UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

UNITED STATES OF AMERICA

S3 10 Cr. 336 (LAK)

v.

ECF Case

JOHN CAMPOS, et al.

Defendants.

X

DEFENDANT JOHN CAMPOS'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT

HAFETZ NECHELES & ROCCO
Frederick P. Hafetz (FH 1219)
Kathleen E. Cassidy (KC 0630)
500 Fifth Avenue
New York, NY 10110
(212) 997-7595

CLYDE SNOW & SESSIONS
Neil A. Kaplan
Anneli R. Smith
201 South Main Street, Suite 1300
Salt Lake City, UT 84111
(801) 322-2516

Attorneys for Defendant John Campos

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I. INTRODUCTION

John Campos, who was the Vice Chairman of the Board of Directors of a Utah bank that processed financial transactions for online poker players, is charged with conspiracy to violate and violations of the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. § 5363, violations of the Illegal Gambling Businesses Act ("IGBA"), 18 U.S.C. § 1955, and money laundering based on violations of IGBA, 18 U.S.C. § 1956(h). All of these charges must be dismissed.

The UIGEA charges must be dismissed because they ignore the clear exemption from prosecution set forth in UIGEA for financial transaction providers such as Mr. Campos. Additionally, the UIGEA counts must be dismissed because they fail to allege any person who as a matter of law can constitute the person "engaged in the business of betting or wagering" required by the statute.

The IGBA charges (and the money laundering charges based on them) must also be dismissed because two basic elements of the statute are not sufficiently alleged in the Indictment: that the companies in question were "gambling businesses" and that the businesses were "conducted" in a State or political subdivision of the United States.

Further, both the UIGEA and IGBA charges must be dismissed as unconstitutionally vague as applied to Mr. Campos. Moreover, criminal prosecution of the conduct alleged here would violate the rule of lenity.

II. OVERVIEW OF INDICTMENT AS IT RELATES TO MR. CAMPOS

John Campos, formerly the Vice Chairman of the Board of Directors of SunFirst Bank in St. George, Utah, was indicted along with ten other individuals in a nine-count superseding indictment.[1] The charges relate to Internet poker and involve the operations of three different companies that host online poker games: PokerStars, Full Tilt Poker ("Full Tilt"), and Absolute Poker.

Each of these foreign companies maintained a website through which poker players could play against each other at virtual poker tables. The poker games hosted by these companies were not house-banked games in which players competed against a casino or bookmaker. Rather, the poker games at issue here were peer-to-peer games in which the players competed against each other. The poker companies did not participate in the games, and had no risk or stake in the outcome of the games. Instead, the companies provided virtual facilities for the games, and collected, in exchange, a fee for each hand played, called the "rake." Ind. ¶ 3. Although the poker companies were always based outside of the United States and, in fact, had no presence in the United States, the Indictment alleges that their Internet operations violated federal gambling laws because the sites permitted United States customers to access and use their websites to play real-money poker games. Ind. ¶¶ 4-6, 15. It further alleges that in order to provide access to real-money poker play to the United States-based players, the poker companies caused third parties to open bank accounts at United States banks to enable processing of payments to and from United States customers. Ind. ¶¶ 23-31.

The eleven defendants charged in the case fall into four categories: owners or employees of the three foreign Internet poker companies (Scheinberg, Bitar, Tom, Beckley, Burtnick, and Tate), intermediaries between the poker companies and payment processors (Lang and Franzen), payment processors who allegedly arranged for banks to process payments for the poker

[1] Although the case is nominally a continuation of an indictment previously returned against a defendant named Daniel Tzvetkoff, the superseding indictment unsealed on April 16, 2011 (the "Indictment" or "Ind.") was the first time criminal charges were filed against Mr. Campos and the ten other individuals referenced herein.

companies (Rubin and Elie), and, finally, Mr. Campos, the lone banker charged in the case. The Indictment alleges that the bank for which Mr. Campos served on the Board of Directors processed payments for PokerStars and Full Tilt through accounts set up at the bank by third party processors. Ind. ¶ 13.

Mr. Campos is charged in six counts of the nine-count Indictment: Count One, conspiracy to violate UIGEA; Counts Two and Three, violations of UIGEA involving PokerStars and Full Tilt, respectively;[2] Counts Five and Six, operating an illegal gambling business involving PokerStars and Full Tilt, respectively; and Count Nine, the money laundering conspiracy. Mr. Campos is not charged in the bank fraud conspiracy, Count Eight.

A. The UIGEA Counts (Counts One Through Three)

UIGEA prohibits "person[s] engaged in the business of betting or wagering" from knowingly accepting certain types of payments in connection with unlawful Internet gambling, as defined by federal and state law. UIGEA itself does not criminalize Internet gambling; instead, it criminalizes the receipt of funds by certain defined persons in connection with Internet gambling that is already unlawful under other federal or state laws. *See* 31 U.S.C. §§ 5361(b), 5362(10), 5363.

The UIGEA counts charge that the defendants were persons "engaged in the business of betting or wagering" who knowingly accepted payments in connection with unlawful Internet gambling, or persons who conspired with, or aided and abetted, such persons. Ind. ¶¶ 32, 33, 36, 38. Specifically, the Indictment alleges that Mr. Campos, acting on behalf of SunFirst Bank, arranged for SunFirst Bank to process payments for PokerStars and Full Tilt, and that SunFirst

[2] Counts Four and Seven charge violations involving Absolute Poker. Mr. Campos is not charged in those counts.

Bank indeed processed such payments from December 2009 until November 2010. Ind. ¶¶ 13, 30-31.

Of the thirty-four paragraphs in Count One, the UIGEA conspiracy count, two-thirds relate to the bank fraud scheme in which Mr. Campos was not alleged to be a participant. The bank fraud scheme allegedly involved the poker companies and third party payment processors attempting to deceive banks and credit card companies into processing poker payments. Significantly, Count One acknowledges that in late 2009 (when third party payment processing began at SunFirst Bank) disclosure was made to SunFirst that it would be processing payments for Internet poker. According to the Indictment, SunFirst's involvement was part of a new strategy by the poker companies to implement processing "that did not involve lies to banks" and to process payments "transparently," that is, without defrauding banks. Ind. ¶¶ 27-30.

B. Operating An Illegal Gambling Business (Counts Five and Six)

Mr. Campos is charged in two counts alleging the operation of an illegal gambling business in violation of 18 U.S.C. § 1955 in connection with two poker companies: PokerStars and Full Tilt. These two counts allege that Mr. Campos and the other defendants "did conduct, finance, manage, supervise, direct and own all and part of 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." Ind. ¶¶ 42, 44.

C. Money Laundering Conspiracy (Count Nine)

All defendants are charged in a money laundering conspiracy to violate 18 U.S.C. § 1956 (a)(2)(A) and § 1957(a). The money laundering conspiracy charge is based on the alleged specified unlawful activity of operating an illegal gambling business, under 18 U.S.C. § 1955. Ind. ¶¶ 53-54.

