling' *includes but is not limited to* poolselling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." 18 U.S.C. § 1955(b)(2) (emphasis added). Although this list is, by its own terms, non-exhaustive, the defendants argue that the list serves to limit the scope of IGBA only to gambling activities that are both unlawful in the state where the gambling is conducted *and* identical or at least similar to the games mentioned in IGBA's list of examples. Under this theory, whenever confronted with a game that is not on the list, courts would be required to conduct an analysis in which certain "features" of the unlisted game are compared with "features" of the various exemplars, even where the unlisted game is indisputably a proscribed form of gambling under the referenced state law.

Tellingly, the defendants have not cited a single case decided in the 40 years since IGBA was enacted that adopts this reading of the statute, nor have defendants offered any evidence at all to support their claim that every court to apply IGBA to date has simply read the statute incorrectly. (Indeed, every court to address IGBA has read the statute to essentially incorporate the gambling law of the states in which the gambling business is conducted.) Instead, the defendants argue that this Court should disregard IGBA's history and precedent and instead revisit the language afresh through the lens of a canon of statutory construction that they claim supports their view. But one "resorts to the canons of construction" only "where the language of the statute remains ambiguous,"[3] *SEC* v. *Dorozhko*, 574 F.3d 42, 46 (2d Cir. 2009), even after

[3] Thus in *Molloy* v. *Metropolitan Transp. Auth*, 94 F.3d 808, 812 (2d Cir. 1996), cited in Elie IGBA Brf. at 11 to support the defendants' preferred construction, the Second Circuit construed a statute's use of the ambiguous term "alteration," which was followed by a list of examples of various physical alterations one could make to a building, as meaning "alternation" as the term is used in construction parlance, rather than applying a far broader definition of

considering "the specific context in which that language is used, and the broader context of the statute as a whole." *In re Ames Dep't Stores, Inc.,* 582 F.3d 422, 427 (2d Cir. 2009) (internal quotation marks and citations omitted). "Where 'the statutory scheme is coherent and consistent,' [the Court's] inquiry need go no further." *United States* v. *Magassouba*, 544 F.3d 387, 404 (2d Cir. 2008) (*quoting Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997)).

Here, there is nothing ambiguous about the term "gambling" that requires analysis of the canons of construction, particularly in the context of poker. Poker has, throughout its history, been understood to be a kind of gambling. Poker is believed to have developed in the 1800s in Louisiana before "mov[ing] up the Mississippi River on steamboats and into the American West." Gabriel Schechter, *How Poker Explains Who We Are,* Washington Times (Nov. 29, 2009) (available on Westlaw as 11/29/09 WATIMES M32). Those who spent their time playing poker in saloons were called "gamblers" from the outset, and poker is described almost unfailingly as "gambling*"* in a variety of contexts in reported cases dating back to the 1800s.[4] This characterization of poker as gambling reflects society's traditional understanding of poker, particularly at the time of IGBA's enactment. For example, Willie Nelson's classic poker song, about knowing when to "hold 'em" and when to "fold 'em" is called – based on the movie by the same name — "The Gambler." Unsurprisingly, therefore, state laws regulating gambling, both before and after the passage of the IGBA, have covered poker as a form of gambling, in some

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alteration that would mean any change whatsoever.

[4] *E.g., Utsler v. Territory*, 10 Okla 463 (1900) ("The witness Fisher also testified that he saw gambling carried on in the room with cards, being known as 'stud poker,' and he also testified that liquor was sold in the same room."); *In re Selling's Estate*, 17 N.Y. St. Rep. 833 (1888) ("The proof submitted by the petitioner also shows the respondent Joseph Selling to be a man of utterly worthless and irresponsible character; that he is a professional gambler, know[n] as 'Poker Joe….'").

cases explicitly identifying poker as such in the state statutes[5] and, in other cases, enacting more generally worded state statutes that have been construed by courts to apply to poker where the issue was litigated.[6] In addition to the laws of various states, the Indian Gambling Regulatory Act of 1988 – a federal statute that establishes regulations for gambling on Indian lands – identifies poker as a type of gambling. *See* 25 U.S.C. § 2703(6).[7]

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[5] *See, e.g.*, Ark Code § 5-66-112 (prohibiting card games, including "poker"), Cal. Pen. Code § 337j(e)(1) (including poker in definition of controlled game, which is unlawful to operate without a license); Conn. Gen Stat. § 52-278a(2) (including poker in definition of gambling); Fla. Stat. § 849.085(2)(a) (gambling on poker not a crime when played for "penny ante"); Idaho Const. Art III § 20(2) (state may not permit casino gambling, including poker); Idaho Code § 18-3801 (including poker as gambling); Iowa Code § 99B.11(3) (tournament exemption to gambling statute does not apply to poker); Ohio Revised Code §§ 2915.01(D) and 2915.02(A)(2) (defining gambling to include "poker, craps [or] roulette"); Okla. Stat. 21 § 941 (poker included in definition of gambling); Or. Rev. Stat. § 167.117(4) (poker a proscribed "casino game"); Tenn. Code Ann. §§ 39-17-501, Sentencing Commission Comments (defining gambling to include "poker"); Wis. Const. Art IV, § 24(6)(c) (poker is not a exempt from state prohibition on gambling).

[6] *See, e.g., Garrett* v. *Alabama*, 963 So. 2d 700 (Ala. Crim App. 2007) (poker covered by state gambling statute); *State* v. *Duci*, 151 Ariz. 263 (1986) (same); *People* v. *Raley*, 2010 WL 1011041 (Colo. App. Aug. 4, 2009) (same); *State* v. *Mitchell*, 444 N.E. 2d 1153, 1155 (Ill App. Ct. 1983) (same); *State* v. *Schlein*, 253 Kan. 205 (1993) (same); *Emerson* v. *Townsend*, 73 Md. 224 (1890) (money loaned for poker was loaned for "gambling"); *Indoor Recreation Enters., Inc.* v. *Douglas*, 235 N.W.2d 398 (Neb. 1975) (poker covered by state gambling statute); *People* v. *Turner*, 629 N.Y.S. 2d 661, 662 (NY Crim Ct. 1995) (same); *Joker Club LLC* v. *Hardid*, 643 S.E. 2d 626 (N.C. Ct. App. 2007) (same); *Garono v. State*, 524 N.E.2d 496, 500 (Ohio 1988) (same); *Commonwealth* v. *Dent*, 992 A.2d 190, 196 (Pa. Super. 2010) (same); *In re Advisory Opinion to the Governor*, 856 A.2d 320, 328-329 (R.I. 2004) (same); *State ex rel Schillberg* v. *Barnet*, 488 P.2d 255 (Wash. 1971) (same).

[7] Elie's contention that the Indian Gaming Regulatory Act treats poker as form of gambling that requires less regulation (Elie IGBA Brf. at 12, n.3) serves an important point. There are many arguments one might offer for the legalization and regulation of gambling generally or specific kinds of gambling in particular, but claim that specific features of poker warrant the legalization and regulation of poker businesses does not mean that poker is not a form of "gambling" as that term has been historically understood and is being used in IGBA.

The term "gambling" in the IGBA similarly cannot be understood to be "ambiguous" in "light of the broader context of the statute as a whole." *In re Ames II*, 582 F.3d at 427. IGBA, enacted as part of the Organized Crime Control Act, was not to crafted to, as defendants would have it, place a federal imprimatur on what activities constitute gambling (a matter traditionally left to the states), but rather to address Congress's finding that, where a state had outlawed a particular form of gambling, "organized crime had developed complex channels" to capitalize on the opportunity presented. *United States* v. *Sacco*, 491 F.2d 995 (9th Cir. 1974) (discussing legislative history). Thus IGBA was "designed to aid the enforcement of state law" where the state had identified the gambling business as illegal while at the same time "exempt[ing] from the federal statute the operators of gambling businesses that are not contrary to a state's public policy on gambling." *United States* v. *Farris*, 624, F.2d 890, 892, 895 (9th Cir. 1980). [8] Given this rationale, Congress had little interest in actually defining what constituted gambling, which explains its decision to reference state law, but significant interest in ensuring that IGBA reached whatever form of gambling a state had seen fit to ban. Under the defendants' theory, however, IGBA would federalize some kinds of gambling that are outlawed by states but not others, based on an *ad hoc* analysis of how similar or dissimilar the game was to those listed in IGBA's list of examples – an extraordinarily complex approach that makes no sense given IGBA's structure and underlying purpose to be essentially co-extensive with state law determinations as to what

[8] Thus the fact that a state might determine that poker should not be covered under its gambling laws actually supports IGBA's purpose: in any such state, IGBA would not restrict the application of what the state had determined to permit. The Government, however, is aware of only one state court, in a decision that has not subsequently reversed on appeal, to have held that its gambling laws did not cover poker, and that case is presently under review by the South Carolina Supreme Court. *See Town of Mt. Pleasant* v. *Chimento*, No. 2009-CP-10-001551 (S.C. Ct. App. Oct. 1, 2009).

type of gambling is lawful.[9] Therefore, the only sensible conclusion is that when Congress stated that gambling under IGBA "includes but is not limited to" particular games it meant just what it said: that it was offering a non-exhaustive list of examples of gambling – not attempting to redefine the general term. *See Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.")

