UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. POKERSTARS; et al., Defendants. ALL RIGHT, TITLE AND INTEREST IN THE ASSETS OF POKERSTARS; et al., Defendants-In-Rem.	Case No. 1:11 Civ. 02564 (LBS)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT AND CLAIMANT HOWARD LEDERER'S MOTION TO DISMISS VERIFIED FIRST AMENDED COMPLAINT

677182.02

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I. INTRODUCTION

Buried in the government's 90-page First Amended Complaint ("FAC"), which targets twenty-eight separate defendants and 136 defendants-in-rem, are precisely two allegations implicating Defendant Howard Lederer ("Lederer"), co-founder of Full Tilt Poker ("FTP"): (1) that Lederer helped FTP defraud its own customers by allowing them to play internet poker with deposited funds before FTP had securely processed their money; and (2) that FTP—an internet poker company located entirely offshore—was an illegal gambling business under the Illegal Gambling Business Act ("IGBA"), 18 U.S.C. § 1955, rendering illegal any proceeds Lederer derived from it. According to the government, these allegations support $42 million *in personam* civil money laundering penalties against Lederer, as well as the forfeiture of two of his bank accounts *in rem*. The government's *in personam* claim must be dismissed for two reasons.

First, the government's fraud allegations fail to state a claim under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). Although the government alleges that Lederer participated in a scheme to defraud FTP's customers, specific factual allegations against him are nowhere to be found. How, exactly, did he mislead players regarding their deposits and accounts? What did he say to them, and when did he say it? Was any information Lederer allegedly provided false when given, and if so, did Lederer know it? The government doesn't say. The only specific factual allegations against Lederer are that he co-founded FTP and helped build it into a successful business, and that he received distributions as part-owner of the company. These allegations fail to state a fraud claim—or any claim—against Lederer.

Second, FTP is not an illegal gambling business under IGBA, a statute that has never been successfully applied solely to poker clubs, let alone internet poker companies headquartered and operated entirely abroad. Based on the statute's plain language, IGBA neither applies extraterritorially nor criminalizes poker, a skills-based sport covered on ESPN alongside golf and

football. Poker is also legal under New York's gambling laws—but because the government has failed even to identify which state law forms the predicate of the IGBA claims, Lederer is left to guess at which statute or statutes the government has in mind. That failure alone justifies dismissal of the IGBA claims.

These two arguments apply with equal force to the government's IGBA and wire fraud-based *in rem* claims against Lederer's bank accounts. Accordingly, the Court should dismiss the $42 million *in personam* claim against Lederer for money laundering, along with the First and Fourth Claims for Relief *in rem*.

II. BACKGROUND

The government's 161-paragraph FAC alleges multiple *in personam* allegations against three online poker companies, twenty-one other entities, four individual defendants, and *in rem* allegations against a multitude of bank accounts. The complaint focuses largely on a series of misdeeds allegedly committed by the poker companies, focusing mainly on their alleged attempts to defraud banks and their players.

Despite its prolixity, the FAC contains scarcely a word about Lederer's role in any alleged wrongdoing by FTP. The sum total of the government's allegations about Lederer is that he was (1) among FTP's founders, owning roughly 8.6% of the company (FAC ¶ 23); (2) on FTP's board of directors from April 2007 until April 2011, during which times he received distributions totaling $42 million (*Id.* ¶¶ 8, 108); and (3) a managing member of Tiltware LLC, and, "[a]t certain times relevant to the Amended Complaint," FTP's president (*Id.* ¶ 23). Of the complaint's161 paragraphs, only 10 involve Lederer's alleged actions.

The government further alleges that FTP defrauded its customers by "misrepresenting to players that funds credited to their online player accounts were secure and segregated from operating funds" when, allegedly, they were not. *Id.* ¶ 99. According to the FAC, FTP received

customer inquiries about the security of player funds. *Id.* ¶ 100. "In response to these inquiries," the government alleges, "in or about March of 2008, [FTP CEO Ray] Bitar and Lederer advised a Full Tilt Poker employee that Full Tilt Poker could represent to players that Full Tilt Poker kept all of its player funds in segregated accounts and that fund would be available for withdrawal by players at all times." *Id.* "[B]ased in part on this information," an unnamed FTP employee allegedly drafted "several form e-mail templates" for use in responding to player inquiries about their funds. *Id.* That is the only allegation relating to Lederer's participation in or knowledge of the alleged fraud against FTP's customers. According to the complaint, after the government had seized FTP's website and assets on April 15, 2011, Lederer reported to other FTP employees in early June 2011 that FTP had approximately $6 million in its bank accounts, with more than $300 million owed to players worldwide. *Id.* ¶ 116.

In addition to the IGBA and wire fraud allegations included in the complaint, the government also contends that FTP committed bank fraud in violation of 18 U.S.C. § 1344 by allegedly arranging for the funds received from U.S. players to be disguised as payments to non-existent entities or non-gambling businesses. *See Id.* ¶¶ 2-4, 35-50. Notably, however, the complaint nowhere alleges that Lederer knew about or had anything to do with this supposed miscoding of transactions by FTP. *See id.* ¶¶ 142 (listing individuals who allegedly conspired to commit bank fraud, but leaving out Lederer).

Based on these threadbare allegations against Lederer, the government seeks a civil monetary judgment of "not less than $41,856,010.92" pursuant to 18 U.S.C. § 1956(h), which represents the total amount of ownership distributions and "profit sharing" payments he allegedly received as part-owner of FTP. FAC ¶ 108. The government also seeks forfeiture of two of Lederer's bank accounts, alleging that at least some portion of the $42 million was deposited into

them. *See id.*; Schedule C ¶¶ 2-3. The FAC alleges that these accounts are forfeitable pursuant to sections 981(a)(1)(A), 981(a)(1)(C), and 1955(d) as

- property used in and proceeds of an illegal gambling business in violation of 18 U.S.C. § 1955 (First Claim for Relief);
- proceeds of a conspiracy to commit bank and wire fraud in violation of 18 U.S.C. §§ 1343, 1344, and 1349 (Second Claim for Relief);
- property involved in a conspiracy to commit money laundering (Third Claim for Relief);
- proceeds of a conspiracy to commit wire fraud in violation of 18 U.S.C. § 1343 and 1349 (Fourth Claim for Relief).