ARGUMENT

III. THE UIGEA COUNTS AGAINST MR. CAMPOS SHOULD BE DISMISSED.

Mr. Campos moves to dismiss the conspiracy and substantive UIGEA counts, Counts One to Three, on four grounds. First, under the UIGEA statute, a "financial transaction provider" such as SunFirst Bank on whose behalf Mr. Campos acted as a director and agent is expressly exempt from criminal prosecution. Second, the poker companies were not "engaged in the business of betting or wagering" as required under the statute and the UIGEA counts are therefore legally insufficient on their face. Third, the statute's application to poker as a "game subject to chance" is unconstitutionally vague. *See infra* Section V. Fourth, under the rule of lenity any uncertainty regarding the scope of UIGEA must be resolved in the defendant's favor. *See infra* Section VI.

A. Mr. Campos Is Exempt From Prosecution Under UIGEA As A Financial Transaction Provider.

UIGEA imposes criminal liability only on persons "engaged in the business of betting or wagering," and expressly states that "financial transaction providers" are not "engaged in the business of betting or wagering." Instead, Congress simultaneously adopted a civil regulatory regime to govern "financial transaction providers," thereby eschewing criminal liability under UIGEA for financial transaction providers such as SunFirst Bank and consequently, agents of financial transaction providers like Mr. Campos.

1. There Is A Clear Exemption From Criminal Liability For Financial Transaction Providers.

Enacted in 2006, UIGEA consists of seven sections, 31 U.S.C. §§ 5361 through 5367, including a provision setting forth criminal liability (§ 5363), a provision directing the promulgation of non-criminal regulation of financial transaction providers (§ 5364), and a detailed section defining terms used in UIGEA (§ 5362).

Under UIGEA's criminal prohibition, "[n]o person *engaged in the business of betting or wagering* may knowingly accept, in connection with the participation of another person in unlawful Internet gambling" payment by certain types of financial transactions. 31 U.S.C. § 5363 (emphasis added). The statute's definition section explains that "the term 'business of betting or wagering' does not include the activities of a financial transaction provider," § 5362(2), thus plainly excluding "financial transaction providers" from the reach of criminal prosecution under UIGEA. The term "financial transaction provider" is defined in § 5362(4) to mean:

> 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.

The term "financial institution," in turn, "has the meaning given the term in section 903 of the Electronic Fund Transfer Act," where it is defined to mean "a state or National bank." § 5362(11)(C); 15 U.S.C. §1693a(8).

As is plain on the face of the indictment, SunFirst Bank is a "financial transaction provider" under UIGEA's definition of that term. SunFirst is a Utah State Bank, thus falling under the definition of "financial transaction provider" in § 5362(4).[3] The Indictment also recognizes that SunFirst Bank is a financial transaction provider, alleging that SunFirst Bank is a "small, private bank based in Saint George, Utah" and that the bank's role in the alleged offenses was "process[ing] payments for PokerStars and Full Tilt Poker." Ind. ¶¶ 13, 30-31. As a

[3] SunFirst is also a "participant in a designated payment system" as that term is defined in § 5362(3).

financial transaction provider, SunFirst Bank's actions were accordingly not subject to prosecution under UIGEA.[4]

The definition of "bet or wager" under § 5362(1) further demonstrates that financial transaction providers are exempt from criminal liability under UIGEA. That subsection excludes from the definition of "bet or wager" "any deposit or other transaction with an insured depository institution." § 5362(1)(E)(vii). SunFirst Bank is an insured depository institution subject to the authority of the FDIC. The Indictment acknowledges the FDIC's authority over SunFirst. Ind. ¶ 31 (alleging that SunFirst ceased processing on November 9, 2010 "at the direction of the FDIC").

In sum, as stated by the Third Circuit in *Interactive Media Entertainment and Gaming Association ("iMEGA") v. Attorney General*:

> The phrase "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). Thus, *the criminal prohibition contained in § 5363 of the Act applies only to gambling-related businesses, not any financial intermediary* or Internet-service provider *whose services are used in connection with an unlawful bet*.

580 F.3d 113, 114 n.1 (3d Cir. 2009) (emphasis added).

UIGEA's structure also demonstrates that Congress rejected criminal liability for financial transaction providers in favor of a purely civil regulatory scheme requiring financial transaction providers like banks to make efforts to identify and block money derived from unlawful Internet gambling from being sent to gambling businesses.

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[4] Notwithstanding the clear exemption in § 5362(2), there are certain very limited circumstances in which a bank could be criminally liable under UIGEA. Section 5367, entitled "[c]ircumventions prohibited," addresses a situation in which an unlawful Internet gambling business attempts to circumvent the criminal prohibition in § 5363 by also acting as a financial transaction provider. Here, there is no allegation (nor could there be) that SunFirst came within those criteria.

Recognizing that banks and other financial transaction providers are often the intermediaries for unlawful payments to gambling businesses, Congress established the regulatory scheme set forth in § 5364, which provides that the Secretary of the Treasury and the Board of Governors of the Federal Reserve, in consultation with the Attorney General, shall prescribe regulations "requiring each designated payment system,[5] and all participants therein, to identify and block or otherwise prevent or prohibit restricted transactions[6] through the establishment of policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions . . . ." A financial transaction provider is considered to be in compliance with UIGEA if it relies on and complies with the policies of its "designated payment system" (as long as those policies comply with the requirements set forth in the statute). § 5364(c).

Pursuant to these provisions, the relevant regulatory authorities adopted an elaborate set of regulations requiring financial transaction providers and payment systems to adopt policies and procedures designed to prevent the transactions targeted by § 5363. *See* 31 C.F.R. §§ 132.1 - 132.7 (2010). While UIGEA was enacted in October 2006, financial transaction providers, like SunFirst Bank, were not required to comply with the final regulations until June 1, 2010. *See* 74 Fed. Reg. 62,687 (Dec. 1, 2009) (extending compliance date to June 1, 2010).

The regulatory scheme set forth in Section 5364 and the regulations implemented pursuant thereto reinforce that Congress intended to deal with financial transaction providers

[5] A "designated payment system" is defined in UIGEA as "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." § 5362(3).

[6] The statute defines "restricted transaction" to mean "any transaction or transmittal involving any credit, funds, instrument, or proceeds described in any paragraph of section 5363 which the recipient [i.e. the person engaged in the business of betting or wagering] is prohibited from accepting under section 5363." § 5362(7).

such as SunFirst Bank through a different enforcement mechanism than the one it chose for persons "engaged in the business of betting or wagering."

2. The Exemption For Financial Transaction Providers Bars Prosecution Of Their Agents Under Theories Of Aiding And Abetting Or Conspiracy Liability.