Even assuming that IGBA is, as defendants claim, limited to forms of gambling that share "common features" to the listed examples, the defendants are simply wrong that "poker does not share any of the characteristics common to the enumerated games." Campos Brf. at 16. In support of this argument, the defendants focus on only two "key features" that they claim are common to the listed games but not applicable to poker: that they are all "lottery or house-banked games in which the house plays against its customers" and games in which "the bettor has no role in, or control over, the outcome" and are therefore "games of chance." Campos Brf. at 16-17.

As an initial matter, this self-serving identification of the "key" features is designed to ignore the countless other commonalties between poker and the listed items (i.e. poker, like various of the listed items, is historically considered gambling, is regularly treated as gambling under state law, is a game where people are betting on indeterminate outcomes, is a game where people can lose large sums on a bet, etc.). But even limiting consideration to the two particular

[9] To the extent that defendants would argue that there is no organized crime connection to internet poker they would be wrong. Indeed, a La Cosa Nostra ("LCN") associate involved in processing payments for the Poker Companies was at one point called upon to assist in collecting $4 million that Elie was accused of stealing from an account used to process transactions for one of the Poker Companies.

"features" of the exemplar games identified by the defendants, poker shares significant commonalities with several of the listed games.

First, defendants claim that in each of the listed games, the bettor has "no role in, or control over, the outcome" and that the game is instead subject only to chance. That is not true with respect to bookmaking, at the very least. Betting on the outcome of sporting events involves "substantial (not 'slight') skill," including "the exercise of [a] bettor's judgment in trying to . . . figure [out] the point spreads." *Office of the Attorney General of the State of New York*, Formal Opinion No. 84-F1, N.Y. Op. Atty. Gen 11 (1984). [10] Sports bettors have every opportunity to employ superior knowledge of the games, teams and the players involved in order to exploit odds that do not reflect the true likelihoods of the possible outcomes. Indeed, academics who have argued that poker should not be treated as a form of illegal gambling on the grounds that it is a "game of skill" make the same argument with respect to sports betting.[11] Ultimately, the outcome of the bets that poker players make on the cards, just like the outcome of the bets on sporting events.[12]

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[10] Indeed, there is an entire cottage industry devoted specifically to professional sports bettors who, like professional stock pickers, seek to apply their own knowledge and research to identify situations where the market (in the case of sports betting, the "line" set by bookmakers) incorrectly factors in the probability of various outcomes. *See, e.g.,* Dan Gordon, *Beat The Sports Books* (Cardoza Publishing 2d ed. 2008); Bobby Smith, *How To Beat The Pro Football Pointspread* (Skyhorse Publishing 2008); Stanford Wong & Susan Spector, *Gambling Like A Pro* (Penguin Books 4th ed. 2005). Of course whether the sports betting market is "efficient" and therefore extraordinarily hard to beat in the long run, particularly given transaction costs, is an open question just as it is in the stock market.

[11] *See, e.g., "Profs back online poker: Harvard lawyers work to overturn gambling ban*," Boston Herald, October 22, 2007, published at 2007 WLNR 20766706 ("Like [Professor Charles] Nesson, [Professor Alan] Dershowitz contends that, under the same 'game of skill' theory, online sports betting should be legalized…. Dershowitz said, 'It is ridiculous to call either poker or sports betting a game of chance.'").

[12] To the extent that the defendants are asserting the much narrower truism – that in poker, unlike the listed games, the very fact that a player makes a particular bet at a particular stage can

The second dissimilarity argued by the defendants – that in the listed games, unlike poker, the house bets against its players – is also inaccurate. With respect to poker, the house earns money primarily through the so-called "rake" – taking a small percentage of each pot – which, cumulatively, at least in the case of internet poker, typically results in the house taking approximately 1/3 or more of all funds deposited by players on the poker website (a high transaction cost that impacts returns available to bettors over time). Many of the games listed in IGBA, when operated by gambling businesses, use a similar revenue model. In pool-selling, for example, the house fee is generally not dependent on the game's outcome, but is rather a share of the total amount wagered by all the players. For example, in the football pools at issue in the case cited by Campos, which were run by the Delaware State Lottery, "[t]he amounts of the prizes awarded [we]re determined on a pari-mutuel basis, that is, as a function of the total amount of money bet by all players" and "[r]evenues [were] distributed pursuant to a fixed apportionment schedule among the players of [the pool], the State, the sales agents and the Lottery Office for its administrative expenses." *Nat'l Football League* v. *Governor of State of Del.*, 435 F. Supp. 1372, 1376 (D. Del. 1977).[13] Traditional lotteries are similar to pool-selling in this respect and, as such, defendants' attempt to lump them together with other "house-banked" games, in which the house is betting against the players, is misleading. Indeed, even bookmaking businesses strive to design their business (by setting odds appropriately, and taking bets on both sides of the line) such that particularly in the long term they have no interest in the

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influence bets made by other players – it is not at all clear how that peculiar feature of poker is relevant to the IGBA analysis.

[13] Notably, the court also addressed the question of whether a game that incorporates an element of skill can nevertheless qualify as a lottery and the Court concluded that it could. 435 F. Supp. at 1384-85.

outcome of particular sporting events and are, like internet poker operators, simply profiting from transactions costs they build into the betting lines. *See United States* v. *Avarello*, 592 F.2d 1339, 1343. n5 (5th Cir. 1979) (discussing revenue model).

For these reasons, IGBA clearly applies to the activities of the Poker Companies and defendants' motion to dismiss the IGBA counts should be denied.[14]

B. The Defendants Are Not Exempt From Prosecution Under IGBA Because The Poker Companies Were Conducting Business in New York and Other States

The defendants also argue that the IGBA does not apply to gambling businesses that operate legally offshore and "conduct" business in a state or states via the internet or telephone. Campos Brf. at 19-22; Elie IGBA Brf. at 14-17. Contrary to the defendants' argument, however, controlling Second Circuit precedent specifically provides that both the IGBA *and* the New York gambling law incorporated by reference in the charged IGBA counts "can be applied to a gambling company that operates legally offshore and accepts bets from New York." *Gotti,* 459 F.3d at 340. In support of the proposition that New York law gambling law itself reached the operations of an offshore gambling company, *Gotti* cited the New York state case, *People ex rel. Vacco* v. *World Interactive Gaming Corp.*, which held that "under New York Penal Law, if the person engaged in gambling is located in New York, then New York is the location where the gambling occurred." 185 Misc. 2d 852, 859-60, 714 N.Y.S.2d 844 (N.Y. Sup. 1999) (" It is irrelevant that Internet gambling is legal in Antigua. The act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling activity

[14] Count Seven charges Elie (but not Campos) with an IGBA count relating to the operation of Absolute Poker. Elie does not address in his brief the fact that Absolute Poker offered blackjack as well as poker (Indictment ¶ 6), but there is in any event no need for the Court to consider this issue given IGBA's clear application to poker.

within New York State.").[15] *See also United States* v. *Kaczowski*, 114 F. Supp 2d 143, 151 (W.D.N.Y. 2000) (rejecting the argument that a foreign bookmaking operation did not violate New York gambling law or the IBGA simply because accepting bets in foreign jurisdiction was legal). Cases outside the Second Circuit are uniformly consistent with its holding that the IGBA can be applied to offshore companies operating in the United States through the phone or internet.[16]

The fact that the Second Circuit and other courts have *already held* that IGBA applies to offshore gambling companies disposes of various arguments that Elie and Campos advance, such as the argument that the 1970 Congress did not (unsurprisingly) contemplate the application of the IGBA to "overseas, licensed online poker providers" (Elie IGBA Brf. at 17-22) or that the "target of [IGBA] was brick and mortar, physical gambling operations." Campos Brf. at 23. The defendants' argument that to apply IGBA to "offshore businesses" would violate various presumptions against extraterritoriality or trade agreements (Elie IGBA Brf. at 19-22; Campos Brf. at 22-23) must also be rejected in light of controlling precedent applying IGBA to gambling

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[15] While Elie does not address *Vacco*, or its adoption in the Second Circuit's opinion in *Gotti*, these two decisions directly dispose of Elie's generally tenuous argument that New York penal law does not itself apply to an "an otherwise legal foreign business" that promotes gambling in New York in violation of New York Penal Law § 225.05. Elie IGBA Brf. at 22-25.