For the reasons stated below, the allegations against Lederer are insufficient to support the $42 million *in personam* claim, as well as the First and Fourth Claims for Relief *in rem*.[1]

III. LEGAL STANDARD

The FAC asserts both an *in personam* claim against Lederer as well as *in rem* claims against his bank accounts. For the *in personam* claim, Rules 8(a) and 12(b)(6) of the Federal Rules of Civil Procedure apply. Accordingly, in evaluating the sufficiency of factual allegations underpinning the *in personam* claim, the Court should follow the two-step process established in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). First, the Court should identify and eliminate allegations "that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. Second, the trial court should evaluate the remaining, non-conclusory allegations "to determine if they plausibly suggest an entitlement to relief." *Id.* at 681. This "plausibility standard" requires "more than a sheer possibility that a defendant has acted unlawfully. Where a

[1] Lederer does not presently challenge the Second Claim for Relief, which is a forfeiture claim predicated on alleged bank fraud by certain individuals other than him. Even though the First Amended Complaint does not allege—and no evidence will support—that Lederer knew about or committed bank fraud, the First Amended Complaint has alleged sufficient facts to permit that *in rem* claim to proceed against the defendant bank accounts under 18 U.S.C. § 981(a)(1)(c). Because the Third Claim for Relief, which alleges money laundering, may be derivative of the bank fraud allegations, Lederer elects not to challenge it here as well.

complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* at 678 (citation and internal quotation marks omitted).

Rule 9(b)'s exacting pleading standard applies to all fraud claims alleged against Lederer. Rule 9(b) requires that when alleging fraud, "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Thus, for a fraud claim to survive a motion to dismiss, the plaintiff must, at a minimum, "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Jiminez v. Brazil Ethanol, Inc.*, No. 11 Civ. 3635(LBS), 2011 WL 5932600, *2 (S.D.N.Y. Nov. 29, 2011) (citation and quotation marks omitted). Conclusory allegations of fraud are insufficient; rather, "[a]n ample factual basis must be supplied to support the charges." *O'Brien v. Nat'l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991). Further, when multiple defendants are involved, "the complaint should inform each defendant of the nature of his alleged participation in the fraud." *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987).

As for the *in rem* claims, the government's pleading burden is a heavy one due to the "drastic nature of the civil forfeiture remedy." *United States v. Daccarett*, 6 F.3d 37, 47 (2d Cir. 1993). The FRCP's Supplemental Rules set the pleading standard for *in rem* civil forfeiture complaints. *See* Fed. R. Civ. P. Supp. R. A(1)(B). Supplemental Rule E(2)(A) directs the government to set forth its claims "with such particularity that the defendant…will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." Supplemental Rule G(2)(f) further commands that the government "state sufficiently detailed facts to support a reasonable belief that the government

will be able to meet its burden of proof at trial." Fed. R. Civ. P. Supp. R. G(2)(f).[2] Thus, "the Government's complaint must assert specific facts supporting an inference that the property is subject to forfeiture." *United States v. $22,173.00 in U.S. Currency*, 716 F. Supp. 2d 245, 248 (S.D.N.Y. 2010) (internal citation and quotation marks omitted).

The Supplemental Rules do not supplant the FRCP. Rather, the latter "apply to Civil Forfeiture actions so long as they are not 'inconsistent with' the Supplemental Rules." *Id.* at 249 (quoting Fed. R. Civ. P. Supp. R. A(2)). This has two important implications.

First, the Supreme Court's pronouncements in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal* inform the legal standard for the government's *in rem* claims. *See $22,173.00 in U.S. Currency*, 716 F. Supp. 2d at 249 (noting that *Iqbal* and *Twombly* "may help to clarify when a civil forfeiture complaint survives the motion to dismiss phase").

Second, Rule 9(b)'s heightened pleading standard applies to all fraud claims supporting the government's forfeiture allegations. Nothing in Rule 9(b) is "inconsistent with" the pleading standard set forth in the Supplemental Rules. Fed. R. Civ. P. Supp. R. A(2). By its terms, Rule 9(b) applies to any party "alleging fraud or mistake." Fed. R. Civ. P. 9(b). As a civil plaintiff, the government is a party like any other, and it can simultaneously abide by Supplemental Rule G(2)(f)'s command to "state sufficiently detailed facts to support a reasonable belief that" it will prevail at trial, and Rule 9(b)'s directive to "state with particularity the circumstances constituting fraud." *See Riverway Co. v. Spivey Marine & Harbor Svc. Co.*, 598 F. Supp. 909, 912 (S.D. Ill. 1984) ("The construction placed upon Rule 9(b) of the Federal Rules of Civil Procedure requiring the circumstances of an action for fraud be stated with particularity, is

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[2] Although the government's burden of proof was once a mere showing of probable cause, Congress elevated the government's burden to a preponderance of the evidence when it passed the Civil Action Forfeiture Reform Act ("CAFRA") in 2000. *See United States v. $92,203.00 in U.S. Currency*, 537 F.3d 504, 509 (5th Cir. 2008) (noting the "increase in the Government's burden—from probable cause to preponderance of the evidence").

helpful in determining the meaning of Supplemental Rule E(2)(a)."); *United States v. Mondragon*, 313 F.3d 862, 864 (4th Cir. 2002) (citing *Riverway* as "[t]he leading case on the subject" of the Supplemental Rules' particularity requirement for *in rem* forfeiture actions).[3]

In sum, both the government's *in personam* and *in rem* allegations against Lederer must rise to the level of plausibility required by *Iqbal* and *Twombly*. The government must allege particularized and specific facts demonstrating that Lederer's funds are subject to forfeiture. And, most importantly, any fraud allegations must satisfy Rule 9(b). Because the government has failed to meet this burden for the *in personam* claim against Lederer and two of the *in rem* Claims for Relief, those claims must be dismissed.