The UIGEA counts of the Indictment charge Mr. Campos, in his capacity as an agent of SunFirst Bank, as a person who conspired with, or aided and abetted, persons "engaged in the business of betting or wagering." The government may not circumvent Congress's affirmative legislative decision to exempt financial transaction providers from criminal liability by charging Mr. Campos, an agent of an exempt financial transaction provider, with conspiring to violate UIGEA or aiding and abetting UIGEA violations allegedly committed by another person. Applying the law of conspiracy and aiding and abetting in such a manner would undermine Congress's decision to exempt financial transaction providers in the first place.

Where there is clear evidence of an affirmative legislative policy, as there is here, to treat one participant in a transaction differently than others, there is a well-settled exception to the general applicability of aiding and abetting liability under 18 U.S.C. § 2 and conspiracy liability under 18 U.S.C. § 371. In *Gebardi v. United States*, 287 U.S. 112, 53 S. Ct. 35 (1932), for example, the Supreme Court reversed the Mann Act conspiracy conviction of a woman who agreed to be transported across state lines for immoral purposes. The Court held that the statute's failure to criminalize the woman's agreement demonstrated "an affirmative legislative policy to leave her acquiescence unpunished." *Id*. at 123, 53 S. Ct. at 38. The Court reasoned that "[i]t would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers." *Id.*

Gebardi remains good law, and in fact, the scope of its holding has been extended. The Supreme Court recently reaffirmed the *Gebardi* rule, holding that drug buyers do not "facilitate" the actions of drug sellers because "where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature." *Abuelhawa v. United States,* 129 S. Ct. 2102, 2106 (2009).

The Second Circuit likewise applied *Gebardi* in *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987) to hold that the government cannot use the aiding and abetting statute to circumvent Congress's choice of which participant in an enterprise to hold criminally liable. In *Amen*, the court considered whether a defendant could be prosecuted for aiding and abetting a violator of the continuing criminal enterprise statute, 21 U.S.C. § 848. Noting that the statute had been passed in order "to target the ringleaders of large-scale narcotics operations," the court recognized that applying aider and abettor liability to people other than the ringleaders would be inconsistent with Congress's intent. *Amen*, 831 F.2d at 381. Citing *Gebardi*, the court reasoned that "[w]hen Congress assigns guilt to only one type of participant in a transaction, it intends to leave the others unpunished for the offense." *Id.* Thus, even though the continuing criminal enterprise statute contained no express exemption from aiding and abetting liability for subordinates in such an enterprise, the court refused to find the defendant liable.

Similarly, in *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991), the Fifth Circuit applied *Gebardi* to affirm the dismissal of a charge of conspiracy to violate the Foreign Corrupt Practices Act ("FCPA") against a foreign official who received a bribe. The court reasoned that it would have been obvious to Congress when it enacted the FCPA that every transaction prohibited by the act would involve not only an offer of a bribe, but also an agreement on the part of a foreign official to receive the bribe. *Id.* at 835. But the statute did not set forth any penalties for foreign officials, and the court held that this silence manifested an intent to exempt the foreign official recipients from prosecution as conspirators. *Id.*

The *Gebardi* principle applies here, but with even greater force in light of UIGEA's explicit exemption for financial transaction providers. In enacting UIGEA, Congress carefully calibrated how to treat the different participants in the "restricted transactions" UIGEA is intended to curtail. Congress's awareness that financial transaction providers would participate in these transactions is evident – indeed, the entire enforcement scheme contemplates that gambling businesses will contract with financial transaction providers to reach their customers. *See*, *e.g.*, 31 U.S.C. § 5361 (Congressional findings and purpose: "(1) Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers."); 31 U.S.C. § 5363 (prohibiting persons engaged in the business of betting or wagering from accepting various financial instruments in connection with the participation of another person in unlawful Internet gambling). Nevertheless, Congress affirmatively excluded financial transaction providers from UIGEA's criminal liability provision and instead enacted a separate regulatory regime to govern their actions.

Given Congress's careful delineation of criminal liability for persons "engaged in the business of betting or wagering," but not for financial transaction providers who service such persons, it would be "unseemly and unwise for the courts and the Executive Branch to bring in through the back door a criminal liability so plainly and facially eschewed in the statute creating the offense." *United States v. Shear*, 962 F.2d 488, 496 (5th Cir. 1992) (rejecting notion that employee could aid and abet employer's criminal OSHA violation where Congress had carefully balanced the respective standards for employers and employees). The government cannot sidestep the plain exemption for financial transaction providers by charging Mr. Campos as a conspirator or aider and abettor.

Nor does the fact the Indictment charges Mr. Campos, and not SunFirst Bank, save the government's UIGEA counts. Financial transaction providers, as defined in the statute, are entities including banks that can act only through their agents. An individual acting in a representative capacity for an entity "assume[s] the rights, duties and privileges of the artificial entity or association of which [he is an] agent[] or officer[] and [he is] bound by its obligations." *See United States v. White*, 322 U.S. 694, 699, 64 S. Ct. 1248, 1251 (1944). Imposing criminal liability on the bank's agents while exempting the bank itself from criminal liability would be nonsensical, and, like applying conspiracy or aiding and abetting liability in this instance, would "bring in through the back door" the liability "so plainly and facially eschewed in the statute." *Shear*, 962 F.2d at 496.

In sum, the UIGEA counts – Counts One through Three – must be dismissed as to Mr. Campos because the activities of SunFirst Bank as a financial transaction provider and Mr. Campos's acts on behalf of SunFirst are exempt from criminal liability.

B. The UIGEA Counts Fail To Allege Any Person Legally Sufficient To Constitute A Person "Engaged In The Business Of Betting Or Wagering."

Even if UIGEA had not expressly exempted financial transaction providers such as SunFirst Bank, and thus Mr. Campos, from criminal liability, dismissal of the UIGEA counts would be warranted because the allegations that the poker companies here were "engaged in the business of betting or wagering" are insufficient as a matter of law to satisfy that element of UIGEA. To be "engaged in the business of betting or wagering" requires that the business has a stake in the outcome of gambling contests, and the Indictment here fails to allege that the poker companies had any such stake.

Section 5362(1)(A) states that the term "bet or wager" "means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome." The Indictment contains no allegation that the poker companies "stak[ed] or risk[ed] . . . something of value upon the outcome" of the poker games played on their sites. Indeed, the Indictment alleges that the poker companies received a fee or "rake" from every hand, not any amount that was dependent upon the outcome of the games. Ind. ¶ 3. Therefore, the six defendants alleged to be the owners or employees of the poker companies and the poker companies themselves cannot be "persons engaged in the business of betting or wagering."[7] The Indictment thus fails to allege an essential element of a UIGEA criminal violation.