[16] *See, e.g., United States* v. *$734,578.82 in U.S. Currency,* 286 F.3d 641, 659-60 (3d Cir. 2002) (IGBA applied to gambling operation lawfully doing business in Isle of Mann where business was promoted in New Jersey); *United States* v. *Atiyeh*, 402 F.3d 354 (3d Cir. 2005) (IGBA applied to gambling operations headquartered in Antigua that accepted bets over the telephone with Pennsylvania residents); *United States* v. *Trusdale*, 152 F.3d 443 (5th Cir. 1998) (applying IGBA to offshore gambling business but holding subsection of Texas gambling statute alleged in indictment did not cover conduct as matter of state law).

businesses operating lawfully in foreign jurisdictions that nonetheless accept bets from U.S. residents.[17]

Faced with settled precedent applying IGBA to offshore gambling companies, the defendants are left to argue that the Poker Companies did not "conduct" their businesses in any U.S. state for the purposes of IGBA. Here, the defendants assert, without basis, that the Government's evidence of domestic conduct will be limited to the placing of bets in New York by New York residents and then argue that this degree of conduct is legally insufficient. This argument is wrong on every level.

As an initial matter, the issue at this stage is not the sufficiency of the evidence but the sufficiency of the Indictment. Each of the IGBA counts "track[s] the statutory language charged," *Stavroulakis*, 952 F.2d at 690, and indisputably alleges that each named defendant did "conduct . . . an illegal gambling business, namely a business that engaged in and facilitated online poker, in violation of New York State Penal Law Sections 225.00 and 225.05 and the law of other states in which the business operated" or aided and abetted the same. Indictment ¶¶ 42, 44, 46. Because a court does not "look[] beyond the fact of the indictment and draw inferences as to the proof that would be introduced by the government at trial," *Alfonso*, 143 F. 3d at 776, the defendants' motion to dismiss the indictment based on unfounded predictions about the proof as to quantum and type of conduct that occurred in New York must be denied.

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[17] These arguments in any event lack merit. The Government is not seeking to apply IGBA "extraterritorially," i.e. only to "conduct that occurs outside the United States," *United States* v. *Kim,* 246 F. 3d 186 (2d Cir. 2001), but to businesses that engaged in conduct *in* the United States that violated state laws incorporated by reference into IGBA. *Cf. United States* v. *Cohen*, 260 F.3d 68 (2d Cir. 2001) (rejecting similar argument with respect to the Wire Wager Act's application to a sports book based in Antigua that accepted bets from New York residents over the phone and internet). With respect to Antigua's claim in the WTO that U.S. gambling laws unfairly discriminated against international trade, Congress has made clear that such resolutions must not "be given effect under domestic law if inconsistent with federal law," 19 U.S.C. § 3512(a)(1), which to do so would plainly be.

In an effort to obscure what is, in reality, an argument about the sufficiency of the evidence at trial, the defendants inaccurately claim that "[t]he *sole* point of contact that the Indictment alleges the defendant Poker Companies had with the United States was the activity of its customers who use their own computers to deposit funds and withdraw funds from their offshore poker accounts, and also to play poker on the companies' websites, which also were hosted offshore." Elie IGBA Brf. at 14-15. This claim strains all credulity. For one thing, the two defendants asserting that the Indictment alleges operations "entirely abroad" (Campos. Brf. at 22) are both United States residents specifically charged with working in the United States to obtain the payment processing channels the Poker Companies needed to conduct their businesses in this country. Indeed, the Indictment's detailed allegations about the elaborate machinations undertaken by the Poker Companies and their agents in order to obtain "e-checks" from players in New York and other states (Indictment ¶¶ 21-26), and corresponding efforts to defeat gambling restrictions imposed by a credit card network located in New York (Indictment ¶¶ 17-20, 34(l)), make plain that the Poker Companies were not simply foreign companies operating exclusively offshore that were simply stumbled upon by bettors in the United States.[18] Indeed, the Government proffers that the trial evidence will show that the Poker Companies engaged in substantial contact with New York and other states in which they were operating unlawfully, including by engaging in multi-million marketing campaigns in the United States (in some cases involving television networks headquartered in New York), by receiving wire transfers through New York, and by deploying representatives to collect on debts owed by payments processors and to grapple with a string of judicially ordered seizures from 2009-2011 (including by judges

[18] Indeed, Full Tilt Poker's parent company, Tiltware LLC, is not a foreign entity at all but a registered California company managed by two United States citizens, one of whom has resided in the United States since the summer of 2008.

in the Southern District of New York) of bank accounts containing poker funds. The Poker Companies had the ability to restrict players' access both to their websites and deposit facilities depending on players' location, and could have terminated their operations in New York or any other state if they desired without interfering with other markets. [19] Instead, they willfully chose to operate in New York state and virtually all others.

Nevertheless, even assuming that the Indictment and proof as to business being conducted in New York was strictly limited, as the defendants claim, to betting by U.S.-based customers, the defendants are nonetheless incorrect on the law. Defendants do not point to a single case that supports their contention that "conducting" business in a particular state requires more than allowing players in the state to place bets on a gambling website hosted elsewhere. Instead, defendants misapply case law supporting a distinct and uncontroversial proposition: that the players who simply wager on games offered by an illegal gambling business are not themselves "persons who conduct" the illegal gambling business and therefore are not criminally liable under IGBA. *See* Campos Brf. at 20 (*citing United States* v. *Becker*, 461 F.2d 230 (2d Cir. 1972), vacated on other grounds, 417 U.S. 903 (1974)); Elie IGBA Brf. at 15 (*citing Sanabria* v. *United States*, 437 U.S. 54, 70-71 n.26 (1978)).[20] Defendants' then conclude that because mere

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[19] For example, in December 2010, both Full Tilt Poker and Pokerstars "turned off" access to players from Washington State, and certain payment processors have at various times refused to process transactions with players using addresses in particular states (based, it appears, not so much on the clarity of the gambling law at issue but whether there were known criminal investigations being pursued by U.S. Attorney's Offices in those states). After the Indictment was unsealed, all three Poker Companies promptly disabled U.S. residents' access to their websites and deposit facilities while continuing to operate elsewhere.

[20] Whether a player can be said to "conduct" the business is also relevant to IGBA's requirement that the illegal gambling business "involve[] five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business." 18 U.S.C. § 1955(b)(1)(ii).

players are not construed to be "conducting" the business under IGBA, it follows that "*accepting* bets from players in the United States is not sufficient to constitute 'conducting' business in the United States." Campos Brf. at 21 (emphasis added).

In making this argument, the defendants conflate two distinct concepts under IGBA – what it means to be "conducting" a gambling business in a certain place and whether certain employees can be construed as being involved in "conduct[ing]" the business. *Becker* addresses only the latter issue and holds, consistent with legislative history, that "Congress' intent was to include all those who participate in the operation of a gambling business, regardless of how minor their roles and whether or not they be labeled agents, runners, independent contractors or the like, and to exclude only customers of the business." 461 F.2d at 232. The footnote in *Sanabria* says the same thing. 437 U.S. at 70-71 n.26. The cited cases do not address (much less limit) what it means for a gambling business to be "conducted" in a state, and the logic of the argument that defendant's advance is absurd: a New Yorker who buys a hot dog from a street vendor is not of course "conducting" that hot dog business, but it would be incorrect to claim that this means the business is not being conducted at all, by anyone.

C. IGBA, As Applied to Internet Poker, Is Not Void for Vagueness

Defendants' argument that IGBA, as applied to internet poker, is void for vagueness because the IGBA "does not mention poker even once" (Elie IGBA Brf. at 26; Campos Brf. at 30) can summarily be disposed of for the reasons set forth in section I.A.: in IGBA's 40 year history, courts have routinely applied IGBA to both poker and offshore gambling operations, consistent with the language and structure of the statute. Accordingly, there is nothing vague about IGBA's application to internet poker in this case.[21]

[21] Given this, the "rule of lenity" invoked by the defendants has still less application. *See*

Elie alone also contends that IGBA is unconstitutionally vague as applied here because it is charged with reference to New York law and because "reasonable minds can differ" as to "whether poker constitutes gambling" under the provisions of the New York Penal Law referred to in each of the IGBA counts charged in the Indictment. Elie IGBA Brf. at 27-30. Reasonable minds cannot.

New York Penal Law § 225 proscribes most forms of gambling, which it defines as follows: "A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." N.Y. Penal Law § 225.00. The term "contest of chance" is further defined as "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." *Id.*

The plain language of the statute itself makes its application to a game such as poker unmistakably clear. First, § 225.00 makes clear that a "contest of chance" need only have a "material" degree of chance. The concept of "materiality" is widely embedded in the law, and generally means something that is of enough relevance to have an impact on the issue or matter at hand. *See, e.g.* Black's Law Dictionary (9th Edition) ("[h]aving some logical connection with consequential facts"). No one can seriously argue that chance is entirely insignificant in a game, like poker, in which cards are randomly distributed and the rules provide that certain random

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Chapman v. *United States*, 500 U.S. at 463 ("The rule of lenity . . . is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the [statute], such that even after a court has seized everything from which aid can be derived, it is still left with an ambiguous statute.") (internal citations and quotations omitted). There is no such ambiguity or uncertainty here.

distributions beat other random distributions. Indisputably there is skill involved in poker as well – a poker player can consider both mathematical probabilities and psychological factors (why other players are making particular bets, or what one's own bet might signal[22]) – but to suggest that random distributions are have not connection to the outcome of the game, that it is not "material" at all, defies all common sense.