IV. ARGUMENT

Only two allegations in the complaint implicate Lederer in his personal capacity such that they would justify the civil money laundering penalties alleged in Section VIII of the FAC (¶¶ 158-161): (1) his alleged role in helping FTP defraud poker players by allowing them to play with deposited funds before FTP had securely processed their money, and (2) his status as co-owner of FTP, which the government—in a novel and extraterritorial application of a decades-

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[3] A few cases have cast some doubt on whether Rule 9(b) applies to civil forfeiture actions. *See United States v. All Funds on Deposit in Dime Sav. Bank of Williamsburg Account No. 58-400738-1 in the Name of Ishar Abdi & Barbara Abdi*, 255 F. Supp. 2d 56, 69 n.18 (E.D.N.Y. 2003); *United States v. $15,270,885.69 on Deposit in Account No. 8900261137*, No. 99 CIV. 10255 (RCC), 2000 WL 1234593 (S.D.N.Y. Aug. 31, 2000) (unreported); *United States v. Approximately $25,829,681.80 in Funds (Plus Interest) in the Court Registry Inv. Sys.*, No. 98 Civ. 2682 (LMM) 1999 WL 1080370 (S.D.N.Y. Nov. 30, 1999) (unreported). None of these cases is persuasive. The two unreported cases cited above were decided before CAFRA raised the government's burden of proof from probable cause to preponderance of the evidence, and all three cases were decided before the Supplemental Rules were amended to include Rule G in 2006. *See* $15,270,885.69, 2000 WL 1234593 at *6 ("Rule 9(b) [is] inapplicable to civil *in rem* actions because the particularity requirements applicable in this context are guided by Rule (E)(2) in combination with the comparatively low, probable cause standard."). *Ishar Abdi* simply relies on one of the previous unreported cases without further analysis. *Ishar Abdi*, 255 F. Supp. 2d at 69 n.18. Moreover, the seminal treatise on civil forfeiture actions has directly questioned the correctness of these holdings, observing that "two unpublished district court opinions" have declined to require the government to allege "purported fraudulent statements with particularity, although it is hard to see why." 1 David B. Smith, Prosecution and Defense of Forfeiture Cases ¶ 9.02[1] at 9-44 (2010).

old statute never before applied to internet poker—characterizes as an "illegal gambling business" in violation of IGBA.[4] Because neither allegation withstands scrutiny, the *in personam* money laundering claims against Lederer must be dismissed. Similarly, the government's First and Fourth Claims for Relief *in rem* against Lederer's bank accounts, which relate to the wire fraud and IGBA allegations respectively, must also be dismissed.

A. The government's claim that Lederer defrauded and conspired to defraud FTP players is devoid of specific factual allegations and fails to satisfy Rule 9(b).

As noted above, for both its *in personam* and *in rem* claims, the government's fraud allegations must "meet the heightened pleading standard of Rule 9(b), which requires that the plaintiff 'state with particularity the circumstances constituting fraud.'" *Jiminez*, 2011 WL 5932600, at *2 (quoting Fed. R. Civ. P. 9(b)). The government's *in personam* fraud allegations against Lederer fall far short of this standard. What, if anything, did Lederer say, and to whom did he say it? Were the alleged statements fraudulent when made? And where are the allegations that "give rise to a strong inference [of] fraudulent intent"? *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993). These necessary allegations for an *in personam* claim against Lederer are absent in the FAC. Further, because the complaint never specifically alleges the name of the speaker, why the statements or false, or any evidence of scienter for *any FTP employee*, the Fourth Claim for Relief *in rem* must also be dismissed.

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[4] In its Second Claim for Relief, FAC ¶¶ 136-143, the government alleges conspiracy to commit bank and wire fraud against a specified list of Defendants. Howard Lederer is not included in that list. *Id.* ¶ 142. Thus, although if proved this claim may support the forfeiture of Lederer's bank accounts *in rem* as proceeds of the alleged conspiracy to commit fraud, they cannot support the *in personam* money laundering claim against Lederer. Counsel for the United States has confirmed this understanding of the First Amended Complaint with Lederer's attorneys. Lederer does not currently move to dismiss the *in rem* claims predicated on the Second Claim for Relief.

1. The single statement implicating Lederer in the First Amended Complaint is insufficient under Rule 9(b) because it fails to identify the speaker, specify the precise statement at issue, and support an inference of fraudulent intent.

The government's wire fraud allegations against FTP appear in FAC paragraphs 99 through 104, but only one sentence implicates Lederer directly. The gravamen of the allegations is that FTP told players "that funds credited to their online player accounts were secure and segregated from operating funds" when, allegedly, they were not. FAC ¶ 99. According to the complaint, "[o]n numerous occasions," FTP's customers asked the company whether their funds were secure, and whether FTP held them "in separate bank accounts" where they were not used for other purposes, such as operating expenses. *Id.* ¶ 100. The key passage follows:

> In response to these inquiries, in or about March of 2008, [FTP CEO Ray] ***Bitar and Lederer advised a Full Tilt Poker employee that Full Tilt Poker could represent to players that Full Tilt Poker kept all of its player funds in segregated accounts and that funds would be available for withdrawal by players at all times.*** Subsequently, and based in part on this information, Full Tilt Poker created several form e-mail templates to be used by Full Tilt Poker to respond to player inquiries about the security of their funds.