There is clear case law supporting this construction of UIGEA in the context of the Wire Act, 18 U.S.C. § 1084, another federal statute that proscribes activity related to the "business of betting or wagering." The meaning of this phrase in the Wire Act context is, of course, highly relevant to its meaning in UIGEA because "when Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233, 125 S. Ct. 1536, 1541 (2005).

Courts considering the phrase "business of betting or wagering" in the Wire Act have concluded that it is limited to "a professional gambling or bookmaking business," in other words, where the business itself accepts risks based on the outcome of contests or events. *Pic-A-State*

[7] Likewise, the third party payment processors did not stake or risk anything on the poker games. Further, transactions with SunFirst Bank, as an insured depository institution, are not included as a "bet or wager" under 31 U.S.C. § 5362(E)(vii), and, as already noted, its activities as a financial transaction provider are excluded from the "business of betting or wagering" under 31 U.S.C. § 5362(2).

PA., Inc v. Pennsylvania, 1993 WL 325539, at *3 (M.D. Pa. Jul. 23, 1993), *rev'd on other grounds*, 42 F.3d 175 (3d Cir. 1994). In *Pic-A-State*, the court held that retail outlets which sold out-of-state lottery tickets in exchange for a fee per ticket were not in the "business of betting or wagering" because they "set no odds, accept[ed] no wagers and distribut[ed] no risks." *Id.* As stated in *Pic-A-State,* "[c]ourts considering the phrase 'business of betting or wagering' appear to have universally concluded that it involves a professional gambling or bookmaking business." *Id. See also United States v. Alpirn*, 307 F. Supp. 452, 454-55 (S.D.N.Y. 1969) ("turf advisor" who provided clients with predictions about horse races was not engaged in the business of betting or wagering because he was not himself making or accepting bets, did not share in losses, and thus his arrangement with his clients was not a betting or wagering contract as that term is normally understood).

Since the poker companies in this case wagered nothing and staked no risk on the outcome of the poker contests among the players, but merely provided a service for a fee, they were not "in the business of betting or wagering." The distinction between the poker companies in this case and websites that offer casino-style games and sports betting is stark. Online operators of casino-style games like roulette and slots are playing against their own patrons. Likewise, sports betting websites are also on the opposite side of their customers' bets. Those operators make profits from their own customers' losses. Such websites necessarily structure their games to give the "house" an edge in accepting bets against their customers. In contrast, in player-versus-player online poker, the website operator is not a party to the game and has no stake in the outcome of the game. It only provides the players (in exchange for a fee) with a platform (i.e., the virtual table) that they can use for playing among themselves. Accordingly, the allegations in the UIGEA counts that the poker companies were engaged in the "business of betting and wagering" fail to satisfy a basic element of § 5363, and the UIGEA counts must be dismissed.

IV. THE IGBA COUNTS SHOULD BE DISMISSED.

Counts Five and Six charge Mr. Campos with violating the Illegal Gambling Businesses Act ("IGBA"), 18 U.S.C. §§ 1955 & 2. Those counts allege, in part, that the defendants, including Mr. Campos, presumably on a theory of aiding and abetting, "did conduct, finance, manage, supervise, direct, and own all and part of an illegal gambling business," namely, PokerStars and Full Tilt.

The Court should dismiss these Counts for four independent reasons. First, online poker does not constitute "gambling," as that term is used in IGBA. Second, the online poker companies are not businesses "conducted" in New York or any other State or political subdivision, as required by IGBA. Third, IGBA is unconstitutionally vague as applied to the defendants' conduct. *See infra* Section V. Fourth, under the rule of lenity any uncertainty regarding the scope of IGBA should be resolved in favor of the defendant.[8] *See infra* Section VI.

A. Statutory Framework

IGBA provides, in relevant part, that "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1955(a). The statute, in turn, provides that an "illegal gambling business" is "a gambling business," which, *inter alia*, "is a violation of the law of a State or political subdivision in which it is conducted." § 1955(b)(1).

[8] It is, of course, well-settled that before Mr. Campos could be found guilty of aiding and abetting a violation of IGBA, a violation of IGBA must exist. *See United States v. Perry*, 643 F.2d 38, 46 (2d Cir. 1981).

As defined in IGBA, "'gambling' includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." § 1955(b)(2). Thus, in order to violate IGBA, a business must meet several requirements, two of which are critical here. First, the business must be a "gambling business." Second, the business must be "a violation of the law of a State or political subdivision in which it is conducted." Because neither of these requirements is met, the IGBA charges must be dismissed.

B. The Poker Companies Are Not A "Gambling Business" Because Poker Is Not "Gambling" Under IGBA.

PokerStars and Full Tilt are not "illegal gambling businesses" under IGBA because they are not "gambling businesses" at all. Section 1955(b)(2) lists nine activities regarded as "gambling" – that list does not include poker, or indeed any other card game. Nor does poker share any of the characteristics common to the enumerated games.

It is a basic canon of statutory construction that "where general words are accompanied by a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 401 (2d Cir. 2008) (invoking canon of *ejusdem generis*) (internal citations and quotation marks omitted). *See also S.D. Warren Co. v. Maine Bd. of Env'tl Protection*, 547 U.S. 370, 378, 126 S. Ct. 1843, 1845 (2006) (invoking related canon of statutory interpretation, *noscitur a sociis,* that "a word is known by the company it keeps" – "a string of statutory terms raises the implication that the words grouped in a list should be given related meaning") (internal citations and quotation marks omitted).

Here, all of the games enumerated in § 1955(b)(2) share at least two key features: (1) they are all lottery or house-banked games in which the house plays against its customers;

and (2) they are all games in which the bettor has no role in, or control over, the outcome. These common traits restrict the scope of the definition of "gambling" to games that are similar in kind to the enumerated games.

The nine gambling activities listed in (b)(2) are described below:

- *Pool-selling* is the selling or distribution of chances in a betting pool[9]—*i.e.*, "[a] gambling scheme in which numerous persons contribute stakes for betting on a particular event (such as a sporting event)."[10] Players cannot affect the game's outcome, so pool-selling is a game of chance.[11]

- *Bookmaking* is "[g]ambling that entails the taking and recording of bets on an event, such as a horse race."[12] Bookmaking is a game of chance, because the bettors have no way of affecting the outcome of events.[13] The bookmaker fixes the odds and the stakes, and bets against his customers.[14]

- *Slot machines* are coin-operated mechanical or electronic devices that pay off when random, individually selected symbols match one another on the machine's display. Otherwise, the bet goes to the house. Slots are house-banked, thus games of chance.[15]

- *Roulette* is a game in which players bet whether a ball, spun along a revolving wheel, will land on a certain color or a certain number. Players make their wagers against the house—hence roulette is a house-banked game—and the outcome is determined purely by the chance that the ball lands on the wagered number or color.[16]

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[9] Webster's New International Dictionary 1764 (3d ed. 1971).

[10] Black's Law Dictionary 1181 (8th ed. 2004).

