UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
-against-	:	11-CV-2564 (LBS)
POKERSTARS, et al.,	:	
Defendants;	:	
ALL RIGHT TITLE AND INTEREST IN THE ASSETS OF POKERSTARS, et. al.,	:	
Defendants In Rem.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE POKERSTARS DEFENDANTS' MOTION TO DISMISS THE VERIFIED FIRST AMENDED COMPLAINT

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INTRODUCTION

Pursuant to Rules 9 and 12(b) of the Federal Rules of Civil Procedure and Rules E and G of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions, the PokerStars Defendants submit this memorandum in support of their motion to dismiss the Government's Verified First Amended Complaint (the "Complaint").[1]

This case involves the Government's attempt to extract a forfeiture of assets from PokerStars, the world's largest online poker room, which for more than a decade provided American players with a safe and regulated poker platform. Poker is one of the nation's oldest pastimes, and has been the hobby of "presidents, congressmen, justices, generals, captains of industry, and ordinary Americans for almost two centuries now." James McManus, *Cowboys Full: The Story of Poker* 404 (2009). Today, over 55 million Americans play poker, and over 15 million have played on the Internet. *See* Poker Players Alliance, Poker Facts, http://theppa.org/resources/facts/ (last visited July 6, 2012). But the Complaint treats these millions of Americans as criminal gamblers, and deems PokerStars a criminal enterprise.

As this memorandum explains, American poker players are not mere gamblers, and PokerStars is nothing like the organized crime enterprises that Congress targeted with the Illegal Gambling Business Act ("IGBA"), 18 U.S.C. § 1955. Unlike criminal enterprises, PokerStars has operated in the light of day for a decade, and has never concealed the fact that U.S. players use the site. Indeed, for years the company consulted with the Department of Justice to obtain clarity

[1] "PokerStars" is a brand and an Internet site, not a corporate entity. For simplicity, however, this memorandum uses the term "PokerStars" to refer to Oldford Group Ltd., Rational Entertainment Enterprises Ltd., Pyr Software Ltd., Stelekram Ltd., and Sphene International Ltd. In adopting this definition, PokerStars does not concede that the allegations in the Complaint are appropriately directed to the defendants *en masse*. Indeed, one of the significant deficiencies of the Complaint is that it fails to specify what conduct is attributable to each PokerStars defendant.

on U.S. law and to ensure that it remained compliant in the United States. PokerStars has also protected its players from risk by ensuring that its games and financial protocols are secure and fair. When the Government filed the Complaint, PokerStars ceased providing services in the United States and took steps to ensure that U.S. players' account balances were fully and promptly refunded.

The Complaint ignores all of this in a misguided effort to depict PokerStars as complicit in criminal activity. The Complaint asserts three claims for relief against PokerStars: (1) that PokerStars' property is subject to forfeiture because it was used in an "illegal gambling business" in violation of the IGBA, or is the proceeds of an illegal gambling business, Compl. ¶¶ 130-35; (2) that PokerStars' property is subject to forfeiture as proceeds of a conspiracy to commit wire and bank fraud, *id*. ¶¶ 136-43; and (3) that PokerStars' property is subject to forfeiture and that PokerStars is subject to a $1.5 billion penalty under the money laundering statute, *id*. ¶¶ 144-50, 159-60.[2] In light of the heightened pleading standards applicable to civil forfeiture claims, and because the facts alleged in the Complaint do not give rise to liability under the relevant criminal and forfeiture statutes, each of these causes of action must be dismissed as a matter of law.

BACKGROUND

This suit names as defendants twenty-eight individuals and entities related to three online poker businesses: PokerStars, Full Tilt Poker, and Absolute Poker-Ultimate Bet.[3] It also names as defendants *in rem* numerous properties allegedly subject to forfeiture. The Complaint's

[2] On September 21, 2011, the Government amended its original complaint by adding further allegations that Full Tilt Poker, an unrelated poker site, and several of its principals defrauded their own customers. *See* Complaint ¶¶ 5, 99-120. The Government conspicuously makes no such allegation against PokerStars.

[3] The Complaint also alleges "Ponzi scheme" based wire fraud claims against certain individuals associated with Full Tilt Poker. These allegations are unconnected to PokerStars.

allegations largely parallel those in a Superseding Indictment filed against eleven individuals alleged to have processed financial transactions for the poker companies; that case is pending before Judge Kaplan. *See United States v. Scheinberg et al.*, No. S3 10 Cr. 336 (S.D.N.Y.) (LAK). This Motion is brought on the PokerStars Defendants' behalf, as well as on behalf of PokerStars' properties named as defendants *in rem*. Claims for these properties have been filed with the Court. *See* Declaration of David M. Zornow, dated July 9, 2012, attached as Exhibit A hereto ("Zornow Decl.") Exs. A-1, A-2.

PokerStars is an online poker room. It does not offer – and has never offered – house-banked games or sports betting.[4] Nor has it ever offered any of the games specified in the IGBA, "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). Thus, unlike a bookmaker or a casino operator, PokerStars does not play against its customers. Instead, the customers play against other customers, in virtual poker rooms made available through PokerStars' software. PokerStars makes money by collecting a fee from each pot or from tournament entry fees, collectively known as the "rake." PokerStars collects this rake regardless of who wins a hand or tournament, and thus has no interest in the outcome of the games.