Id. (emphasis added). This is the only factual allegation specifically implicating Lederer in any alleged wire fraud scheme against FTP's customers. It fails Rule 9(b) for three reasons.

First, it is unclear who allegedly made the statement at issue, and to whom it was directed. Where, as here, the plaintiff brings a fraud claim against multiple defendants, Rule 9(b) requires the plaintiff "to identify which defendant caused each allegedly fraudulent statement to be spoken, written, wired or mailed" as well as "to whom the communication was made." *Alnwick v. European Micro Holdings, Inc.*, 281 F.Supp.2d 629, 639 (E.D.N.Y. 2003); *see also Manela v. Gottlieb*, 784 F. Supp. 84, 87 (S.D.N.Y. 1992) (holding that Rule 9(b) requires plaintiffs to "plead with particularity by setting forth separately the acts complained of by each defendant"). Was it Bitar or Lederer? Did Bitar and Lederer speak in tandem? The government's attempt to lump Lederer and Bitar together into an undifferentiated hybrid-

defendant, who "advised" an unidentified "Full Tilt Poker employee," FAC ¶ 100, fails Rule 9(b)'s particularity requirement.

Second, the FAC fails to "specify the statements that the plaintiff contends were fraudulent." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). The government never alleges how Lederer or Bitar communicated the allegedly false directives to the unnamed Full Tilt Poker employee, or what, exactly, was said. Lederer is left to guess at whether the alleged direction was given orally (and if so, to whom), or in writing (and if so, in what form). Rule 9(b) is designed to preclude such guesswork. *See O'Brien*, 936 F.2d at 676.

Third, even if the Court were to conclude that the bare statement in paragraph 100 meets Rule 9(b)'s particularity requirement, it must still dismiss the fraud claim based on the government's failure to allege "facts that give rise to a strong inference of fraudulent intent" on Lederer's part. *S.Q.K.F.C., Inc. v. Bell Atl. TriCon Leasing Corp.*, 84 F.3d 629, 634 (2d Cir. 1996). Indeed, nothing in the complaint supports the inference that Lederer knew any of the alleged statements—whatever they were—were false, if indeed they were. The complaint merely states in conclusory fashion that "Full Tilt Poker provided no protection whatsoever to deposits it received from players in the United States and other countries," and instead used the funds for business expenses and owner distribution payments. FAC ¶ 105. This allegation is silent as to time. It is unclear whether the government contends that the statement—"that Full Tilt Poker kept all of its player funds in segregated accounts and that funds would be available for withdrawal by players at all times"—was false when made. *Id.* ¶ 100. Indeed, the complaint later asserts that FTP's difficulties securing player funds began only "around August 2010," two years *after* Lederer or Bitar made the allegedly fraudulent statements at issue. *Id.* ¶ 113.

In short, the FAC's single, vague, unattributed allegation against Lederer in paragraph 100 fails to satisfy Rule 9(b)'s exacting requirements. It cannot support the government's $42 million *in personam* claim against Lederer.

2. The government never links Lederer to any of the other allegedly false statements referenced in the First Amended Complaint.

The complaint includes a few additional allegedly fraudulent statements purportedly made by FTP employees, but none of them implicates Lederer. For example, the government alleges that, "[o]n or about May 6, 2008," an unnamed person at FTP "created a form e-mail which its staff then e-mailed to players." *Id.* ¶ 100(a). The email stated that FTP kept player funds "in several deposit accounts throughout the world, all of which are separate and distinct from our operating accounts." *Id.* Lederer is nowhere alleged to have authored, edited, or sent this email. It cannot support a wire fraud claim against him.

The complaint further alleges that another (or possibly the same) unnamed FTP employee authored a second email "[o]n or about May 23, 2008," which stated that "all player account funds are segregated and held separately from our operating accounts." *Id.* ¶ 100(b). Again, the government nowhere alleges that Lederer had anything to do with this allegedly misleading email. It, too, cannot support a wire fraud claim against him.

The same goes for Web-forum posts attributed to an FTP employee identifying himself as "FTPDoug" on July 18, 2008. *Id.* ¶ 101(c-d). What "FTPDoug" wrote on an internet poker forum cannot form the basis of a fraud claim against Lederer. Indeed, it is nowhere alleged that Lederer authored this statement, or even knew it was made.

The government's final fraud allegation concerns a statement allegedly issued by FTP "[i]n response to" the events of April 15, 2011, i.e. *after* the government unsealed its indictment against FTP and seized FTP's website. The statement supposedly told FTP customers:

> In light of recent events involving the freezing of certain accounts, Full Tilt Poker would like to assure all players that their funds remain safe and secure. Processing of both deposit and withdrawal requests is proceeding as normal and is still available to all of our players . . . . We assure all players on Full Tilt Poker that your online playing experience will not change and that you will be able to deposit and withdraw funds as needed. Your money remains safe, secure and accessible at all times.

Id. ¶ 104. As a cursory amount of Internet research would have revealed had the government cared to check, this statement was posted on FTP's website sometime in mid-2009, nearly two years before the events of April 15, 2011. *See* Full Tilt Poker, *Statement from Full Tilt Poker Regarding Recent Check Withdrawal Issues* (June 30, 2009, 2:28 AM), http://web.archive.org/web/20090630022812/http://www.fulltiltpoker.com/official-statement-online-poker-withdrawals (accessed by entering http://www.fulltiltpoker.com/official-statement-online-poker-withdrawals into the Internet Archive). Indeed, the statement's plain terms reveal that it was not made in response to the events of April 15, 2011; it would have been nonsensical to assure players that "[p]rocessing of both deposit and withdrawal requests is proceeding as normal and is still available to all of our players" or that their "online playing experience will not change" when the government had seized FTP's website, replacing the company's logo with a giant Department of Justice seal. This lackadaisical approach to alleging fraudulent statements permeates the complaint and demonstrates that the government's fraud claim cannot withstand scrutiny.