[11] *See, e.g.*, *Nat'l Football League v. Governor of State of Del.*, 435 F. Supp. 1372, 1385–86 (D. Del. 1977) ("chance rather than skill is dominant factor" in betting pool).

[12] Black's Law Dictionary 194 (8th ed. 2004).

[13] *See Bayer v. Johnson*, 349 N.W.2d 447, 449 (S.D. 1984) ("The outcome of . . . events [in a bookmaking scheme] in no way depends upon the skill of the bettors. The wagering is therefore a contest in which chance predominates over skill.").

[14] *See id.*

[15] *See, e.g.*, *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1104 & n.12 (9th Cir. 2003) (quoting K. Alexa Koening, *Gambling on Proposition 1A: The California Indian Self Reliance Amendment*, 36 U.S.F. L. Rev. 1033, 1041 n.65 (2002)) ("'Las Vegas-style slot machines offer "house-banked" games, which enable the house to collect players' losses.'"); *Brock v. Claridge Hotel & Casino*, 711 F. Supp. 779, 780 (D.N.J. 1989) (describing slot machines and blackjack as games of chance).

[16] Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/roulette (last visited Sept. 27, 2011) (Roulette is "a gambling game in which players bet on which compartment of a revolving wheel a small ball will come to rest in.").

- *Dice tables* are house-banked games in which players throw dice, usually in pairs, and make wagers against the house, based on the outcome of the throw, and thus they are also games of chance.[17]

- *Lotteries* are "[a] method of raising revenues, esp[ecially] state-government revenues, by selling tickets and giving prizes . . . to those who hold tickets with winning numbers that are drawn at random."[18] Lottery participants cannot affect the outcome.[19] Because the house keeps any bet that does not pay out, a lottery is a house-banked game.

- *Numbers games* are essentially lotteries. In a numbers game, players wager that on a certain day, a chosen series of numbers will occur in some event to which the numbers game is pegged, for example, the payoff totals of a day's horse race. The house guarantees the payoffs to any winners, and "[i]n such a game neither the number of winning players nor the total amount of the payoffs can be predicted in any one day."[20]

- *Bolita* is a form of lottery "in which one attempts to guess a variably determined 2-digit number,"[21] sometimes derived by drawing numbered balls from a hopper,[22] or somehow tied to the results of the state lottery. Because the numbers are "variably determined," bolita constitutes a game of chance.[23] Bolita is a house-banked game because it is a form of lottery.

- *Policy* is similar to bolita or a numbers game, but differs in the method of determining the winning sequence or combination of digits. "In policy, [the winning sequence] is ascertained by the drawing *at random* from a wheel in which tags, each bearing one of the possible combinations of numbers that can be played, have been placed."[24] Policy is thus a game of chance[25] and a house-banked game.

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[17] *See, e.g.*, *Kansas City v. Caresio*, 447 S.W.2d 535, 537 (Mo. 1969) (finding that dice game was "game of chance" under local ordinances).

[18] Black's Law Dictionary 966 (8th ed. 2004).

[19] *See, e.g.*, *Womack v. Comm'r of IRS*, 510 F.3d 1295, 1306 (11th Cir. 2007) (describing lottery as "game of chance"); *State ex rel. Kellogg v. Kan. Mercantile Ass'n*, 25 P. 984, 985 (Kan. 1891) (holding that plan for allocation of prizes "by chance" is a lottery).

[20] *United States v. Baker*, 364 F.2d 107, 112 (3d Cir. 1966).

[21] Webster's New International Dictionary 248 (3d ed. 1971).

[22] *See, e.g.*, *United States v. Spino*, 345 F.2d 372, 373 (7th Cir. 1965).

[23] *See, e.g.*, *Santos v. United States*, 461 F.3d 886, 888 (7th Cir. 2006) (describing "bolita" as lottery), *aff'd*, 553 U.S. 507, 128 S. Ct. 2020 (2008); *United States v. Febus*, 218 F.3d 784, 788 (7th Cir. 2000) (same); *Ex parte Alvarez*, 94 So. 155, 155 (Fla. 1922) (describing bolita as "game of chance").

[24] *Baker*, 364 F.3d at 112 (emphasis added).

[25] *See, e.g.*, *Forte v. United States*, 83 F.2d 612, 615-16 (D.C. Cir. 1936) (noting that "policy game is undoubtedly a lottery," defined by D.C. Code as game of chance).

Although the statute provides that gambling "is not limited" to the enumerated games, the definition's illustrative list establishes a framework to determine whether a game constitutes "gambling" under IGBA. Online poker is qualitatively different from all of these enumerated games. First, online poker is not house-banked—the house does not participate at all, but instead merely collects a fee, or "rake," for hosting the game. Ind. ¶ 3. Second, online poker is a game in which the outcome depends to at least some degree on the skill and decisions of the bettors. The players compete against each other on a level playing field, using an array of talents and skill, to prevail over their opponents. These features differentiate poker from all nine of the enumerated games. Reading the statute to cover a game like poker that shares none of the common features of the enumerated games would render the language of (b)(2) mere surplusage. In order to give the language of (b)(2) substantive effect, while still attributing meaning to the phrase "includes but is not limited to," this subsection must be interpreted as a non-exclusive list of types of "gambling" that share certain defining characteristics, thus limiting the meaning of "gambling" to games that share those characteristics. *See United States v. Menasche*, 348 U.S. 528, 538-9, 75 S. Ct. 513, 520 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal citations and quotation marks omitted). *See also Iannelli v. United States*, 420 U.S. 770, 789, 95 S. Ct. 1284, 1295 (1975) (describing IGBA's limited definition of "gambling" as part of "a carefully crafted piece of legislation"). Because poker is substantially different from the games listed in IGBA, it is not "gambling" under the statute, and the IGBA charges must be dismissed.

C. PokerStars And Full Tilt Are Not Illegal Businesses "Conducted" In New York.

IGBA can only be applied to PokerStars and Full Tilt if they are illegal gambling businesses that are "a violation of the law of a State or political subdivision in which [they are] *conducted*." 18 U.S.C. § 1955(b)(1) (emphasis added). They are not. Although the Indictment charges that the poker companies were "business[es] that engaged in and facilitated online poker, in violation of New York State Penal Law Sections 225.00 and 225.05 and the laws of other states," it fails to allege that they were businesses "conducted" in New York or any other state. The Indictment fails to mention a single act that occurred in New York or any other state that is sufficient to meet the requirement that the business was "conducted" in any U.S. state as that term has been interpreted in the IGBA context. The poker companies in this case "conducted" their businesses abroad.