Moreover, even if the use of the word "material" was not enough to make clear that the law covered poker, § 225.00 specifically provides that gambling covers games "in which the outcome depends in a material degree upon an element of chance, *notwithstanding that skill of contestants may also be a factor therein*." N.Y. Penal Law § 255.00 (emphasis added). Taking these components together, there can simply be no question that § 225.00 covers games like poker; indeed, these provisions appear to have been written with games like poker, that combine skill and chance, in mind. *See also People* v *Turner*, 165 Misc. 2d 222, 224 (N.Y. City Crim. Ct. 1995) (observing that N.Y. Penal Law § 255.00 covers games "such as poker or blackjack which require considerable skill in calculating the probability of drawing particular cards" because the ultimate outcomes "depends to a material degree upon the random distribution of cards.").

Not surprisingly, therefore, Elie fails to cite even a single case implying that § 255.00's definition of gambling does not reach poker, and the arguments Elie offers as to why § 225.00 is nonetheless unconstitutionally vague as applied to that game are wholly without merit. Most of the cases cited by Elie involve conflicting opinions by New York Criminal Court judges in the mid-1990s addressing arrests on gambling charges of street corner hustlers offering tourists,

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[22] These fuzzier sorts of skills arguably have less application to internet poker, however, where there are far fewer "cues" for a player to read or signal, and where individuals routinely play against people that they have never met and will not necessarily play with ever again. In fact, Full Tilt Poker popularized a form of internet poker referred to as "Rush Poker" in which players are dealt hands at different virtual tables in rapidly varying succession, offering very little opportunity for players to examine how their opponents are playing.

college students and other naïve passers-by the chance to "play" three card monte or similar shell games. *See* Elie IGBA Brf. at 28. The confusion in these cases stemmed from how to apply gambling law to something that was, as practiced, not a game of skill or a game of chance but rather a con accomplished by sleight of hand and other ruses. As such, these cases do nothing to advance the argument that New York's gambling law does not apply to poker.

Elie also contends that it is not entirely clear that the "material degree of chance" test spelled out in §225.00 is even the law in New York. *See* Elie IGBA Brf. at 28, n. 10. This claim is also groundless. The New York penal statute in force since 1965 unequivocally identifies "material degree of chance" as the relevant test under New York law, and the Second Circuit identified it as the test in *Gotti* as well. *See Gotti*, 459 F.3d at 340. The purported "confusion" Elie describes stems from the fact that in *People* v. *Li Ai Hua*, 885 N.Y.S.2d 389, 384 (N.Y. City Crim. Ct. 2009), the court included a quote from a 1904 New York case that applied a "predominance" rather than a "material degree" test to games involving skill and chance under *a long superseded* version of the New York Penal statute that did not itself articulate a standard.[23] But even setting aside Elie's obvious error in quoting a case that has been superseded by statute, Elie's argument in still unpersuasive because even under the prior penal law and the more restrictive predominance test, every reported judicial opinion in the state of New York consistently described poker as gambling. *See, e.g.*, *Katz Delicatessen, Inc.* v. *O'Connell*, 97 N.E.2d 906, 907 (N.Y. 1951) (affirming liquor license suspension because deli allowed social poker games in basement, a form of gambling); *People* v. *Dubinsky*, 31 N.Y.S. 2d 234, 236

[23] *See People ex rel Ellison* v. *Lavin*, 71 N.E. 753 (N.Y. 1904) ("The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game."). *See also* Bennet Liebman, *Poker Flops Under New York Law*, 17 Fordham Intell. Prop. Media & Ent. L.J 1 (2006) (discussing evolution of New York gambling statute and case law).

(N.Y. Ct., Spec. Sess. 1941) (affirming conviction of man who charged fee to allow individuals to play poker in an apartment, noting that there was "no question" that stud poker was a form of gambling).[24] Given that New York law now expressly provides for a broader "material degree of chance" test it is not necessary to determine whether "skill" or "chance" in fact predominate in the game of poker.[25] What is important to note is that, no matter what test New York courts have applied, they have consistently identified poker as gambling, which provides further reason to quickly dispose of the defendants' vagueness claim.

Finally, there is a significant flaw in the premise of Elie's argument that to prevail he need demonstrate only that *New York* gambling law is vague as to poker (which it is not). An as applied vagueness challenge requires the defendant to prove that the statute provided "insufficient notice that his or her behavior at issue was prohibited," *Dickerson* v. *Napolitano*, 604 F.3d 732, 745 (2d. Cir. 2010) (*citing Farrell* v. *Burke*, 449 F.3d 470, 490 (2d Cir. 2006)) Here, Elie is charged with aiding and abetting the operation of three internet poker companies that did business, not only in New York, but throughout the United States and, in violation of the

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[24] *See also*, *Luetchford* v. *Lord*, 11 N.Y.S. 597, 597 (N.Y. Gen. Term. 1890), rev'd on other grounds, 30 N.E. 859 (N.Y. 1892) (involving foreclosure of a mortgage to pay a gambling debt involving poker); *People* v. *Bright*, 96 N.E. 362, 363 (N.Y. 1911) (conviction of defendant as a "common gambler" based on poker playing); *People* v. *Cohen*, 289 N.Y.S. 397, 399 (N.Y. Magis. Ct. 1936) (describing any game involving delivery of cards "face down" as a game of chance); *In re Fisher*, 247 N.Y.S. 168, 178-79 (N.Y. App. Div. 1930) ("any game of cards for stakes is technically gambling"); *People* v. *Pack*, 39 N.Y.S.2d 302, 305 (N.Y. Ct. Spec. Sess. 1947) (same); *People ex rel Felming* v. *Welti*, 97 N.E.2d 906, 907 (N.Y. 1951) ("every card game is a game of chance and if played for money constitutes gambling under our statute.").

[25] The answer to that question depends on, among things, whether one is talking about a single hand of poker or something else. It is a mathematical truism that in *any* game involving both chance and skill, the element of luck will tend to be evenly distributed the more times the game is played such that even in a game that is 1% skill and 99% chance, the player with the greater skill will prevail in the long run. *See Three Kings Holdings LLC.* v. *Stephen Six,* 45 Kan. App. 2d 1043 (2011) (affirming trial court's holding that a "single hand" analysis applied under the predominance test). Additionally, the more evenly matched in skill particular players are, the more luck will predominate.

law of New York and other states. To support a claim of insufficient notice, therefore, Elie would thus have to demonstrate that that it was unclear whether the laws in *any* of the states where the gambling companies did business covered poker. This he could do not do. In numerous states the relevant gambling statute explicitly identifies poker as "gambling" under state law, *see supra* at n.5, and in numerous other states, courts have held that poker is a form of gambling under state law, *see supra* at n. 6.

For all of the reasons set forth in Section I, the defendants' motions to dismiss the IGBA counts should be denied.[26]

II. The Defendants' Motion to Dismiss the UIGEA Counts Should Be Denied

In arguing that the Court should dismiss the UIGEA counts, the defendants advance a variety of claims, including that the statute does not extend to internet poker, that it exempts them from prosecution and that it is, as applied to internet poker, unconstitutionally vague. Each of these arguments should be rejected.

A. UIGEA Applies to Internet Poker

UIGEA provides that "No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling" certain types of payments. 31 U.S.C. § 5363. As with IGBA, UIGEA defines gambling with reference to other law, providing that gambling is "unlawful" where "such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." Despite this clear breadth, the defendants argue that UIGEA contains an implicit exemption for internet poker companies because poker companies do not have a stake in the outcome of gambling contests and are not,

[26] The defendants' motions to dismiss the money laundering conspiracy count, which are predicated entirely on the lack of any IGBA violation, should also accordingly be denied.

therefore, "engaged in the business of betting and wagering" at all. Campos Brf. at 12-15; Elie UIGEA Brf. at 13-15. The defendants' argument has no basis in the language, structure or legislative history of the UIGEA.

By the plain language of its terms, UIGEA applies to any person engaged "in the business of betting or wagering," and the activities of the poker companies easily fit within this definition. Internet poker operators (like the Poker Companies at issue in this case) provide a software platform on which players can participate in poker games and, in exchange, the poker operators receive a percentage of the amounts wagered (through the "rake" taken from the pot) for virtually every hand of poker played. In operating, for profit, websites where players wager against each other in poker games, the poker companies are unquestionably engaged in the business of betting or wagering.