PokerStars is located in – and holds a gaming license from – the Isle of Man in the British Isles. The Isle of Man has adopted and rigorously enforces a comprehensive array of statutes and

[4] To the extent that this Memorandum contains facts other than those in the Complaint, those facts (such as basic information regarding poker and PokerStars' operations) are subject to judicial notice because each is not subject to reasonable dispute either as a fact "generally known within" this Court's jurisdiction or as a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* Fed. R. Evid. 201(b).

regulations regarding online gaming businesses within its jurisdiction, including PokerStars.[5] The Isle of Man's principal statute is the Online Gambling Regulation Act 2001 ("OGRA"), which establishes licensing requirements for online gaming businesses. Under the OGRA, the Isle of Man's Gambling Supervision Commission is charged with enforcing the Isle's gambling laws. *See* OGRA § 11. The Commission "ensure[s] that gambling is conducted in a fair and open way," "protect[s] children and other vulnerable persons from being harmed or exploited by gambling," and "prevent[s] gambling from being (i) a source of crime or disorder, (ii) associated with crime or disorder, or (iii) used to support crime." Isle of Man, Gambling Supervision Act 2010 § 5(2). PokerStars is required to hold its players' money on trust and not commingle those funds with company funds or use them for company expenses. PokerStars also holds licenses from Italy, France, Spain, Belgium, Denmark, and other countries. Throughout the period covered by the Complaint, approximately 75% of PokerStars' business was from players outside of the United States.

PokerStars began permitting U.S. players to use its site in December of 2001. Since then, the company has taken every necessary step to ensure that its U.S. players have a safe and enjoyable experience. PokerStars has always placed the interests of its players first, and has scrupulously adhered to all applicable rules and regulations relating to participants' money and game integrity.

After the Superseding Indictment and Complaint in this case were filed, PokerStars ceased providing services to U.S. customers and refunded their account balances. The

[5] A certificate of good standing certifies that PokerStars currently is compliant with all applicable laws, regulations, and terms of its license has been issued by the Isle of Man's Gambling Supervision Commission. Raman Decl. Ex. A-3. The Isle of Man is on the "White List," meaning that the United Kingdom recognizes "a robust regulatory environment" on the Isle. Gambling Commission, *Online mystery shopping programme*, 2 n.1 (July 2009), available at http://www.gamblingcommission.gov.uk/pdf/online%20mystery%20shopping%20programme%20july%202009.pdf.

Government has acknowledged that PokerStars can continue providing services to its worldwide customer base, which the company continues to do.[6]

SUMMARY OF ARGUMENT

The Complaint reads like a novel, invoking shady dealings and far-reaching conspiracies. But unlike pulp writers who enjoy literary license, the Government must honor the pleading standards of the Federal Rules of Civil Procedure. And that is where the Government's story breaks down: The Complaint fails to allege sufficient facts – grounded in valid legal theories – to justify its bold bid to seize more than $1.5 billion from PokerStars.

The Complaint suffers from three global flaws. *First*, it does not provide adequate detail to satisfy the heightened pleading requirements applicable to civil forfeiture and fraud actions. This vagueness fails to do what pleading rules require: Let PokerStars know what it is alleged to have done wrong so that it can marshal its defense. *Second*, the Complaint fails to state a legally viable theory of how PokerStars violated the IGBA, 18 U.S.C. § 1955, the wire and bank fraud statutes, 18 U.S.C. §§ 1343-44, and the money laundering statutes, 18 U.S.C. §§ 1956-57. *Third*, although the Government admits that PokerStars operated legally throughout the world – and has implicitly conceded that it has lawfully provided services in much of the United States – it seeks to seize *all* of PokerStars' assets without showing that this Court has *in rem* jurisdiction over those assets and without attempting to separate PokerStars' lawful income from the income that the Government alleges PokerStars earned through illegal activities.

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[6] *See* Letter Agreement between the United States and PokerStars Regarding Use of the PokerStars.com Domain Name, dated April 19, 2011 (Raman Decl. Ex. A-4). Cf. Isle of Man, Gambling Supervision Commission, GSC Statement Regarding PokerStars (Apr. 21, 2011), http://www.gov.im/gambling/ (last visited July 6, 2012) (confirming that PokerStars' licensing remains "unchanged" in the wake of the allegations in the United States).

Any of these three flaws standing alone would be fatal. Together, they show that the Government has grossly overreached in an attempt to cripple a legitimate international business. For the reasons that follow, the Government's claims fail as a matter of law and the Complaint must be dismissed with prejudice.

ARGUMENT

I. Legal Standards Applicable to this Motion

In a civil forfeiture action, "the burden of proof is on the Government to establish, by a preponderance of the evidence that the property is subject to forfeiture." 18 U.S.C. § 983(c)(1). When, as in this case, "the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense." § 983(c)(3).

The sufficiency of a civil forfeiture complaint is governed by the Federal Rules of Civil Procedure and the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions (the "Supplemental Rules"). Under Supplemental Rule G(2)(f), the complaint must "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Supp. R. Fed R. Civ. P. (hereinafter "Supp. R.") G(2)(f). The complaint also "must state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." Supp. R. E(2)(a).