The only activity alleged to have taken place in New York, or any state, is illegal betting. *See* Ind. ¶ 34(b) (alleging that on or about January 20, 2009, PokerStars, Full Tilt Poker and Absolute Poker each received an electronic transfer of funds from a gambler located in the Southern District of New York). But it is well-established that "conduct" under IGBA requires more than mere betting. In *United States v. Becker*, 461 F.2d 230 (2d Cir. 1972), *vacated on other grounds*, 417 U.S. 903, 94 S. Ct. 2597 (1974), the Second Circuit examined the meaning of the term "conducts" as used in IGBA subsection (a), which applies to anyone who "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business." The Court found that the term "conducts" refers to any participation in the operation of a gambling business, except participation as a customer. *Id.* at 232. *See Sanabria v. United States*, 437 U.S. 54, 70-71 n.26, 98 S. Ct. 2170, 2182 n.26 (1978) (citing *Becker*, among other cases, for the proposition that § 1955 "proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor"); *United States v. Greco*, 619 F.2d 635, 638 (7th Cir. 1980) ("mere bettor or customer of a gambling business cannot be said to conduct the business") (internal citations, quotation marks, and emphasis omitted).

The word "conducted" in subsection (b)(1) thus means the same thing – that is, it does not extend to mere betting. *See, e.g., Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501, 118 S. Ct. 927, 939 (1998) ("[S]imilar language contained within the same section of a statute must be accorded a consistent meaning."). Under this meaning of "conduct," simply accepting bets from players in the United States is not sufficient to constitute "conducting" business in the United States. As a matter of law, the Indictment is therefore insufficient to establish that the poker companies' businesses are "conducted" in New York or other states.

Moreover, the Indictment contains no allegation that the poker companies have any employees or infrastructure in the United States. No court has held that a business may be criminally liable under IGBA without some actual physical presence and conduct in the state whose law was allegedly violated. Where courts have found that a foreign-based gambling business violated IGBA, they have looked to facts such as the presence of employees or the existence of a physical office in the state. For example, in *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006), the court noted that New York-based defendants were essentially operating a local branch of the Costa Rican business in New York. *Id.* at 340. Similarly, in *United States v. Kaczowski*, the court rejected the defendants' motion to dismiss because the indictment alleged that defendants maintained facilities in New York where they regularly received and relayed bets for players to the off-shore enterprise. 114 F. Supp. 2d 143, 151 (W.D.N.Y. 2000). *See also United States v. $734,578.82 in U.S. Currency*, 286 F.3d 641, 659–60 (3d Cir. 2002) (holding that the defendant property was located in New Jersey, and that its forfeiture arose because of the defendant's conduct occurring in New Jersey).

In this case, contrary to the history and plain language of IGBA, the government is attempting to apply IGBA to a business that is conducted entirely abroad. The Indictment does not allege that PokerStars or Full Tilt operated any facilities in the United States. At all times relevant to the Indictment, Poker Stars was located in the Isle of Man; Full Tilt in Ireland. Ind. ¶¶ 4-6. Indeed, the Government concedes that the poker companies "keep their computer servers, management and support staff offshore." Karaka Decl.[26] ¶ 7.

This attempt to broaden the scope of IGBA to reach businesses conducted abroad must be rejected. IGBA simply does not contemplate Internet businesses and does not apply to a business that has no presence in the United States and does no more than accept money from players located in the United States. The plain language of IGBA demonstrates that it does not apply to businesses "conducted" abroad. The statute refers to "the law of a State or political subdivision," in which the "business . . . is conducted." This language refers to U.S. states and political subdivisions, not to foreign countries. Had Congress intended foreign entities to fall within the statute, it would have said so. *See, e.g.*, 7 U.S.C. § 8310(a) (listing separately "States or political subdivisions of States, national governments of foreign countries, local governments of foreign countries"); 16 U.S.C. § 1151(i) ("the Federal Government, or any State or political subdivision thereof, or of any foreign government"); 18 U.S.C. § 1030(e)(9) ("any State or political subdivision of the United States, any foreign country, and any state, province, municipality, or other political subdivision of a foreign country").

The context in which IGBA was enacted reinforces that IGBA does not apply to overseas businesses. IGBA was enacted in 1970 as part of the Organized Crime Control Act in order to curtail "syndicated gambling, the lifeline of organized crime." *United States v. Sacco*, 491 F.2d

[26] The Declaration of Rosemary Karaka dated March 17, 2011 was filed with the Court in support of the government's motion for a post-indictment restraining order. It is attached as Exhibit A.

995, 998 (9th Cir. 1974). The target of the statute was brick and mortar, physical gambling operations within the United States – overseas online gambling providers did not exist. Furthermore, as Congress noted in its findings when it passed UIGEA, thirty-six years after enactment of IGBA, UIGEA was necessary because "traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders." 31 U.S.C. § 5361(a)(4). This phrasing surely referred to IGBA as well as the various state laws, and it provides further support for the argument that IGBA does not reach the conduct alleged in this case. To read IGBA to apply to businesses conducted offshore would violate the presumption against extraterritorial application of statutes. *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869, 2878 (2010) ("When a statute gives no clear indication of an extraterritorial application it has none."). Accordingly, the IGBA counts should be dismissed.

V. CONSTRUING UIGEA OR IGBA TO REACH THE CONDUCT AT ISSUE WOULD RENDER THE STATUTES UNCONSTITUTIONALLY VAGUE.

As demonstrated in Sections I through IV, the Court should dismiss the UIGEA and IGBA counts without reaching the constitutional issues this case presents. The fact that both UIGEA and IGBA are unconstitutionally vague as applied to the conduct charged in the Indictment provides an additional reason for dismissal of these counts. "A statute can be impermissibly vague for either of two independent reasons: First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 2498 (2000) (citing *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 1859 (1999)). UIGEA and IGBA are impermissibly vague as applied to Internet poker for both of these fundamental reasons.

An unconstitutionally vague statute "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808, 812 (1954). "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306, 128 S. Ct. 1830, 1846 (2008). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Harriss*, 347 U.S at 617, 74 S. Ct. at 812; *accord Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 1858 (1983) (The first test for constitutional vagueness is whether "a penal statute define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited.").

In addition, to satisfy due process, Congress must, in drafting a criminal law, "establish minimal guidelines to govern law enforcement." *Smith v. Goguen*, 415 U.S. 566, 574, 94 S. Ct. 1242, 1248 (1974). The Supreme Court has held that this aspect of the vagueness doctrine is even more important than the requirement of fair notice. *Kolender*, 461 U.S. at 357-58, 103 S. Ct. at 1858 ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.") (internal citation and quotation marks omitted).

Here, UIGEA and IGBA fail in both respects. Neither UIGEA nor IGBA provides fair notice that running a poker website or receiving payments related to online poker play is unlawful. Furthermore, neither statute establishes minimal guidelines to govern law enforcement with respect to whether, and to what extent, either statute applies to Internet poker.