Recognizing that the activities of the Poker Companies clearly fall within the explicit requirements of the UIGEA, the defendants invent an implicit requirement that they also be involved in betting against their customers. Critically, there is simply nothing in the language of UIGEA that requires the poker companies to have been placing bets or wagers on their own behalf[27], to have had direct exposure to the risks taken by others, in order to fall within the ambit of the statute. While it is of course true, as defendants argue, that to "bet or wager" means to risk something of value (and UIGEA adopts this standard definition) it nowhere follows that that companies "in the business of betting and wagering" must themselves have a stake in particular bets.

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[27] In the instant case, however, at least two of the Poker Companies did bet against their own players. Full Tilt Poker was owned in large part by professional poker players who would play on the site against the company's customers. Insiders at Absolute Poker and Ultimate Bet not only played against their customers, but cheated when they were doing so by accessing a software "feature" that allowed them to see other players' cards during games.

Other provisions of UIGEA also make clear that Congress did not, as defendants contend, impose an implicit requirement that gambling businesses themselves wager against their customers in order to be "in the business" of gambling and wagering. Notably, the UIGEA provides that certain types of businesses ("a financial transaction provider, or any computer service or telecommunications service") are not, as a general matter, themselves "in the business of betting and wagering." 31 U.S.C. § 5362(2). The fact that Congress took pains to make explicit that these businesses were not "in the business of betting and wagering," without feeling the need to explicitly exclude poker companies, which exist solely for the purpose of facilitating gambling, is an additional indication that Congress intended no safe harbor for poker companies.[28] Additionally, by their very nature, financial transaction providers, computer services and telecommunications services do not engage in bookmaking, or otherwise take on gambling risks of any kind, and there would be no reason to explicitly exclude these entities if Congress had included an overarching requirement that any entity in the "business of betting or wagering" be involved in betting against its customers. *See, e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks omitted).

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[28] In a similar vein, in defining the term "bet or wager" Congress specifically excluded "participation in any fantasy or simulation sports game or educational game," subject to certain limitations. 31 U.S.C. § 5362(1)(E)(ix). Companies offering fantasy sports or educational games operate by charging a fee for the service, just as the poker companies do. If, as defendants would have it, UIGEA only applies to businesses that wager against their customers – and thus would have no bearing on fantasy sports or educational games to begin with – there would be no need to explicitly exclude these activities from the definition of "bet or wager." *See TRW Inc.*, 534 U.S. at 31.

UIGEA's circumvention provision relating to financial transaction providers and the other excluded entities in 31 U.S.C. § 5362(2) adds further support, consistent with the plain language of the statute, that being in the "business of betting and wagering" does not require the business to itself bet against its customers. Specifically, Congress took care to provide that even "a financial transaction provider or computer service or telecommunications service" would be treated as if it were in "in the business of betting and wagering" in certain cases where it (or someone controlling it, or controlled by it) "operates, manages, supervises, or directs an Internet website at which unlawful bets or wagers may be placed, received or otherwise made." 31 U.S.C. § 5367. By using verbs like "operate[], manage[], supervise[], or direct[]," and by employing the passive voice when discussing bets and wagers ("bets or wagers may be placed, received or otherwise made"), Congress made clear that persons may be liable for simply *facilitating* the betting and wagering of others on the Internet, even if they do not engage in betting and wagering themselves. Under the defendants' theory, although certain financial transaction providers, interactive computer services or telecommunications services can in certain cases be guilty under UIGEA for simply facilitating the betting and wagering of others in internet poker and other games, the internet poker companies (which unquestionably do the same thing, and in a more direct fashion) would enjoy a complete exemption. There is no reason to construe UIGEA in a way that produces such a perverse result.

In light of the plain language of the statute, supported by its structure, defendants face a heavy burden in demonstrating that Congress intended UIGEA to specifically exclude poker from its ambit, particularly given that IGBA (which like UIGEA incorporates by reference state gambling law) had been consistently applied to poker gambling at the time the UIGEA was enacted. *See* Section I.A, *supra*. The defendants offer no support for this proposition and, in

fact, legislative history is squarely against them. UIGEA was passed in 2006 at a time when internet poker was an extremely common form of internet gambling, a fact Congress recognized. In the Congressional findings accompanying UIGEA's enactment, Congress explicitly referenced the Congressionally commissioned "National Gambling Impact Study Commission" of 1999. *See* 31 U.S.C. § 5361(a)(1). The Commission's report includes numerous references to "poker" and "video poker." *See, e.g.*, Nat'l Gambling Impact Study Comm. Report at pp. 1-2, 2-3, 2-4, 2-5, 3-11, 3-12, 5-3, 7-4, 7-20, 7-23 and 7-24 (*available at* http://govinfo.library.unt.edu/ngisc/reports/finrpt.html). Moreover, in its chapter on Internet Gambling, the Commission stated "[m]ost Internet gambling sites offer casino-style gambling, such as blackjack, poker, slot machines, and roulette." Commission Report at p. 5-3. That Congress relied on a Commission that clearly viewed poker as within the umbrella of gambling and, in particular, internet gambling, provides additional evidence that Congress did not intend to exclude poker from the ambit of UIGEA and that, if it had so intended, it would done so in a much clearer fashion.

Indeed, there is some indication that UIGEA was drafted to specifically to *ensure* that internet poker would be *included* in the statute's ambit. The UIGEA defines the term "bet or wager" as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance . . . ." 31 U.S.C. § 5362(1)(A). An earlier version of the law proposed in same 2005-2006 Congress, House Resolution 4777, contains precisely the same quoted language with one modification, applying only to "a game *predominantly* subject to chance." *See* 2005 Cong US HR 4777 (9/22/06). The word "predominantly" was not included in the final version of UIGEA after the Department of Justice expressed the concern that the phrase "predominantly subject to chance" might not be "sufficient to cover card games, such as poker." *See* Testimony of Bruce G. Ohr, before the House

Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security (available at http://www.gambling-law-us.com/Articles-Notes/DOJ-testimony-4477.htm).

Faced with statutory language, structure and legislative history inconsistent with its position, the defendants cite two district court cases addressing the use of the phrase "in the business of betting and wager" in the context of the Wire Wager Act, 18 U.S.C. § 1084, which makes it a crime for those in such a business to use the wires to transmit bets or wagers. *See* Campos Brief at 13-14 and Elie UIGEA Brf. at 12-13 (citing *Pic-A-State Pa* v. *Dep't of Revenue*, 1993 U.S. Dist. LEXIS 12790 (M.D. Pa. July 23, 1993); *United States* v. *Alpirn*, 307 F. Supp. 452, 455 (S.D.N.Y. 1969)). These cases, however, offer no support for the proposition that "the businesses of betting and wagering" – in the context of the UIGEA – applies only to businesses that bet against their customers.

In *Pic-A-State Pa.*, the court considered a commerce clause challenge to a Pennsylvania law which purported to bar Pic-A-State, which sold tickets to legal state run lotteries through a network of retail stores, from selling tickets to out-of-state lotteries. In finding the state statue unconstitutional, the court briefly considered the argument that Pic-A-State might violate the Wire Wager Act before rejecting it on the grounds that this business was not "engaged in the business of betting and wagering," and observing that courts had construed the phrase as involving "a professional gambling or bookmaking business." 1993 U.S. Dist. LEXIS 12790, at *3. There is little in this holding that is helpful to the Poker Companies. *Pic-A-State*'s conclusion that a "business of betting and wagering" means a "professional gambling business" (i.e., in the *Pic-A-State* case, the purveyor of the lottery itself) provides no cover to the Poker Companies, which unquestionably are such businesses. While the district court, in reaching this conclusion, noted that Pic-A-State "set no odds, accept[ed] no wagers and distributed no risks,"

id., the Court did not purport to identify this as a generally applicable test for identifying a "professional gambling business."[29]

Even if *Pic-A-State* (in any event non controlling) could be construed as holding that a "business of betting and wagering" must itself stake money in order to be subject to the Wire Wager Act, that conclusion would have little bearing in the context of the UIGEA. The Wire Wager Act refers to "bets or wagers on any sporting event or context" and is typically charged (excepting in negotiated pleas) in connection with bookmaking operations, particularly given ambiguity as to whether the statute even applies to non-sports gambling. *Compare In re MasterCard Intern. Inc.*, 313 F.3d 257 (5th Cir. 2002) (holding it does not) *with United States* v. *Lombardo*, 639 F. Supp. 2d 1271, 1280 (D. Utah. 2007) (holding that it does). Although discussions about who is involved in the "business of betting and wagering" in the Wire Wager Act context might therefore indeed revolve around such things as whether the business sets odds or distributes the risks from its wagers by laying off bets with other bookies, that provides no basis for concluding that a "business of betting and wagering" under UIGEA, which explicitly applies to any "game subject to chance," 31 U.S.C. § 5362(1)(A), should be so constrained. That is particularly true in light of the UIGEA's plain language, statutory construction, and evidence of legislative intent, all of which demonstrate that the UIGEA's scope is much broader.