The standards imposed by the Supplemental Rules "are more stringent than the general pleading requirements set forth in the Federal Rules of Civil Procedure," *United States v. Daccarett*, 6 F.3d 37, 47 (2d Cir. 1993), reflecting "the drastic nature of the civil forfeiture

remedy." *United States v. $1,399,313.74 in U.S. Currency*, 591 F. Supp. 2d 365, 369 (S.D.N.Y. 2008) (internal quotation marks and citation omitted). That means the Complaint must *surpass* the ordinary requirement that any complaint be well-pled and "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Even under the less stringent standard applied to *in personam* actions, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (quoting Fed. R. Civ. P. 8(a)(2)) (dismissing complaint despite possibility that plaintiff might prove his entitlement to relief). Here, the standard is higher. Whereas a complaint may ordinarily survive a motion to dismiss if its allegations show that entitlement to the demanded relief is *plausible*, a complaint seeking forfeiture can only survive if it is *reasonable* to believe that the Government *will* prevail at trial. *See* Supp. R. G(2)(f); *see also In re 650 Fifth Ave. & Related Properties*, 777 F. Supp. 2d 529, 542 (S.D.N.Y. 2011) (explaining that a civil forfeiture complaint must surpass ordinary pleading standards); *see also $1,399,313.74 in U.S. Currency*, 591 F. Supp. 2d at 376 (noting that the Government's conclusion that funds were subject to forfeiture "may in fact be true," yet dismissing the complaint as insufficiently pled).

The Government's fraud claims should face a still stricter standard. Under Rule 9(b) of the Federal Rules of Civil Procedure, a civil complaint alleging fraud must "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). This rule requires the Government to "(1) detail the statements (or omissions) that [it] contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." *Eternity Global Master Fund Ltd. v.*

Morgan Guar. Trust Co. of N.Y., 375 F.3d 168, 187 (2d Cir. 2004) (internal quotation marks and citation omitted).[7] And while the Court must accept as true all facts properly alleged in the Complaint, under both Rule 8 and Rule 9 that "tenet . . . is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949.

In addition to these stringent pleading requirements, the Complaint faces a heightened substantive standard. The Court must apply the rule of lenity when construing both the civil forfeiture statutes and the underlying criminal laws. *See County of Suffolk, N.Y. v. First Am. Real Estate Solutions*, 261 F.3d 179, 195 (2d Cir. 2001). As the Supreme Court recently explained:

> This venerable rule 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). Thus, should this Court find that either the civil forfeiture statutes or the underlying offense statutes are susceptible to multiple interpretations, "the tie must go to the defendant." *Id*. at 514.

II. This Court Should Dismiss the Gambling Allegations

The Government's first claim is that PokerStars violated the IGBA by providing real-money online poker services from the Isle of Man that were accessed by individuals in New York. This claim fails on its own terms, and its parallel forfeiture allegations fail because the

[7] Although this court has previously held – prior to the adoption of Supp. R. G and without binding precedent to guide it – that the heightened pleading standard of Rule 9(b) does not apply to forfeiture actions, its application is consistent with Supplemental Rule A(2) and Supplemental Rule G(1). The Federal Rules of Civil Procedure apply to forfeiture actions "except to the extent that they are inconsistent with the[] Supplemental Rules." Supp. R. A(2). And by its own terms, where Supp. R. G is silent – as it is regarding whether allegations of fraud require more specified pleading – the Federal Rules of Civil Procedure apply. Supp. R. G(1).

Complaint does not sufficiently allege that the property at issue was "used in violation" of the IGBA, 18 U.S.C. § 1955(d), or constitutes "proceeds" of such a violation. *Id.* § 981(a)(1)(C).

A. The Complaint Does Not Plead a Violation of the IGBA

The IGBA provides 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," and it permits seizure and forfeiture of "[a]ny property, including money, used in [an illegal gambling business]." 18 U.S.C. § 1955(a), (d). In relevant part, the IGBA specifies that an "illegal gambling business" is a "gambling business" that "is a violation of the law of a State or political subdivision in which it is conducted." *Id*. § 1955(b)(1). To establish that PokerStars violated the IGBA, the Government therefore first must prove that PokerStars is a "gambling business," and then that its existence violates "the law of a State or political subdivision *in which it is conducted*." *Id.* (emphasis added).

While the statute does not define "gambling business," it provides that the term "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." *Id*. § 1955(b)(2). Conspicuously, the IGBA never mentions poker, despite poker's popularity at the time of the statute's enactment in 1970. It also never mentions foreign businesses, or purports to criminalize the transmission of gambling information.

The IGBA has never before been used to prosecute foreign online poker operators, and the Government's attempt to broaden the statute to reach PokerStars' conduct is as flawed as it is unprecedented. For four reasons, the Government's IGBA claim must be dismissed. *First*, the IGBA allegations are too vague and speculative to satisfy the heightened pleading requirements that govern civil forfeiture actions. *Second*, the IGBA does not apply because PokerStars does

not "conduct" its business in the United States. *Third*, PokerStars is not a prohibited "gambling business" under the IGBA because poker does not constitute "gambling" under the statute. *Finally*, the New York gambling statute that the Complaint identifies as the predicate for the IGBA violation does not apply to PokerStars' operation of an overseas website.

1. The Gambling Allegations Are Too Vague and Speculative to Satisfy the Heightened Pleading Requirements Applicable to Forfeiture Actions

This Court should dismiss the Government's IGBA claim because the Complaint does not satisfy the heightened pleading standards applicable to civil forfeiture actions. *See* Supp. R. E(2), G(2). Indeed, the Complaint's gambling allegations are exceedingly vague. It asserts, without explanation, that Internet gambling is illegal in the United States. *See* Compl. ¶¶ 1, 34, and 47. But it offers little support for that claim, and this Court should not "credit legal conclusions couched as factual statements or threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *MSLMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 270 (2d Cir. 2011) (internal quotation marks and citation omitted).