A. UIGEA, As Applied To Poker, Is Unconstitutionally Vague.

UIGEA applies to online poker only if poker is "a game subject to chance," such that bets and wagers upon the outcome of the games fall within the statutory definition of "bet or wager." § 5362(1)(A). *See* § 5363 (criminal prohibition only applies to persons "engaged in the business of betting or wagering"); § 5362(10) (definition of "unlawful internet gambling" incorporates the term "bet or wager"). However, UIGEA is impermissibly vague as applied to poker because it provides no legal standard or guidance by which individuals, law enforcement, courts, or juries can determine whether poker qualifies as a "game subject to chance." 31 U.S.C. § 5362(1)(A).

The phrase "game subject to chance" is vague in several important respects. First and most importantly, the statute does not say how much "chance" must be involved for a game to be "subject to chance" for purposes of the statute – e.g., whether chance must solely determine the outcome of the game, or instead predominate over skill, or perhaps be present to a material degree, or merely have the potential to alter the outcome of the game in some circumstances. Further, the statute does not clarify the appropriate level of abstraction at which to consider a "game" – i.e., in the case of poker, it does not say whether the role of chance should be considered by looking at a single hypothetical poker hand, or whether it should be considered by examining the long run. The statute also fails to explain whether the phrase "game subject to chance" is a term of art which refers only to traditional house-banked gambling games. In the context of poker, a game which indisputably involves at least some degree of skill and which is not a house-banked game, the statute's vagueness on these issues leaves it open-ended, and denies individuals like Mr. Campos fair notice and subjects him to arbitrary criminal prosecution.

The first issue – the degree to which chance must influence the outcome of a game to deem the game "subject to chance" – is vitally important. Virtually every game involves some degree of chance, and individuals must know, and juries must be instructed, where the game must fall along the skill versus chance continuum in order to be "subject to chance" within the meaning of the statute. But the statute simply does not speak to this issue, directly or indirectly.

The statutory language provides no guidance because the phrase "subject to" has several possible meanings. "Subject to" could mean "exposed or vulnerable [to]," or it could mean "conditional upon." Collins English Dictionary – Complete & Unabridged (10th ed. 2009). These two definitions present equally valid readings of the phrase "subject to chance." The former suggests that any material influence could render a game subject to chance, while the latter suggests that the outcome must be wholly or overwhelmingly dependent upon chance. Neither the text of the statute nor the context in which the phrase "subject to chance" appears provides any guidance as to how to interpret the phrase. Further, it cannot be said that the phrase has any settled legal meaning that can guide an individual attempting to tailor his conduct to the law or law enforcement, courts, or juries attempting to apply the law. No other statute – federal or state – uses the phrase "subject to chance," and no precedent interpreting this language exists.

Nor do the administrative regulations implementing UIGEA shed any light on the proper interpretation of the phrase "subject to chance." Instead, they add to the confusion. During the rulemaking process for UIGEA, many comments were received raising the question of the statute's application to games of skill, and particularly to poker. *See* Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382, 69,386 (Nov. 18, 2008) (to be codified at 12 C.F.R. Part 233, 31 C.F.R. Part 132). Specifically, the comments asked the agencies to clarify whether Congress intended the law to apply to games of skill, whether a game was subject to chance when skill predominated over chance, whether "game subject to chance" referred only to traditional house-banked gambling games, like roulette and slots, and whether poker was a "game subject to chance." *Id.* The Federal Reserve and the Department of the Treasury – the two agencies charged with implementing UIGEA – refused to answer any of these questions. Instead, the agencies stated:

> The Agencies believe that the characterization of each of the activities discussed above depends on the specific facts and circumstances. As noted above, the Agencies believe that questions regarding what constitutes unlawful Internet gambling should be resolved pursuant to the applicable Federal and State gambling laws. While there may be some games or contests conducted over the Internet that are not 'games subject to chance' and, thus, not subject to the Act and the final rule, the Agencies believe that such issues are more appropriately resolved pursuant to the various underlying gambling laws than with a single regulatory definition.

Id. (Footnotes omitted).

The agencies' interpretation, which suggests that the phrase "subject to chance" has no independent significance, but instead draws its meaning entirely from underlying state and federal law, cannot be correct. It would mean that a single phrase in a federal statute could mean something different in every prosecution. Instead, it is clear that the statute incorporates two independent and potentially conflicting formulations of games of chance. First, § 5362(1), defines "bet or wager" in pertinent part, as the "staking or risking of something of value upon the outcome of…a game subject to chance." One must determine whether a game constitutes a "game subject to chance" as that term is used in UIGEA. Second, § 5363 states that "no person engaged in the business of betting or wagering" can accept payments in connection with "unlawful Internet gambling." Section 5362(10) defines "unlawful Internet gambling" as placing or receiving a bet or wager using the Internet where "such bet or wager is unlawful under any Federal or State law."

State gambling laws typically include some formulation defining prohibited gambling in terms of the role chance plays in the game. *See, e.g.*, N.Y. Penal Law §§ 225.00(1) and (2) (using the term "contest of chance" and defining it to mean one 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"). State law formulations may be more or less permissive than the "game subject to chance" formulation used in UIGEA. The individual trying to adhere to the law or the government agent trying to enforce the law must now consider whether the game in question passes muster under the state law formulation of game of chance in addition to the federal formulation. With respect to poker, a game in which skill unquestionably plays some role, the uncertainty inherent in determining the degree of chance that separates lawful from unlawful conduct means that § 5363 "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct [is] prohibit[ed]." *Hill*, 530 U.S. at 732, 120 S. Ct. at 2498.

Regardless of whether the agencies were correct in their reading of the statute, it is clear that the agencies failed to provide readers with any guidance as to the required degree of chance. Instead, their response highlights the fact that UIGEA is hopelessly vague on this point. The best the agencies could muster in response to legitimate comments and questions about what constitutes unlawful conduct prohibited by UIGEA was that it "depends on the specific facts and circumstances." 73 Fed. Reg. 69,382, 69,386. But which facts? And what circumstances? If the agencies themselves cannot say what Congress intended to include as a game of chance, then it simply is unfair to impose criminal liability on an individual for failing to divine the answer. *Cf. Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553, 1581 (M.D. Tenn. 1989) (holding that "[c]learly, if the regulating authority cannot determine the establishments which are subject to its authority, the establishments themselves cannot be expected to determine whether they need to be licensed or not."); *City of Knoxville v. Entertainment Resources, LLC*, 166 S.W.3d 650, 656 (Tenn. 2005) (holding that "the inability of the officers charged with enforcing the ordinance to define its key terms weighs heavily against the ordinance's constitutionality").

UIGEA and its regulations are also silent on whether games like poker should be evaluated by examining a single hypothetical hand (and if so, what kind of hand), or by considering results over the long run, or something else. Courts, law enforcement, and individuals are left without any guidance as to how to evaluate whether poker is a "game subject to chance." This is precisely the sort of unbridled discretion that the void-for-vagueness doctrine seeks to curb. *See Chatin v. Coombe*, 186 F.3d 82, 89 (2d Cir. 1999) ("An enactment fails to provide sufficiently explicit standards for those who apply it when it 'impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis.'") (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S. Ct. 2294, 2299 (1972)).