3. The Fourth Claim for Relief *in rem* should be dismissed because the government's wire fraud allegations fail to satisfy Rule 9(b).

To adequately allege its wire-fraud based *in rem* forfeiture claim (the Fourth Claim for Relief), the government must show that the seized proceeds came from the alleged wire fraud, not that Lederer was personally involved. But the complaint fails even to accomplish this. The FAC never names the speaker for any of the allegedly false statements (other than the pseudonym "FTPDoug"), it never explains what about the statements is false, and it never

alleges any evidence of scienter. The complaint therefore fails to satisfy Rule 9(b) for anyone at FTP, and the *in rem* Fourth Claim for Relief should be dismissed.

B. The government's IGBA claim is based on an impermissible extraterritorial application of the law, and fails to allege facts supporting an IGBA violation.

Apart from the inadequate wire fraud allegations, only one other claim implicates Lederer: the allegation that FTP violated IGBA, making all FTP proceeds illegal.[5] This novel application of a decades-old statute far exceeds the statute's text and intended scope. ***First***, under the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), IGBA does not apply extraterritorially to a business operated abroad whose only contact with the United States is that some of its poker players are based here. ***Second***, even if IGBA could apply to FTP, the FAC alleges no IGBA violation. The complaint never alleges that FTP violated any state law, "an essential and substantive element" of an IGBA charge, *United States v. Miller*, 774 F.2d 883, 885 (8th Cir. 1985), nor does it allege any facts that, taken as true, demonstrate that poker constitutes "gambling" under § 1955(b)(2). Accordingly, the government's IGBA charges support neither the *in personam* claims against Lederer, nor the First Claim for Relief *in rem*. Both must be dismissed.

1. IGBA does not apply extraterritorially to FTP, a company based and operated outside of the United States.

The Supreme Court's recent decision in *Morrison* demonstrates that IGBA does not apply extraterritorially. Further, based on *Morrison* and cases interpreting it, applying IGBA to FTP's conduct in this case would constitute an impermissible extraterritorial application of the statute.

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[5] The government apparently takes the position that *all* proceeds of FTP are tainted, despite the fact that a significant part of FTP's business catered to players living outside of the United States. Lederer reserves the right to argue that proceeds derived from international operations do not constitute proceeds from any IGBA, wire-fraud, or bank-fraud violation.

a. IGBA does not apply extraterritorially.

In *Morrison*, the Supreme Court considered whether § 10(b) of the Securities Exchange Act creates a cause of action for foreign plaintiffs suing foreign and American defendants for misconduct involving foreign securities, where much of the misconduct took place in the United States. In answering that question, the Court reiterated the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison*, 130 S. Ct. at 2877 (citation and internal quotation marks omitted). Thus, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 2878; *see also Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32 (2d Cir. 2011) ("*Morrison* wholeheartedly embraces application of the presumption against extraterritoriality."). Applying that presumption, the Court concluded that § 10(b) does not apply extraterritorially. The Court first noted that "[o]n its face, § 10(b) contains nothing to suggest it applies abroad." *Morrison*, 130 S. Ct. at 2881. It then rejected all of petitioners' arguments as to why the statute applied abroad. Most notably, the Court rejected the argument that because the prices of foreign securities are disseminated throughout the United States, and therefore affect markets in the United States, section 10(b) should apply.

Applying *Morrison*'s analysis to IGBA, it is clear that IGBA does not apply extraterritorially. On its face, IGBA contains no language suggesting extraterritorial application. Further, IGBA was passed together with the Racketeer Influence and Corrupt Organizations (RICO) Act as part of the Organized Crime Control Act of 1970. Applying *Morrison*, the Second Circuit recently held that RICO does not apply extraterritorially. *Norex*, 631 F.3d 29. In addition, one of Congress's findings in passing the Unlawful Internet Gambling Enforcement Act ("UIGEA") was that "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(4) (emphasis added). Congress's recognition that "traditional" mechanisms, including IGBA, were inadequate to enforce cross-national activity strongly suggests that IGBA does not apply extraterritorially.

b. Applying IGBA to FTP would constitute an improper extraterritorial application of IGBA.

Because IGBA lacks extraterritorial application, the government must show that FTP's activities inside the United States bring the company within the statute's reach. The government cannot make that showing. Under *Morrison*, to determine whether U.S. conduct—the "territorial event"—is sufficient to make conduct non-extraterritorial, courts must ask whether that "territorial event" was the "'focus' of congressional concern." 130 S. Ct. at 2884 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 255 (1991) ("*Aramco*")). *Morrison* is again instructive. There, the Court noted that section 10(b) punishes "only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" *Id.* (quoting 15 U.S.C. § 78j(b)). On that basis, the Court held that the "focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Id.* The Court also rejected the argument that a statute could be applied extraterritorially if effects of the deception were felt inside the United States. In so holding, the Court observed that "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." 130 S. Ct. at 2884.[6]

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[6] Following *Morrison*, courts have found impermissible extraterritorial application of statutes despite effects on or activity in the United States. *See, e.g., United States v. Philip Morris USA, Inc.*, 783 F.Supp.2d 23 (D.D.C. 2011);

Here, FTP is an Irish corporation, governed by Irish law. Its business was legal under Irish law. Its staff and management lived and worked in Ireland. It was operating under a license from the Alderney Gambling Control Commission. FTP's bank accounts were all outside of the United States. The only "territorial events" relating to FTP are the playing of poker hands on FTP's site (and the associated payments for those hands) by players in the United States. *See* Decl. of Rosemary Karaka in Support of Post-Indictment Restraining Order, S.D.N.Y. Case No. 1:10cr00336 LAK, Dkt. # 76, at ¶ 7 ("internet gambling companies keep their computer servers, management and support staff offshore"). Yet the "focus" of § 1955 is not on playing or betting, but on those who "conduct[], finance[], supervise[], direct[], or own[]" an "illegal gambling business." Thus, IGBA focuses on the gambling business's operations, not the nature of its customers. *See* 18 U.S.C. § 1955(b)(1). Indeed, the Supreme Court has noted that IGBA "proscribes any degree of participation in an illegal gambling business, *except participation as a mere bettor*." *Sanabria v. United States*, 437 U.S. 54, 71 n.26 (1978) (emphasis added). Yet all activities other than those of "mere bettors" were not territorial events. Just as the "focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States," *Morrison*, 130 S. Ct. at 2884, IGBA's focus is not where the poker-playing took place, but where the gambling business is located and operated. For FTP, that is not the United States.