The Complaint also fails to plead facts demonstrating a predicate state law violation. *See* 18 U.S.C. § 1955(b)(1)(i). In all 89 of its pages, the Complaint never identifies a state law that PokerStars violated. The closest the Complaint comes is to reference the Superseding Indictment, which identifies New York Penal Law § 225.00 and 225.05, "and the law of other states in which the business operated," as predicates. *See* Superseding Indictment ¶ 42. Neither the Indictment nor the Complaint, however, explain *how* PokerStars allegedly violated those sections of the New York Penal Law, or the law of any other state, except that the Indictment says, once, that PokerStars "facilitated online poker." *Id*. Again, the Government's conclusory allegations do not support anything more than speculation that it might be entitled to relief.

The Complaint's vagueness is problematic because it renders PokerStars unable to prepare a full defense. Because the Government appears to be reserving its right to establish an IGBA violation based on either the laws of New York or the laws of any state where PokerStars had customers, PokerStars faces an unreasonable burden: Identify the gambling regulations in every state and prepare a defense to every one just in case. Even limiting itself to New York, PokerStars must apparently guess which of its actions in the State – to the extent it had any – might have violated New York law under the Government's unarticulated theory.

The Complaint's failure to describe the alleged violation also casts doubt on the Government's ability to justify a forfeiture of over $1.5 *billion* – a colossal sum that threatens PokerStars' worldwide operations. Indeed, the same U.S. Attorney who brought this action advised defendants in the parallel criminal case that the Government is not pursuing claims of IGBA violations with respect to *forty* states. *See* U.S. Attorney's Letter to Counsel for Elie and Campos, Dated September 20, 2011, at 2 (Zornow Decl. Ex. A-5). And even with respect to the New York Penal Law, the failure to explain the alleged violation undermines the Government's claim because the scope of the violation will determine the scope of the permissible forfeiture.

These flaws, individually and together, require dismissal of the Complaint. The Complaint's vagueness prevents PokerStars, "without moving for a more definitive statement," to prepare its defense. *See* Supp. R. E(2)(a). And the Complaint does not state sufficient facts to support a reasonable belief that the Government will meet its burden of proof at trial. *See* Supp. R. G(2)(f). The Complaint thus fails to satisfy the pleading requirements applicable to a civil forfeiture action, and so the first claim for relief must be dismissed.[8]

[8] On February 7, 2012, Judge Kaplan issued a decision denying the defendants' motion to dismiss the Indictment in the related criminal action. *United States v. Elie*, No. S3 10 Cr. 336, 2012 WL 383403 (S.D.N.Y. Feb. 7, 2012). That decision is of little moment here, however, because the pleading standards for civil forfeiture

2. The IGBA Does Not Apply to PokerStars' Conduct Because the Statute Does Not Reach Overseas Activity

The text, structure, and legislative history of the IGBA establish that PokerStars – a lawful foreign enterprise with some customers that visit from the United States – is not an "illegal gambling business" under the statute.

By its terms, the IGBA applies only to businesses that operate domestically; it does not apply extraterritorially to businesses conducted abroad. The statute is triggered only when a gambling business "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) (emphasis added). This language limits the statute's sweep to U.S. states and political subdivisions, as opposed to foreign jurisdictions.

Because PokerStars' business is not conducted in the United States, the first claim for relief should be dismissed. The Complaint does not allege that PokerStars has any employees, infrastructure, or other interest in New York other than its customers. To the contrary, the Government alleges that PokerStars' business is headquartered abroad, in the Isle of Man; that it "keep[s its] computer servers, management and support staff offshore;" and that its Internet domain is hosted in the United Kingdom.[9] No part of the Complaint alleges that PokerStars has any tangible presence in the United States. Instead, all the Complaint alleges is that bettors located in New York used computers to access the website www.PokerStars.com (hosted

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complaints are far more stringent than the standards applicable to indictments. An indictment "need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992). Consequently, there is "no summary judgment in criminal cases." *Elie*, 2012 WL 383403, at *1. Applying that permissive standard – which Judge Kaplan stated was "[p]aramount in evaluating" the motions before him – the Court held that the Indictment survived. Id. A civil forfeiture complaint, however, must do far more to receive the same solicitude. The complaint must demonstrate not only that the Government might be able to prove its case, but it must also "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial." Supp. R. G(2)(f).

[9] *See* Superseding Indictment ¶ 4 (incorporated by reference at Compl. ¶ 9); Karaka Decl. ¶ 7; Compl. ¶ 63.

offshore), played games (on those offshore servers), and transferred money into and out of their PokerStars accounts (also offshore). Compl. ¶¶ 60-61.