Significantly, since it was passed in 2006, UIGEA has been the subject of constant efforts, by lawmakers and advocates on both sides of the issue, to amend UIGEA to clarify the status of online poker under federal law. A number of legislators and current and former high-ranking law enforcement officials have spoken out on the ambiguity of UIGEA with respect to online poker and several bills intended to clarify UIGEA's scope are currently pending before Congress. *See, e.g.*, H.R. 1174, 112th Cong. (2011). For example, in May 2011, during testimony at a House Judiciary Committee Hearing, Attorney General Eric Holder said deciding whether poker was a game of skill or chance was "beyond my capabilities," but said that it was up to Congress to clarify the laws with regard to online poker.[27] Former FBI Director Louis Freeh, speaking at a news conference in the U.S. House of Representatives, recently noted that UIGEA has "great ambiguity" which "puts a burden on the banks and the financial institutions to police the Internet, which is a ridiculous proposition." Tony Batt, *Former FBI Director Calls For Federal Internet Poker Regulation*, GamblingCompliance, Sept. 16, 2011, http://www.gamblingcompliance.com/node/47530.

Because the term "game subject to chance" is integral to the application of the statute, but the statute fails to provide any explicit standards for what that means, 31 U.S.C. § 5363 is unconstitutionally vague as applied to online poker. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926) ("[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . . [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."). Therefore, Counts One, Two, and Three of the Indictment should be dismissed against Mr. Campos.

B. IGBA, As Applied To Poker, Is Unconstitutionally Vague.

In addition, Counts Five and Six should be dismissed because reading IGBA to cover defendants' alleged conduct would render the statute so open-ended that it would fail constitutional scrutiny.

As discussed in Section IV.B., *supra*, IGBA does not mention poker even once. If the statute is interpreted to mean that online poker, despite sharing none of the characteristics common to the "gambling" games enumerated in § 1955(b)(2), falls within the scope of IGBA,

[27] Nathan Vardi, *U.S. Attorney General Calls On-line Poker Crackdown Appropriate But Doesn't Know if Poker is a Game of Chance or Skill*, Forbes, May 3, 2011, *available at* http://tinyurl.com/holderpoker.

then the statute offers no guidelines by which either law enforcement or a person of reasonable intelligence can assess whether a given game falls within the statute's scope. This vagueness creates a strong probability of arbitrary enforcement. While IGBA has been upheld against facial challenges, it would be unconstitutional to apply its definition of "gambling" to a game like poker—which, as discussed, bears no relationship to the games enumerated in the statute.

VI. UNDER THE RULE OF LENITY ANY UNCERTAINTY REGARDING THE SCOPE OF UIGEA OR IGBA MUST BE RESOLVED IN MR. CAMPOS'S FAVOR.

Under the rule of lenity, unless online poker is unambiguously covered by the terms of UIGEA or IGBA, Mr. Campos's conduct should not be deemed unlawful. The Supreme Court has directed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct. 515, 522 (1971) (internal citation and quotation marks omitted). "This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* at 348, 92 S. Ct. at 522 (internal quotation marks omitted); *see also United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 1225 (1997) ("[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by [] resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered"); *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 622 (1955) ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.").[28]

Applying the basic principle of lenity to this case, the prosecution of Mr. Campos for violations of UIGEA and IGBA must fail. Neither UIGEA nor IGBA contains the requisite clear statement that online poker is covered by its terms. UIGEA does not mention the game of poker,

[28] The rule of lenity is especially appropriate in construing statutes that, like IGBA, constitute predicate offenses for the money laundering statute. *See Skilling v. United States*, 130 S. Ct. 2896, 2932-22 (2010).

and, as discussed, it does not define "game subject to chance," leaving the scope of the statutory prohibition open-ended. Similarly, under IGBA, online poker can be an illegal gambling business only if poker is considered "gambling." Not only does IGBA fail to list poker among the enumerated "gambling" games, IGBA does not define "gambling" beyond listing nine house-banked games of pure chance. With respect to both statutes, the rule of lenity requires this Court to adopt the most defendant-friendly interpretation of the statute and read it to exclude online poker. And finally, IGBA applies only to illegal gambling businesses that "are a violation of the law of a State or political subdivision in which [they are] conducted," 18 U.S.C. § 1955(b)(1). For the reasons set forth in Section IV, *supra*, under the rule of lenity the Court should construe the term "conducted" in IGBA to exclude the conduct alleged here – merely accepting bets placed in New York or other states.

The Supreme Court's recent decision in *United States v. Santos*, 553 U.S. 507, 513-15, 128 S. Ct. 2020, 2025-2026 (2008), is instructive. In *Santos*, the Court applied the rule of lenity in affirming the lower courts' decision vacating money laundering convictions premised on the statutory term "proceeds," which Congress did not define. The Court recognized that the term could mean either of two different things, but that "the tie must go to the defendant." *Id.* at 514, 128 S. Ct. at 2025. Under the rule of lenity and the Supreme Court's reasoning in *Santos*, this Court must adopt the defendant-friendly reading of UIGEA and IGBA and find that these statutes do not cover the conduct charged in this case. Accordingly, Counts One through Three, Five and Six must be dismissed.

VII. IF THE COURT DISMISSES THE IGBA COUNTS, IT MUST ALSO DISMISS THE MONEY LAUNDERING COUNT.

The money laundering conspiracy charge, Count Nine, is based on the alleged specified unlawful activity of operating an illegal gambling business in violation of 18 U.S.C. § 1955, as charged in Counts Five and Six. Ind. ¶¶ 53-54. If the Court dismisses Counts Five and Six, it must also dismiss Count Nine. *See United States v. D'Allesio*, 822 F. Supp. 1134, 1146 (D.N.J. 1993) (money laundering counts of indictment had to be dismissed after district court dismissed mail fraud counts which had served as specified unlawful activity underlying money laundering charges).

CONCLUSION

For the foregoing reasons, Mr. Campos respectfully requests that the Court dismiss all counts of the Indictment against him, and grant any such further relief as the Court may deem just and proper.

Dated: September 30, 2011
New York, New York

Respectfully submitted,

HAFETZ NECHELES & ROCCO

By: ______/s/________________
Frederick P. Hafetz (FH 1219)
Kathleen E. Cassidy (KC 0630)

500 Fifth Avenue, 29th Floor
New York, NY 10110
(212) 997-7595

CLYDE SNOW & SESSIONS

By: Neil A. Kaplan
Anneli R. Smith

201 South Main Street, Suite 1300
Salt Lake City, UT 84111
(801) 322-2516

Attorneys for Defendant John Campos

PokerStrategy.com

The Professional Poker School