IGBA's history further demonstrates the statute's "focus" on the gambling business, rather than the customers. IGBA "was enacted as [part] of the Organized Crime Control Act of 1970. The legislation was aimed at curtailing syndicated gambling, the lifeline of organized crime, which provides billions of dollars each year to oil its diversified machinery." *United*

Cedeno v. Intech Group, Inc., 733 F.Supp.2d 471 (S.D.N.Y. 2010).

States v. Sacco, 491 F.2d 995, 998 (9th Cir. 1974) (internal citations omitted). It was based on Congress's findings that "organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking," and several other activities, Pub. L. 91-452, Title VIII, § 803(a), 84 Stat. 922, 937 (1970), and that organized crime's interstate nature, and propensity for bribing state and local officials, made it difficult for local authorities to combat, *Sacco*, 491 F.2d at 999-1001 (citing S. Rep. No. 91-617, 91st Cong., 1st Sess. 16 (1969)). IGBA's origin in the fight against organized crime makes clear that the "focus" of the legislation was on the gambling organizations, not the bettors.

This case mirrors Judge Rakoff's recent decision in *Cedeno*, in which he concluded that RICO does not apply to a predicate money laundering scheme that used American banks to launder money when the RICO enterprise was located abroad. "So far as RICO is concerned, it is plain on the face of the statute that the statute is focused on how a pattern of racketeering affects an *enterprise*. . . . But nowhere does the statute evidence any concern with foreign enterprises." 733 F. Supp. 2d at 473 (emphasis added). Just as RICO concerns ***enterprises***, and thus does not apply to foreign enterprises even if the predicate acts took place in the United States, IGBA concerns gambling ***businesses***, and thus does not apply to a foreign business even if some customers happen to be located in the United States. Thus, applying IGBA to FTP's activities in this case would constitute an impermissible extraterritorial application of the statute.

2. Even if IGBA applies to FTP's conduct, the First Amended Complaint fails to sufficiently allege a violation of IGBA.

Even if IGBA could be applied to a foreign business based abroad, the complaint nonetheless fails sufficiently to allege an IGBA violation. ***First***, the complaint never alleges that FTP violated any state law, one of the key elements of an IGBA claim. ***Second***, the complaint never alleges any facts that "plausibly" suggest that poker constitutes "gambling" under §

1955(b)(2). In fact, maintaining a poker website that charges a fee to allow customers to play poker against each other does *not* constitute "gambling" under § 1955(b)(2).

a. The First Amended Complaint fails to allege any state law that FTP violated and thus failed to allege the necessary elements of an IGBA cause of action.

For FTP to constitute an "illegal gambling business," it must be a 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). This requirement is arguably the most important of the three requirements for a "gambling business" to be an "illegal gambling business" under § 1955(b)(1). *See Miller*, 774 F.2d at 885 ("[T]he elements of a Section 1955 violation are actually contained in the underlying state law alleged to have been transgressed."). As explained by the Eighth Circuit: "The statute defines an 'illegal gambling business' as one which 'is a violation' of state law. 18 U.S.C. § 1955(b)(1)(i). The word 'is' strongly suggests that the Government must prove more than a violation of some state law by a gambling business. *The gambling business itself* must be illegal." *United States v. Bala*, 489 F.3d 334, 340 (8th Cir. 2007) (emphasis in original).

Here, the government has nowhere alleged that the alleged gambling business conducted by FTP is illegal in the place where that business is conducted. Nor could it: FTP was legally operating under a duly issued license from the Alderney Gambling Control Commission. Accordingly, FTP lies outside IGBA's ambit.

To the extent the government believes that FTP violated some U.S. state law, the FAC again falls short. The complaint not only fails to allege a specific state statute that FTP's conduct violated, but it also neglects to allege *which state's* laws were allegedly offended. There is simply no mention in the FAC of any state law whatsoever.

The government's failure to allege any state law violation warrants the FAC's dismissal under Fed. R. Civ. P. 8(a). Rule 8(a) requires that a complaint "give the defendant fair notice of

what [plaintiff's] claim is." *Twombly*, 550 U.S. at 555 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Without any knowledge of the "essential and substantive element" of the government's § 1955 claim, *Miller*, 774 F.2d at 885, Lederer lacks fair notice of the basis of the government's claim such that he can mount a defense.

The government could be basing its IGBA claim on a violation of any of the myriad gambling laws of any of the fifty states, all of which penalize slightly different behavior. Lederer cannot be expected to respond to any such allegation. New York law alone contains at least five different laws prohibiting different forms of gambling, each of which would require Lederer to prepare different legal and factual defenses. *See* N.Y. Penal Law §§ 225.00 *et seq*.[7] The FAC's utter silence on the matter dooms the IGBA claims.