For these reasons, the phrase "in the business of betting and wagering" properly applies to the Poker Companies.

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[29] *Alpirin*, which held simply that a defendant who advised gamblers which horses to bet on but took no bets himself was not "in the businesses of betting and wagering," *Alpirin*, 307 F. Supp at 455, has even less application.

B. Elie and Campos Are Not Exempt From Prosecution Under the UIGEA

Elie and Campos claim that UIGEA, a statute that makes it a crime for anyone "in the business of betting or wagering" to accept payments for illegal internet gambling, implicitly exempts from liability those like Elie and Campos who conspire with or aid and abet internet gambling businesses in obtaining such payments. Campos Brf. at 6-15; Elie UIGEA Brf. at 4-11. UIGEA provides that "[t]he term 'business of betting or wagering' does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service." 31 U.S.C. § 5362(2). Because some (but not all) entities categorized as "financial transaction providers" are subject to a regulatory scheme designed to allow the institutions to "identify" and "block" gambling transactions, 31 U.S.C. § 5364(a)(1), the defendants infer that Congress therefore intended to immunize from prosecution anyone aiding and abetting or conspiring with someone "in the business of betting and wagering" provided the person happens to be associated with a financial transaction provider. The extraordinary immunity from 18 U.S.C. §§ 2 and 371 liability that the defendants urge is not supported by the language or structure of UIGEA, and is clearly inconsistent with the statute's intended purpose.

As an initial matter, aiding and abetting liability (18 U.S.C. § 2[30]) and co-conspirator liability (18 U.S.C. § 371[31]) are criminal statutes of broad applicability, applying with few

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[30] 18 U.S.C. § 2 provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a).

[31] 18 U.S.C. § 371 provides that "[i]f two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."

exceptions to every substantive criminal offense. With respect to § 2, the Second Circuit has held that unless Congress expressly provides otherwise, the "general rule is that aiders and abettors are punishable as principals." *United States* v. *Falu*, 776 F.2d 46, 49 (2d Cir. 1985). *Accord United States* v. *Yakou*, 428 F.3d 241, 251-52 (D.C. Cir. 2005) (the aiding and abetting statute, "typically applies to any criminal statute unless Congress specifically carves out an exception that precludes aiding and abetting liability") (quoting *United States* v. *Angwin*, 271 F.3d 786, 802 (9th Cir. 2001)); *United States* v. *Armstrong*, 909 F.2d 1238, 1241 (9th Cir. 1990) ("Aiding and abetting is implied in every federal indictment for a substantive offense."); *United States* v. *Maldonado-Campos*, 920 F.2d 714, 715 n. 1 (10th Cir. 1990) (Section 2 applies to the entire criminal code for "it is rather a statutory canon defining an ingredient of criminal responsibility generally, than the definition of law of any crime.") (internal quotations omitted). The same principle applies to the general conspiracy statute, enacted by Congress to address the "threat to the public over and above the commission of the relevant substantive crime" inherent in groups of individuals working together towards common criminal purposes. *United States* v. *Jimenez Recio*, 537 U.S. 270, 275 (U.S. 2003) (internal quotation marks and citations omitted). The burden therefore clearly lies with the defendants to demonstrate that Congress intended to immunize certain defendants from § 2 or § 371 liability in enacting UIGEA.

This they cannot do. Here, Congress included no language specifically exempting UIGEA from the general applicability of Title 18, United States Code, Sections 2 and 371. "In the face of this silence, we must presume that Congress intended aiders and abettors to be punished as principals." *United States* v. *Falu*, 776 F.2d at 49. The lack of any legislative history suggesting that Congress intended to alter § 2 or § 371 in connection with the UIGEA also favors

the presumption of applicability. *See id.* (noting that legislative history providing "no expression either way" insufficient to rebut presumption of applicability).

Nor does the fact that the UIGEA identifies those "in the business of betting and wagering" as principals for the purposes of the offense suggest Congressional intent to alter aiding and abetting or conspiracy liability. The two pre-UIGEA gambling statutes – the Wire Wager Act and the IGBA – impose similar limitations on who can be principals for purposes of the offense. *See* 18 U.S.C. § 1084 (applying, like UIGEA, only to those "in the business of betting and wagering"); 18 U.S.C. § 1955 (applying only to those who "conduct, finance, manage, supervise, direct, or own a gambling business"). Despite the fact that the Wire Wager Act and IGBA, like the UIGEA, expressly define the principal of the offense as someone operating the gambling business – draftsmanship designed to exclude mere gamblers[32] – it is well established (and defendants do not claim otherwise) that §2 and § 371 apply to these statutes. *See, e.g, United States v. Miller*, 22 F.3d 1075 (11th Cir. 1994) (affirming conviction for aiding and abetting under Wire Wager Act); *United States* v. *Battista*, 575 F.3d 226 (2d Cir. 2009) (affirming conviction following plea involving conspiracy to violate Wire Wager Act); *United States* v. *Merrell*, 701 F.2d 53 (6th Cir. 1983) (affirming conviction for aiding and abetting under IGBA).

Indeed, the Supreme Court has specifically held that the general conspiracy statute could be applied to prosecutions under the IGBA, notwithstanding the fact that IGBA itself limited the substantive offense to those that operated a gambling business conducted by at least five people.

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[32] *See Sanabria* v. *United States*, 437 U.S. 54, 71 n. 26 (1978) ("§1955 proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor."); *United States* v. *Sutera*, 933 F.2d 641, 649 (8th Cir. 1991) ("Running a gambling business is a fundamental aspect of" the Wire Wager Act).

See Iannelli v. *United States*, 420 U.S. 770 (1975). In explaining its decision, the Supreme Court stated the following:

> The Act is a carefully crafted piece of legislation. Had Congress intended to foreclose the possibility of prosecuting conspiracy offenses under § 371 by merging them into prosecutions under § 1955, we think it would have so indicated explicitly. It chose instead to define the substantive offense punished by § 1955 in a manner that fails specifically to invoke the concerns which underlie the law of conspiracy.

420 U.S. at 789. Particularly given the Supreme Court's construction of IGBA, had Congress intended for UIGEA to limit the applicability of § 371 or § 2, "it would have so indicated explicitly." *Id.* *See also United States* v. *Wells*, 519 U.S. 482, 495 (1997) ("We presume that Congress expects its statutes to be read in conformity with this Court's precedents[.]").

Given that federal gambling statutes consistently target only those involved in gambling businesses as principals, the only statutory features the defendants can offer to support their claim of immunity is the fact that UIGEA (1) specifically describes certain entities as not being in "the business of betting and wagering" and (2) subjects some, but not all, of these entities to certain regulations. The defendants' argument misconstrues the significance of these statutory features, which do not in fact support the argument advanced by the defendants.

For one thing, the defendants' presentation of UIGEA as a bifurcated statute – applying a criminal provision to the gambling businesses but merely a "a civil regulatory regime" to other entities that may be used to facilitate such businesses (Campos Brf. at 5) – is simply not accurate. UIGEA does provide that "[t]he 'business of betting or wagering' does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service." 31 U.S.C. § 5362(2). But it does *not* then subject all excluded entities to regulation, undermining defendants' argument that Congress's intent was to divide potential entities between criminal and regulatory regimes. Further undermining the defendants' presentation of

the statute as bifurcated is the fact that Congress provided that "notwithstanding 5262(2), a financial transaction provider, or any interactive computer service or telecommunications service, may be liable under this subchapter" (i.e. as a principal) where the entity has "actual knowledge and control of bets and wagers and…operate[], manage[], supervise[], or direct[] an Internet website at which unlawful bets or wagers may be placed…" 31 U.S.C. § 5367. Both of these facts significantly erode the criminal exposure / regulation dichotomy that defendants' seek to draw to buttress their claim that Congress, without ever stating it, intended to radically restrict the application of § 371 or § 2 to the UIGEA criminal provision.