As a matter of law, these allegations are insufficient to establish that PokerStars' business was "conducted" in New York. The Supreme Court has already concluded that bettors do not "conduct" business under the IGBA. In *Sanabria v. United States*, 437 U.S. 54, 70-71, n.26 (1978), the Court examined IGBA subsection (a), which applies to anyone who "conducts . . . an illegal gambling business." The Court explained that the IGBA does not proscribe the actions of bettors. *Id.* at 70-71, n.26. It follows that the word "conducted" in subsection (b)(1) also excludes the actions of bettors. *See, e.g.*, *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998) ("[S]imilar language contained within the same section of a statute must be accorded a consistent meaning."). Although some of PokerStars' *customers* reside in the United States, all of *the company's* actions occur abroad, and therefore are not "conducted" here as required by the IGBA. *See United States v. Ayo*, 801 F. Supp. 2d 1323, 1329-30 (S.D. Ala. 2011) (holding for purposes of venue that online gaming site "accept[ed]" bets in the location where the site received payments, not the location(s) from which the bettors sent payments). *See also United States v. Truesdale*, 152 F.3d 443, 447 (5th Cir. 1998) (holding that the receipt and processing of bets from U.S. customers by offshore bookmakers took place offshore).

The IGBA's legislative history reflects the limitation imposed by its text. Enacted as part of the Organized Crime Control Act of 1970, the IGBA's target was syndicated gambling in America's cities, not licensed, regulated, overseas businesses. Indeed, the IGBA was drafted by the Department of Justice to fill a "loophole" in then-existing gambling regulation. *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Crim. Laws & Procedures of the S. Comm. on the Judiciary*, 91st Cong., 1st Sess. 382-83 (1969) (Statement of Will Wilson,

Asst. Att'y Gen.) (hereinafter "*Senate Hearings*"). Earlier federal gambling statutes, specifically the Wire Act, 18 U.S.C. § 1084, the Travel Act, 18 U.S.C. § 1952, and the Paraphernalia Act, 18 U.S.C. § 1953, all required the Government to prove that some interstate activity had taken place. As a result, federal authorities were unable to target intrastate operations – particularly large "numbers" rackets – which siphoned money from poor communities to organized crime, but did not include an interstate component. *Senate Hearings* at 383; *see also Organized Crime Control: Hearings before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong., 2d Sess., 156-57 (1970) (Statement of John N. Mitchell, Att'y Gen. of the United States) (hereinafter "*House Hearings*")

The Department of Justice sought a solution to this singular problem. It therefore asked Congress to find that organized crime and illegal gambling have an effect on interstate commerce *per se*, and to pass the IGBA so that federal authorities could pursue intrastate gambling operations. William Hundley, who had served for seven years as the head of the Organized Crime and Racketeering Section at the Department of Justice, confirmed the narrow purpose and reach of the statute in testimony before the Senate:

> [P]robably the *only* area where [the IGBA] would be helpful would be in getting at big numbers rackets, because . . . some of the really big numbers operations, particularly in a place like New York, can be, by the nature of the operation, self-contained . . . and you could use this new [statute] against those.

Senate Hearings 425 (Statement of William Hundley) (emphasis added). Hundley emphasized that "I don't see that it would be really of much use otherwise in the gambling area." *Id.* In urging Congress to pass the statute, the Attorney General was likewise emphatic that that the statute "is an anti-racketeering measure only and, if enacted, will be enforced by the Department of Justice strictly in accord with its legislative purpose." *House Hearings* 170 (Statement of John N. Mitchell).

The import of these statements cannot be overstated. As a recent memorandum by the Office of Legal Counsel discussing the limited reach of the Wire Act reveals, legislative history plays a critical role in determining the proper meaning of federal gambling law. *See generally* Office of Legal Counsel, U.S. Dep't of Justice, *Whether proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults violate the Wire Act* (Sept. 20, 2011) (hereinafter "OLC Memo," attached as Zornow Decl. Ex. A-6). The OLC Memo addressed whether, given its ambiguous text, the Wire Act applies to all bets or wagers, or only to those related to sporting events or contests.[10] For decades, the Government had taken the expansive position that it could prosecute *all* bets or wagers under the Wire Act.[11] Yet after examining the legislative history, which – like the IGBA – demonstrated Congress's intent to apply the statute narrowly, OLC reached the conclusion that "interstate transmissions of wire communications that do not relate to a sporting event or contest fall outside of the reach of the Wire Act." OLC Memo at 1 (internal quotation marks omitted). Similarly here, the IGBA's legislative history confirms what the statute's text already makes clear: the IGBA applies to domestic gambling operations and not to lawful foreign businesses like PokerStars.

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[10] The Wire Act provides that "[w]hoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest . . . shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C. § 1084(a).

[11] The fact that the Government has now reversed course to adopt the narrower view of the Wire Act reinforces just how broadly the Government is over-reaching in the instant case. Indeed, before the OLC Memo, the Criminal Division had – mistakenly, we now learn – aggressively pursued indictments and civil forfeiture of hundreds of millions of dollars premised on Wire Act violations in an array of cases, including cases involving online poker. See, *e.g.*, Complaint at 4, *United States v. $6,637,076.23 in U.S. Currency Funds Previously on Deposit at Goldwater Bank in Scottsdale, Ariz., in Account No. 160201, Held in the Name of Allied Wallet, Inc.*, No. 10-cv -6169 (S.D.N.Y. Aug. 17, 2010) (online poker case); Superseding Information at 2, *United States v. Rennick*, No. 1:09-cr-00752 (S.D.N.Y. May 11, 2010) (charging Wire Act violations for payments made related to "poker, blackjack, slot machines, and other casino games"); Information at 2, *United States v. Dikshit*, No. 1:08-cr-01265 (S.D.N.Y. Dec. 16, 2008) (charging Wire Act violation for operation of online casino and poker).