Indeed, the Eighth Circuit recognized the importance of pleading a particular state statute in *Miller*. There, the government's indictment "failed to cite the state statute alleged to have been violated." 774 F.2d at 883. The Eighth Circuit concluded that

> the particular state statute alleged to have been violated is an *essential and substantive element* of a violation of 18 U.S.C. section 1955. Other than the requirements of five persons and of 30 days or $2,000, the elements of a Section 1955 violation are actually contained in the underlying state law alleged to have been transgressed. Thus, the indictment's reference to Section 1955 *did not inform Miller of the crime with which he was charged*. An allegation that some state statute has been violated does not "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished."

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[7] Lederer maintains that FTP's conduct as alleged in the FAC violates none of these New York laws because the outcome of poker does not "depend[] in a material degree upon an element of chance." N.Y. Penal Law § 225.00(1). Rigorous academic research on this point could hardly be clearer. *See, e.g.*, Steven D. Levitt & Thomas J. Miles, *The Role of Skill Versus Luck in Poker: Evidence from the World Series of Poker*, National Bureau of Economic Research Working Paper 17023 (April 2011), *available at* http://pricetheory.uchicago.edu/levitt/Papers/WSOP2011.pdf (concluding that differences between return on investment for skilled versus unskilled poker players "are highly statistically significant and far larger in magnitude than those observed in financial markets"); Rachel Croson, Peter Fishman & Devin G. Pople, *Poker Superstars: Skill or Luck?*, 21 Chance No. 4, 25 (2008). Should this case proceed, and should the predicate offense be a state law premising liability on poker's status as a game of chance, Lederer intends to prove that skill, not chance, dominates the outcome of poker.

Id. at 885 (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)) (emphases added). Although *Miller* involved an indictment rather than a civil forfeiture complaint, *Miller*'s conclusion that citation to a specific state statute is necessary to fully inform a defendant of the crime with which he is charged is equally applicable here. Without fully informing Lederer of the state offense that FTP is alleged to have committed, the FAC fails to "give [Lederer] fair notice of what [the government's] claim is." *Twombly*, 550 U.S. at 555.

The complaint's allegations cast no light on the basis of the IGBA charge. The complaint merely alleges that FTP "provided real-money gambling on internet poker games to United States customers." FAC ¶ 22. But there are numerous versions of poker, all with different rules. As the complaint acknowledges, FTP offered at least four different types of poker. *Id.* ¶ 65 (Texas Hold 'em, Omaha, Stud, and Razz). The complaint never discusses these games' rules, nor explains why these games violate state law, let alone which state law they violate. To the extent the FAC is predicated on a violation of New York law, a failure to allege facts showing that these games are games of chance may on its own be sufficient to dismiss the complaint. *See People v. Li Ai Hua*, 24 Misc.3d 1142 (Crim. Ct. Queens Cty. 2009) (dismissing information for "play[ing] 'Mahjong' which is a game of chance" because the information included "no support . . . for the claim that mah jong is a game of chance"). Because the FAC fails to allege anything about the predicate state law offense, the IGBA charges must be dismissed.

b. The First Amended Complaint fails to allege that FTP is a "gambling business" under IGBA.

To violate IGBA, a business must be engaged in "gambling" as defined in 18 U.S.C. § 1955(b)(2). Section 1955(b)(2) defines "gambling" by providing a non-exhaustive list of nine activities that constitute gambling. No form of poker appears on this list. But to qualify as a "gambling," running an online poker website must be "similar to the specific items in the list."

Molloy v. Metropolitan Transp. Auth., 94 F.3d 808, 812 (2d Cir. 1996). The complaint alleges no facts that, accepted as true, plausibly suggest that poker is similar to the specific activities listed in § 1955(b)(2). In fact, poker is not similar to those activities.

(i) To be a violation of IGBA, a business must be engaged in "gambling" as defined in § 1955(b)(2).

IGBA criminalizes the conduct, finance, management, supervision, direction, or ownership of an "illegal gambling business." 18 U.S.C. § 1955(a). An "'illegal gambling business' means a gambling business which" violates state law, involves five or more persons, and satisfies certain operation or revenue requirements. *Id.* § 1955(b)(1). Thus in order to be an "illegal gambling business," a business must be a "gambling business," or a business that engages in gambling. "Gambling" is defined as "includ[ing] but . . . 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." *Id.* § 1955(b)(2).

The government has argued in the past that an "illegal gambling business" under IGBA does not have to engage in "gambling" under § 1955(b)(2), but only has to satisfy the requirements in § 1955(b)(1)(i)-(iii). In two key ways, this would violate the "cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted) (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). First, the only time the word "gambling" is used in IGBA outside of the phrase "illegal gambling business" is when IGBA defines an "illegal gambling business" as "a gambling business which" satisfies the § 1955(b)(1)(i)-(iii) requirements. *See* 18 U.S.C. § 1955. Thus reading the definition of "illegal gambling business" to not be limited to businesses that engage in "gambling" under § 1955(b)(2) would make the § 1955(b)(2) definition of gambling entirely superfluous. Second, § 1955(b)(1)

defines "illegal gambling business" as "a *gambling* business which" satisfies the § 1955(b)(1)(i)-(iii) requirements. If Congress did not intend the word "gambling" to limit the type of businesses that violate the statute, it would have simply left that modifier out. The only logical interpretation of Congress's decision to include it is to read IGBA as limiting "illegal gambling businesses" to businesses engaged in "gambling" under § 1955(b)(2).

(ii) The First Amended Complaint never alleges that running an online poker site is "gambling" under § 1955(b)(2).

IGBA does not define the term "gambling." Instead, it provides a list of illustrative activities, stating, "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." 18 U.S.C. § 1955(b)(2). When interpreting a "general provision in light of a list of specific illustrative provisions," courts "construe the general term . . . to include only things similar to the specific items in the list." *Molloy*, 94 F.3d at 812; *see also Begay v. United States*, 553 U.S. 137, 141-42 (2008) (holding that drunk driving was not a "violent felony" for purposes of the Armed Career Criminal Act because it was "too unlike the provision's listed examples" of other violent crimes); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 401 (2d Cir. 2008) ("[W]here 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." (internal citation and quotation marks omitted)).