Nor does the fact that "financial transaction providers" face regulatory requirements support the claim that Congress intended to exempt those such as Campos and Elie from UIGEA liability. Those regulatory requirements are highly limited. For one thing, UIGEA does not impose any requirements on "financial transaction providers" directly. Instead, UIGEA required the Department of Treasury and Federal Reserve to prescribe regulations for "designated payment systems," a term defined essentially, as networks through which financial transactions can be processed.[33] More importantly, the only regulations UIGEA calls for to be imposed are "policies and procedures to identify and prevent" the processing of gambling transactions. 31 U.S.C. § 5364. In other words, UIGEA's regulatory regime assumes that financial institutions are not knowingly participating in gambling-related transactions and establishes procedures to ensure that they do not unwittingly do so. At the heart of the regulatory regime, therefore, is the

[33] Specifically, "any system utilized by a financial transaction provider that the Secretary and the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, jointly determine, by regulation or order, could be utilized in connection with, or to facilitate, any restricted transaction." 31 U.S.C. § 5362(3). The regulations ultimately identified five systems: the ACH network, the credit/debit/stored value card system, the check collection system, the wire transfer system, and the money transmitting system. 12 C.F.R. § 233.3.

presumption of good faith on the part of the financial institutions. The actual regulations, not issued in final form until June 1, 2010, are of a piece, exempting most participants in "designated payment systems" from *any* requirements and, for the non-exempt participants, simply requiring "written policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit" gambling transactions. *See* 31 C.F.R. §§ 132.1 -132.7 (2010).

Nothing about the existence of these limited measures suggests that Congress intended to eliminate aiding and abetting liability or conspiracy liability for all "financial transaction providers" – an extraordinarily broad term[34] that includes entities not required to do anything under the regulations– who, with the requisite criminal intent, conspire with or aid and abet internet gambling companies in their violations of the law. Certainly nothing about the limited regulatory regime suggests Congress intended anyone who owned or worked for or was otherwise associated with a financial transaction provider was immune from liability under § 2 or § 371.

Nor do the cases cited by the defendants alter this analysis. Broadly speaking, the cases cited by the defendants stand for the proposition that, where a criminal transaction requires two parties for completion, and where the statute in question criminalizes the actions of only *one* of those parties, this legislative judgment cannot be circumvented through the application of conspiracy and/or aiding and abetting liability. *See Gebardi* v. *United States*, 287 U.S. 112 (1932) (Mann Act covers only defendant transporting a woman for purposes of prostitution, not the woman who is transported); *Abuelhawa* v. *United States*, 129 S. Ct. 2102 (2009) (Controlled

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[34] The term "financial transaction provider" means "a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system." 31 U.S.C. § 5362(4).

Substances Act distribution offense applies only to seller of drugs, not the seller's customer); *United States* v. *Amen*, 831 F.2d 373 (2d Cir. 1987) (Continuing Criminal Enterprise offense applies to supervisors of significant drug organizations only, not those they managed); *United States* v. *Castle*, 925 F.2d 831 (5th Cir. 1991) (Foreign Corrupt Practices Act applied to person making payments to foreign officials, not to foreign officials who may or may not be violating law by receipt of such payments). Neither this principle, nor those cases, are applicable to Elie and Campos here. To the extent there are participants in gambling transactions who are properly analogized to those exempt from liability in the cited cases, those participants are ordinary bettors, who in fact are excluded exposure under each of the federal gambling statutes.

Moreover, in each of the cases cited by the defendants, the limits on § 371 and § 2 were in clear keeping with legislative intent. Contrary to the defendants' arguments, there is nothing in UIGEA that reflects Congressional intent to exclude agents or employees of virtually any participant in financial networks who knowingly and intentionally facilitate illegal gambling transactions that violate UIGEA. The notion that Congress chose to eschew any form of criminal liability in favor of mild prophylactic regulations to address the kind of conduct alleged against Elie and Campos in the Indictment makes no sense. The Indictment alleges that, after the passage of the UIGEA, internet gambling companies found that they could not obtain money from U.S. residents without elaborate machinations. Ensconced in gambling-friendly locations beyond the perceived reach of U.S. law enforcement, the principals of these companies arranged for Elie and other payment processors to act as their agents so they could operate. They relied on bankers like Campos, willing to accept illegal gambling transactions in return for investment in a troubled bank and a "bonus" for himself. Internet gambling companies simply could not access the U.S. financial system without people like Elie or Campos, many of whom may well have

been employees of a "financial transaction provider," particularly given its broad definition in the UIGEA.[35]

And yet to support their claim that Congress intended to silently immunize them from criminal liability for such conduct, defendants point to a regulatory scheme that has virtually no application to Campos or Elie at all. Campos himself is subject to no regulations and the fact that his employer, beginning in June 2010, was required simply to "establish[] written policies and procedures reasonably designed" to avoid illegal gambling, 12 C.F.R. § 233-4(b), hardly addressed the problem of those accused of acting with criminal intent. Elie is subject to no regulations either personally *or* it appears even as applied to his processing companies: the June 2010 regulations specifically exempt all participants in a "check collection system," which includes the Check 21 system that Elie used to process electronic checks. 12 C.F.R. §§ 233.4(b), §233.2(h).[36]

At bottom, then, the defendants are arguing that Congress implicitly intended to eliminate two generally applicable statutes, § 2 and § 371, when it created a crime addressed to internet gambling companies who in fact *require* aiders and abettors and conspirators connected to the U.S. financial system in order to do the very thing – access the system for money – that the new crime forbids. And the "proof" Congress intended to immunize these crucial actors is that the same statute calls for certain entities to create "policies and procedures" that have either insignificant or non-existent impact on such co-conspirators. Such a reading would eviscerate

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[35] Elie, for example, opened gambling processing accounts using one corporate entity and, after the funds in the company accounts were ordered seized, simply selected a different corporate entity for further processing.

[36] Elie previously processed transactions through the ACH system which required the same sort of "policies and procedures" regulation but ultimately switched to processing e-checks through a network that avoided the ACH system (likely in part because the ACH system was subject to greater regulatory scrutiny under various regulatory schemes).

UIGEA, violating the "interpretive principle that statutory exceptions are to be construed narrowly in order to preserve the primary operation of the general rule." *Nussle v. Willette*, 224 F.3d 95, 99 (2d Cir. 2000) (internal citations and quotations omitted.").

C. The UIGEA, As Applied to Online Poker, Is Not Void For Vagueness

The defendants argue that the UIGEA counts are void for vagueness as applied to internet poker because UIGEA "fails to provide adequate notice to the public and because it vests an unacceptable degree of discretion in law enforcement personnel." Elie UIGEA Brf. at 14; Campos Brf. at 23. In light of the numerous state statutes prohibiting poker as a form of gambling and the numerous state and federal courts that have construed poker as a form of gambling, which are described in greater detail in section I.A *supra*, this argument should be summarily rejected.

A plaintiff making an as-applied challenge must show that the statute in question provided insufficient notice that his or her behavior at issue was prohibited. *Dickerson*, 604 F.3d at 745 (*citing Farrell* v. *Burke*, 449 F.3d 470, 490 (2d Cir. 2006)). "Even if a person of ordinary intelligence has notice of what a statute prohibits, the statute nonetheless may be unconstitutionally vague 'if it authorizes or even encourages arbitrary and discriminatory enforcement.'" *Dickerson*, 604 F.3d at 747 (*citing Hill* v. *Colorado*, 530 U.S. 703, 732 (2000)). To survive a vagueness challenge, a statute must "provide explicit standards for those who apply it…[b]ut a law need not achieve meticulous specificity, which would come at the cost of flexibility and reasonable breadth." *Dickerson*, 604 F.3d at 747 (internal citations and quotations omitted).

The defendants' vagueness argument rests primarily on their contention that the phrase "game subject to chance," which is part of the UIGEA's definition of "bet or wager," is vague.

Elie UIGEA Brf. at 14. This argument fails on several grounds. First, the UIGEA, by its terms, incorporates other federal and state law to determine which activities fall within the scope of the UIGEA. *See* 31 U.S.C. § 5362(10(A) ("The term 'unlawful Internet gambling' means to place, receive or otherwise knowingly transmit a bet or wager…*where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made*.") (emphasis added). Ultimately, therefore, the defendants' various concerns about the phrase "game subject to chance" are beside the point; the laws of numerous States, including New York's, clearly (and have for decades) unambiguously prohibited poker. This body of state law, on which the applicability of the UIGEA critically depends, provides more than adequate notice that UIGEA applies to internet poker.