Nor does the statute's purpose permit stretching the text that Congress enacted to reach an entity like PokerStars, which operates in the light of day. Unlike the organized crime entities targeted by the IGBA, PokerStars has operated openly, responsibly, and under the supervision of sophisticated gaming regulators. Its operations do not implicate the IGBA's purposes.

In addition to the IGBA's text, legislative history, and purpose, the structure of federal gambling law likewise demonstrates that the IGBA does not apply. In contrast to the limited terms of the IGBA, Congress enacted other statutes – such as the Wire Act, the Travel Act, 18 U.S.C. § 1952, and the Paraphernalia Act, 18 U.S.C. § 1953(a) – to target the movement "in interstate or *foreign* commerce" of gambling related information, personnel, and paraphernalia. That is why, in the most significant Internet gambling prosecutions to date, the Government charged the defendants with violations of those statutes, and not the IGBA. *See* note 10, *supra*; *United States v. Cohen*, 260 F.3d 68, 78 (2d Cir. 2001) (upholding Wire Act conviction for online gaming executive); *United States v. Corrar*, 512 F. Supp. 2d 1280, 1282 (N.D. Ga. 2007) (also charging Travel Act violation for entering United States). But the fact that other gambling statutes do not apply here cannot justify stretching the IGBA to reach PokerStars' conduct.

The clearest evidence of the IGBA's inapplicability lies in Congress's decision in 2006 to enact the Unlawful Internet Gambling Enforcement Act ("UIGEA") – a criminal prohibition targeting Internet gambling. Congress explained that the UIGEA was necessary because existing "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). Because the IGBA was one of those existing "law enforcement mechanisms," UIGEA's enactment suggests that Congress's understanding was that the IGBA

does not apply to Internet gaming companies that conduct their operations outside the United States.

To the extent there is ambiguity about the IGBA's application to offshore Internet businesses, a number of doctrines – including the presumption against extraterritoriality and the rule of lenity – counsel against such application. Starting with the presumption against extraterritoriality, a statute will not be read to criminalize extraterritorial activity absent a clear statement of congressional intent, particularly where the conduct in question is legal where it occurs. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). Thus, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. Nat'l Austl. Bank, Ltd.*, 130 S. Ct. 2869, 2878 (2010). The present case illustrates the concerns behind this rule. The IGBA (1) makes no mention of foreign businesses, (2) does not provide that the transmission of information to customers in the United States amounts to "conducting" business in the United States, and (3) has never been used to prosecute such activity. To award the Government the sweeping forfeiture it seeks would be to expand the IGBA beyond Congress's intent in conflict with firmly established canons of construction.[12]

The Supreme Court's holding in *Morrison* forecloses any argument that the presumption against extraterritoriality is inapplicable even if the Government adopts the argument that the relevant conduct in this case actually occurred domestically. In *Morrison*, the Court held that the Securities Exchange Act did not apply to the sale of securities via a foreign exchange *even when*

[12] When courts have upheld IGBA charges against businesses with foreign operations, those businesses also had significant domestic operations, so the question at issue here was not presented. *See, e.g., United States v. Gotti*, 459 F.3d 296, 315-17 (2d Cir. 2006) (noting that the defendants resided in New York, and had operated local branch of an offshore gambling business); *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 forfeiture arose because of conduct in New Jersey). This Court itself recently deferred judgment as to whether IGBA has extraterritorial application. *See Gamoran v. Neuberger Berman Mgmt. LLC*, No. 10-cv-6234 (LBS), 2010 WL 4537056, at *4, n.2 (S.D.N.Y.), *reconsideration denied*, 2011 WL 476620 (S.D.N.Y. Feb. 9, 2011).

the purchasers resided in the United States. *Morrison*, 130 S. Ct. at 2885; *see also Absolute Activist Value Master Fund Ltd. v. Ficeto*, No. 11-cv-0221, Slip Op. at 14 (2d Cir. Apr. 13, 2012) (holding that in order for a sale of securities to be regarded as "domestic" under *Morrison*, it was not sufficient that the broker-dealer was in the United States, nor was it sufficient that the securities were issued by U.S. companies and registered with the SEC). Rejecting the argument that the conduct was in fact domestic, the Court explained that "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." *Morrison*, 130 S. Ct. at 2884 (emphasis original). Because the "focus" of the statute was on domestic transactions, the Court held that it did not apply to foreign ones. *Id*. The same reasoning controls here: the focus of the IGBA is undoubtedly on *intrastate* gambling businesses operated by domestic organized crime groups. The presence of U.S. customers does not justify the application of the IGBA to PokerStars' foreign poker games any more than the presence of U.S. purchasers justifies the application of the Exchange Act to foreign securities transactions.[13]

The same conclusion follows from the rule of lenity. *See* Part I, *supra*. The IGBA is a penal statute that imposes liability only on businesses that are "conducted" in the United States. To the extent that the meaning of the word "conducted" is ambiguous, this Court must adopt the narrower interpretation of the statute, and read it to require that at least some part of the alleged gambling *business* – *e.g.*, offices, employees, equipment, or incorporation – as opposed to the business's *customers*, be located in the United States. Any broader reading would fail to give

[13] Although *Morrison* itself dealt only with securities laws, the holding of that case extends to every statute that is silent with regard to its extraterritorial application. *See, e.g., Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32-33 (2d Cir. 2010) (holding that Morrison determines the extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et. seq.).

foreign businesses "fair warning of the conduct prohibited by the statute . . . that makes . . . a [criminal] sanction possible." *First Am. Real Estate Solutions*, 261 F.3d at 195.