To allege an IGBA violation, the government must therefore allege "sufficient factual matter, accepted as true," *Iqbal*, 556 U.S. at 678, that FTP's activities in running an online poker site are similar to the activities listed in § 1955(b)(2). A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557) (alterations in original). Yet the FAC nowhere suggests that FTP's activities are remotely

similar to the activities listed in § 1955(b)(2). There are no facts in the complaint about the rules of the various poker games played on FTP, or FTP's role in charging for and administering those games. This alone is reason to dismiss the government's IGBA-based claims.

(iii) Running an online poker site is not "gambling" under § 1955(b)(2).

The government's failure to plead facts sufficient to establish that poker is "roughly similar" to the activities listed in § 1955(b)(2) is not surprising: running an internet poker site like FTP falls outside IGBA's definition of "gambling." Nearly all the activities listed in § 1955(b)(2) involve games where the business—the "house"—is betting directly against the customers. In bookmaking, slot machines, roulette, dice tables, lotteries, policy, bolita, or numbers games, the house directly bets against its customers such that when the customer/bettor loses, the house wins. This makes sense given that the phrase for these companies in IGBA is a "gambling business," suggesting that the business itself is gambling. There are numerous reasons Congress may have wanted to penalize these games. In these games the businesses have an incentive to cheat, and it is likely difficult for customers to monitor them. These games were also tended to fund organized crime, a problem that animated IGBA's passage.

The only activity listed in § 1955(b)(2) that does not involve a business betting against its customers is pool-making. Pool-making, however, is hardly a game at all but is rather simply a forum to allow people to place bets on external events over which the customers/bettors have no control. None of the activities listed in § 1955(b)(2) involves a business that charges a hosting fee for players to engage in a game like bridge, scrabble, or poker, where betting is part of a larger game whose outcome predominantly depends on the players' skill. *See In re Allen*, 59 Cal.2d 5, 7 (1962) (holding that bridge is a game of skill in part because "it is obvious that, although there is of course an element of chance resulting from the deal of the cards, there is

continually recurring necessity in the bidding and play of the hand to make decisions which, considered together, will ordinarily be determinative of the outcome of the game").

This is true even if, as the government has argued in the corresponding criminal case, a common understanding of the word gambling would include poker. "Only in the absence of a statutory definition does this court normally look to the ordinary meaning or dictionary definitions of a term." *United States v. Lettiere*, 640 F.3d 1271, 1274 (9th Cir. 2011). Indeed in *Begay*, even where drunk driving satisfied the statute's definition of violent felony (i.e. a crime that "presents a serious potential risk of physical injury to another"), the Court found that the illustrative list of examples limited the statutory definition to crimes "roughly similar" to that illustrative list. 553 U.S. at 137. Thus, the illustrative list in this case must limit a non-statutory understanding of what "gambling" means to activities similar to those listed in § 1955(b)(2). In short, the government's "Willie Nelson" argument, while glib, is irrelevant.[8]

Congress's decision to include the specific games listed in § 1955(b)(2) was hardly random. IGBA was enacted as part of the Organized Crime Control Act of 1970. 84 Stat. at 937. That Act was based on Congress's findings that organized crime harmed American security and economic stability, and that "organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking," and several other activities. *Id.* at 922-23. It is thus unsurprising that Congress focused IGBA on the types of games organized crime used. This explains why Congress's list includes such esoteric games as bolita. It also explains why Congress did not include in the list of activities charging a fee to host skill-based games that include betting as one element of the game, like bridge or poker.

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[8] The government told Judge Kaplan that "poker, with all apologies, of course, to Willie Nelson, is understood to be a quintessential form of gambling." Hr'g Tr., *United States v. Elie*, at 23 (Dec. 1, 2011). The government apologized to the wrong country singer; "The Gambler"—the song to which the government was likely referring—was sung by Kenny Rogers.

At the very least, the list of activities constituting IGBA's definition of "gambling" is sufficiently ambiguous that an average person would not be certain whether a company hosting a poker site falls within it. Under the rule of lenity, such ambiguity should be interpreted in favor of the defendant.[9] The rule of lenity "not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion). Both of these concerns apply in this case. IGBA's definition of "gambling" is at best an uncertain command as to the legality of charging a fee for players to play a skill-based game that includes betting as one aspect of the game. And given that Congress's goal in passing IGBA was to fight organized crime, not to generally criminalize all card games involving money, many of which were likely played by the very Congress-people who passed IGBA, the burden should be on Congress to speak clearly if it does in fact want to criminalize a company like FTP.

V. CONCLUSION

The government's *in personam* claim for civil money laundering penalties against Howard Lederer is premised on allegations that (1) Lederer participated in FTP's fraud against its players; and (2) FTP operated in violation of IGBA. The government has failed to sufficiently plead either of these allegations, and the *in personam* claims against Lederer must be dismissed. The government has similarly failed to plead its First and Fourth *in rem* claims for relief against Lederer's bank accounts, and those claims too must be dismissed.

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[9] The rule of lenity applies in civil forfeiture cases when the statute is "punitive and quasi-criminal in nature." *United States v. One 1973 Rolls Royce, V.I.N. SRH-16266 By & Through Goodman*, 43 F.3d 794, 819 (3d Cir. 1994); *see also County of Suffolk, New York v. First Am. Real Estate Solutions*, 261 F.3d 179, 195 (2d Cir. 2001).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on July 9, 2012, I caused a true copy of the foregoing Memorandum of Points and Authorities in Support of Defendant and Claimant Howard Lederer's Motion to Dismiss Verified First Amended Complaint pursuant to Rule G of the Supplemental Rules for Admiralty and Maritime Claims to be served by the Court's ECF system upon:

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