Second, the defendants' generalized concerns about supposed ambiguity with the phrase "game subject to chance" are not relevant in the context of an as-applied challenge limited to poker. The defendants complain that the UIGEA is vague because "[v]irtually every game – and for that matter virtually all human activity – involves some element of chance." Elie Brf. at 14. But regardless of how sharply defined the contours of this standard are, the defendants' as applied challenge must fail because there is no doubt that poker falls within its scope and, therefore, the scope of the UIGEA. *See Dickerson*, 604 F. 3d at 746-47 (rejecting as applied challenge to statute that criminalized the possession of items in any way resembling things worn by police officers, and explaining that in an as-applied challenge, the plaintiffs must show "not that [the statute at issue] provides insufficient notice to some people as to items that are prohibited, [but] that it provided insufficient notice to the plaintiffs as to the specific items that they were arrested for possessing…. Even if there is ambiguity as to the margins of what conduct

is prohibited under the statute, we are of the view that an ordinary person would understand the statute to prohibit the possession of items" that were at issue in the case at hand).[37]

The defendants next argue that the UIGEA's reliance on other state and federal law "cannot be correct" because "[i]t would mean that a single phrase in a federal statute could mean something different in every prosecution." Elie UIGEA Brf. at 16. Again, this argument is unpersuasive. The fact that the UIGEA incorporates the law of various states – which necessarily vary – does not render the statute vague, as the Third Circuit has already concluded with respect to UIGEA itself. *See Interactive Media Entm't & Gaming Ass'n* v. *AG of the United States*, 580 F.3d 113, 116 (3d Cir. 2009) ("a statute is not unconstitutionally vague merely because it incorporates other provisions by reference; a reasonable person of ordinary intelligence would consult the incorporated provisions") (citing *United States* v. *Iverson*, 162 F.3d 1015, 1021 (9th Cir. 1998)). Similarly, "the fact that gambling may be prohibited in some states but permitted in others does not render the Act unconstitutionally vague." *Interactive Media*, 580 F.3d at 116 (citing *United States* v. *Tripp*, 782 F.2d 38, 42 (6th Cir.1986) (noting that a federal criminal statute may "incorporate[] state law for purposes of defining illegal

[37] Defendants' argument that the UIGEA "incorporates two independent and potentially conflicting formulations of games of chance" (Elie Brf. at 16) is similarly unpersuasive. First, there is nothing irreconcilable about the UGIEA's definition of "bet or wager" and the UIGEA's incorporation of state law. Rather, it appears that the UIGEA applies to betting or wagering on games that are both "subject to chance" and in violation of some other state or federal law. It is hard to imagine a state gambling law that applied to games that were not "subject to chance" at all (other than, arguably, sports betting, which is addressed separately in UIGEA any event) and defendants certainly have not identified any. Moreover, whether or not these provisions of the UIGEA are theoretically irreconcilable for some hypothetical game is irrelevant as applied to internet poker. There can be no serious dispute that poker is both "subject to chance" and contrary to numerous state laws and, therefore, the defendants' as applied challenge should again fail.

conduct…even if the result is that conduct that is lawful under the federal statute in one state is unlawful in another")).[38]

For these reasons, the defendants' vagueness challenge to the UIGEA should be rejected.[39]

III. Elie's Motion To Dismiss The Conspiracy To Commit Bank Fraud and Wire Fraud Count Should Be Denied

Elie argued that Count Eight of the Indictment, which charges Elie and others with a conspiracy to commit both wire fraud and bank fraud, fails to properly allege these offenses and therefore should be denied. In fact, the allegations in the Indictment adequately charge these offenses and Elie's real contention – that the Government will not be able to *prove* these offenses – is simply premature prior to trial.

Count Eight charges Elie and other defendants with conspiracy to commit bank fraud and wire fraud, in violation of 18 U.S.C. § 1349, in connection with efforts described in detail in

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[38] The statements of current and former government officials cited by the defendants (Elie UIGEA Brf. at 18) are both irrelevant to the UIGEA vagueness analysis and not in any event supportive of the defendants' position. The Attorney General said first, it appears lightheartedly, that it was "beyond his capabilities" to determine whether poker was a game of skill or chance, before later stating "I'm sure there is some degree of skill that is involved in there, some degree. I am not a poker player myself." *See* Eric Holder Testimony before House Judiciary Committee, May 3, 2011 at 22, 47-48 (available at www.micevhill.com/attachments/immigration_documents/hosted_documents/112th_congress/TranscriptOfHouseJudiciaryCommitteeHearingOnJusticeDepartmentOversight.pdf). The fact that there is, indisputably, some skill in poker is irrelevant given UIGEA's application to any game "subject to chance." Nor, for that matter, do former FBI Director Freeh's comments support the defendants' argument. Although Director Freeh (who is now in private practice, and has represented parties in connection with the instant investigation) expressed generalized concerns about the UIGEA, he never claimed that it was unclear whether the UIGEA applied to internet poker. In fact, he stated that he "applaud[ed]" the instant case against the poker companies.

[39] For the same reasons, the defendants' argument based on the rule of lenity should also be rejected. The UIGEA, read in conjunction with applicable state law, clearly applies to poker. Therefore, there is no basis on which to turn to so-called "defendant-friendly" (Elie UIGEA Brf. at 34) interpretations of the statute which are, in actuality, entirely inconsistent with its statutory language, structure and underlying purpose.

Count One of the Indictment (in paragraphs incorporated by reference) to lie to banks and other financial institutions in order to obtain processing channels for the Poker Companies.

Elie offers no valid grounds to support his claim that Count Eight fails to allege a bank fraud/wire fraud conspiracy. Count Eight more than meets the requirement that an indictment "need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *Stavroulakis*, 952 F.2d at 693. Addressing the bank fraud statute, the Indictment alleges a scheme to "defraud a financial institution . . . and to obtain monies . . . owned by and under control and that financial institution by means of false and fraudulent pretenses, representations and promises, in violation of Title 18, United States Code, Section 1344." Indictment at ¶ 49. In the next paragraph, the Indictment tracks the language of the wire fraud statute, 18 U.S.C. § 1343, alleging the use of the wires "to deceive financial institutions and other financial intermediaries into processing and authorizing payments to and from the Poker Companies and United States gamblers by disguising the transactions to create the false appearance that they were unrelated to gambling." Indictment at ¶ 50.

Rather than raise any real defect with the sufficiency of Count Eight's allegations, Elie's motion instead simply asserts Elie's view of Second Circuit law on what the Government must ultimately prove to establish bank fraud and wire fraud and then speculates that the Government's evidence will prove insufficient. Specifically, Elie argues that to prove bank fraud the Government will be required to prove a scheme involving "actual or potential loss" and that wire fraud requires proof of intent to cause some type of "actual harm." Elie Fraud Brf. at 2.

The Government does not disagree with the broad strokes of Elie's discussion of Second Circuit case law. It is correct that to prove a conspiracy to commit bank fraud, the Government must prove that the scheme alleged to be the object of the conspiracy involved conduct "intended

to victimize the bank [or banks] by exposing it to an actual or potential loss." *United States* v. *Rodriguez*, 140 F.3d 163, 167 (2d Cir. 1998). Similarly, it is correct that the Second Circuit has interpreted the mail and wire fraud statute to require an intent to cause "harm," but what Elie omits from the discussion is the corresponding Second Circuit law that interprets "harm" broadly, to include "harm to the victim's property interests" including "deprivation of information necessary to make discretionary economic decisions." *See, e.g., United States* v. *Carlo*, 507 F.3d 799 (2d. Cir. 2007); *United States* v. *Dinome*, 86 F.3d 277, 284 (2d Cir. 1996); *United States* v. *Kinney*, 211 F.3d 13, 18-19 (2d Cir. 2000).

The Government is aware of the law governing what it will be required to prove and of course intends to offer proof that will comport with it. With respect to the bank fraud requirement of exposure to "actual or potential loss," the Government intends to offer evidence that the credit card miscoding (set forth in paragraphs 17-21 of the Indictment) exposed United States issuing banks to potential losses because, among other things, the banks were issuing credit to individuals who may or may not repay it. Furthermore, regarding fraudulent e-check processing (set forth in paragraphs 21-26), the Government will offer evidence that the banks were deceived into processing electronic checks for gambling businesses and were exposed to losses because, among other things, the rules governing these payments systems allowed aggrieved customers to reverse e-check transactions long after they had occurred. With respect to the wire fraud requirement regarding "harm" (and also further supporting the bank fraud charges), banks who chose not to move money for gambling businesses (whether because of legal or reputational concerns or simply as a discretionary business decision) but were tricked into doing so suffered harm, including but not limited to their property rights to information necessary for the bank to make a decision about whether such business was worth accepting.

This is by no means a complete discussion of evidence the Government intends to offer to support Count Eight (there may be proof of more tangible losses as well), but rather a representation that the Government is aware of the threshold and expects to meet it.

The discussion on this point is in any event premature at best. The Indictment, which spells out the credit card miscoding and e-check processing issues in detail, and quotes the correct provisions of the fraud statutes, is plainly sufficient to survive a motion to dismiss.

For these reasons, Elie's motion to dismiss Count Eight should be denied.

CONCLUSION

For the reasons set forth above, the requests that the Court deny the defendants' motions to dismiss in their entirety.

Respectfully submitted,

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Certificate of Service **Filed Electronically**

The undersigned attorney, duly admitted to practice before this Court, hereby certifies that on the below date, he/she served or caused to be served the following document(s) in the manner indicated:

Government's Response to Defendant's Pre-Trial Motions

Service via Clerk's Notice of Electronic Filing upon the following attorneys, who are Filing Users in this case:

William Cowden, Esq.
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N/A

Dated: New York, New York
November 4, 2011

PREET BHARARA
United States Attorney

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