3. Online Poker Does Not Constitute "Gambling" Under the IGBA

The first claim for relief should be dismissed for the independent reason that PokerStars is not a "gambling business," and so it cannot qualify as an "illegal gambling business" under the IGBA. The IGBA does not define a "gambling business," but the statute's definition of "gambling" provides that it includes, but is not limited to, nine activities – "pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games." 18 U.S.C. § 1955(b)(2). Notwithstanding the widespread popularity of poker at the time of the IGBA's enactment, Congress excluded it from the list of prohibited gambling activities.

The nine games that Congress listed provide a framework that limits the IGBA's definition of "gambling" to games that are similar in kind. "Under the common sense approach to interpreting a general provision in the light of a list of specific illustrative provisions, *ejusdem generis,* we construe the general term . . . to include only things similar to the specific items in the list." *Molloy v. Metro. Transp. Auth.*, 94 F.3d 808, 812 (2d Cir. 1996). Additionally, the canon of *noscitur a sociis*, which means that "a word is known by the company it keeps," *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370, 378 (2006), "is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

The Supreme Court recently applied this principle to a similar statute in *Begay v. United States*, 553 U.S. 137 (2008). In that case, the Court considered the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924, which imposes enhanced criminal penalties for firearm violations

on defendants previously convicted of "violent felonies." The ACCA defines a "violent felony," in part, as "any crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). The defendant had been previously convicted of driving under the influence, and the Government argued that his offense constituted a "violent felony" because it involved conduct that presents a serious potential risk of physical injury to another.

The Court rejected this argument. It reasoned that "the provision's listed examples – burglary, arson, extortion, or crimes involving the use of explosives – illustrate the kinds of crimes that fall within the statute's scope. Their presence indicates that the statute covers only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'" *Begay*, 553 U.S. at 142 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). The Court reasoned further that if Congress had intended the statute to cover *every* risky crime, and thus make the statute "all-encompassing, it is hard to see why it would have needed to include the examples at all." *Id*. Applying the well-settled rule that courts must give meaning to every word of a statute, the Court reasoned that "we should read the examples as limiting the crimes that [the ACCA] covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." *Id*. at 143. The Court thus held that even though driving under the influence poses a serious risk of physical injuries to others, it could not constitute a violent felony under the ACCA. *Id*. at 147-48.

Under the reasoning of *Begay*, the IGBA's reach must be limited to games that are similar to the ones that Congress expressly included. Otherwise, "it is hard to see why

[Congress] would have needed to include the examples at all." *Id*. at 142. The nine enumerated games share two key traits that constrain the statutory definition of "gambling."

First, the enumerated games are games of chance; the players have no control over the events that determine whether they win or lose. For example, in pool-selling and bookmaking, players cannot control the underlying sporting events. Nor can players will the roulette wheel to stop on 00, or halt the slot machine's gears at 7-7-7, or manipulate the dice to come up 6-6 on every roll. So too with lotteries, policy, bolita, and numbers – where the players exercise no control over the drawing that determines the winners. The common denominator in all these games is that uncontrollable variables are the *sole* determinants of the players' success in the game. They are, in short, nothing but games of pure chance. Even if the players can exercise some skill in, for example, betting on a team that they believe is likely to win, or adopting a betting pattern at a dice table that is likely to limit their losses, the players have no control whatsoever over the outcome of the game itself.

Second, the listed games are house-banked games, lotteries, or sports betting. In house-banked games, the house plays against the customers, and it retains an "edge" that ensures it prevails over the players over the long run. House-banked games generate significant revenue for gaming enterprises, and also raise unique regulatory concerns because the house's interest in the outcome of the game creates an incentive for it to cheat or deceive its players. Congress and many state legislatures have recognized the crucial distinction between house-banked and non-house-banked games, and have subjected the former to more intense scrutiny. *See, e.g.*, Indian Gaming Regulatory Act, 25 U.S.C. §§ 2703(7)(A)(ii), 2703(7)(B)(i) (providing that house-banked card games receive more stringent regulatory treatment); Cal. Penal C. § 330 (prohibiting "any banking . . . game played with cards, dice, or any device"). Lotteries constitute a separate

category of games that historically have been subject to enhanced regulation. "States have long viewed [lotteries] as a hazard to their citizens and to the public interest, and have long engaged in legislative efforts to control this form of gambling. Congress has, since the early 19th century, sought to assist the States in controlling lotteries." *United States v. Edge Broad. Co.*, 509 U.S. 418, 421 (1993). Sports betting is a game in which the house sets odds that favor it and in which the player cannot control the outcome of the event being wagered upon.

The Internet poker games hosted on PokerStars' servers share none of these traits. Internet poker is not a house-banked game, lottery, or sports betting, but a peer-to-peer game in which the players match wits with each other. Also unlike the enumerated games, poker is played on a level field where no party has an "edge," other than their own skill. Moreover, poker players, unlike the bettors in the enumerated games, influence or control the outcome of the game, and can prevail without revealing or relying on chance events (*i.e.*, the deal of the cards) – for instance, by bluffing. This means that poker is not a game of pure chance.[14] Indeed, the Government has already acknowledged that Internet poker is not a pure game of chance in its letter to counsel in the parallel criminal case, which stated that "[i]t is not the Government's intention to argue that poker violated the law of any state that applies a 'preponderance of chance' test to whether an activity involving both skill and chance is gambling . . . ." Zornow Decl. Ex. A-5 at 3.

[14] Importantly, defendants are not presently arguing that Internet poker is different from the enumerated games because it requires more skill (although it does). Rather, defendants argue that Internet poker is different because skill plays a qualitatively different role in poker than it does in games that the IGBA describes as "gambling." In the listed games, the players use their skills to play the odds. But in poker, the players use their skills to change the odds themselves, and thereby counteract and occasionally thwart the influence of chance in the game. Poker is therefore like playing golf for a prize, while the enumerated games are like betting on the outcome of a professional golf match.

These distinctions – between house-banked games and peer-to-peer games, and between games of chance and games of skill – are dispositive for purposes of determining the IGBA's reach. By listing nine games that are house-banked or pure games of chance, Congress carefully crafted a definition of "gambling" that does not extend to poker. That poker is properly excluded from the IGBA's definition of gambling is reinforced by the fact that the game was well known at the time the statute was enacted. If Congress had wished to include poker in its definition of "gambling," it certainly could have. But it did not. Instead, members of Congress identified a range of games that generated significant revenues for organized crime entities, including numbers, betting on horse racing and sporting events, lotteries, dice games, and illegal casinos. *See* 116 Cong. Rec. 590 (1970) (statement of Sen. McClellan); *see also* President's Commission on Law Enforcement & Administration of Justice, *The Challenge of Crime in a Free Society* 188 (1967). Just as there was no evidence in the legislative history of the Wire Act that that statute was designed to cover non-sports related bets or wagers, neither was there discussion in the IGBA's legislative history suggesting that poker games or their operators were targets. That omission is particularly telling given that Congress went out of its way to identify more obscure games like bolita. The IGBA's definition of "gambling" does not include poker, and because PokerStars has never offered any other game, this Court should dismiss the first claim for relief.

4. Neither New York Gambling Law Nor the Gambling Laws of the "Other States" Alluded to by the Government Reach Overseas Activity

Independently, the first claim should be dismissed because online poker does not violate the only state law even potentially alleged to be a predicate to the IGBA claim – New York's Penal Law § 225.05. Like the IGBA, Section 225.05 does not purport to apply to businesses located in foreign jurisdictions. The statute provides that "[a] person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling

activity." N.Y. Penal Law § 225.05. Neither this section nor the statute's definitions of "advance gambling activity" or "profit from gambling activity" ever mention application beyond the borders of New York. N.Y. Penal Law § 225.00. Like the federal courts, New York applies both the rule of lenity and the "settled rule of statutory interpretation, that unless expressly stated otherwise, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state . . . enacting it." *Goshen v. Mutual Life Ins. Co. of N.Y.*, 730 N.Y.S.2d 46, 47 (N.Y. App. Div. 1st Dep't 2001) (internal quotation and citations marks omitted), *aff'd*, 774 N.E. 2d 1190 (N.Y. 2002).

Finally, to the extent that the New York Penal Law is ambiguous with regard to its extraterritorial application, the presumption against extraterritoriality and the rule of lenity, discussed in Part II.A.2., *supra*, compel the conclusion that the statute does not apply to businesses like PokerStars.

In sum, the Complaint does not allege that PokerStars did anything *in* New York that would give rise to liability, and PokerStars' foreign activities are not subject to the New York Penal Law.[15] As a result, the Government cannot establish a predicate offense under state law under the IGBA and the first claim for relief should be dismissed.[16]

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[15] Although this subpart addresses only whether the New York Penal Law applies to foreign businesses, PokerStars does not concede – and in fact contests – that poker qualifies as "gambling" under Section 225.00 of the New York Penal Law. Amicus Poker Players Alliance will expand on the argument that poker is not gambling in New York because skill predominates over chance in determining the outcome of the game. PokerStars joins in that argument.

[16] To the extent the Government may attempt to prove a predicate state law violation based on other state gambling laws that it has failed to identify in the Complaint, such an attempt would fail not only because the governing pleading standards do not permit it, but also because so far as PokerStars is aware, no state targets the extraterritorial conduct at issue in this case.

B. The IGBA Forfeiture Allegations Also Should Be Dismissed Because the Complaint Does Not Allege Facts Demonstrating that the Property at Issue Is Subject to Forfeiture Under the IGBA

The gambling forfeiture claim impermissibly overreaches for another reason. The Government has not met its burden to plead facts demonstrating that the property it seeks is actually subject to forfeiture, *i.e.*, that the property constitutes proceeds traceable to illegal gambling, or that the property has a "substantial connection" to unlawful activity. *See* 18 U.S.C. § 983(c)(1), (3), Supp. R. G(2). The Government has failed to meet its burden for two reasons.

First, the Government seeks forfeiture of all of PokerStars' assets, but this Court lacks jurisdiction over properties located outside the United States.

Second, forfeiture of PokerStars' assets – either as property "used in violation" of the IGBA or as "proceeds" or property "derived from" proceeds traceable to an IGBA violation – is impermissible because the Government has not pled the requisite nexus between the properties and the alleged underlying offenses. Under the civil proceeds forfeiture statute, only property "obtained" or "acquired" as a result of unlawful activity is subject to forfeiture. 18 U.S.C. §§ 981(a)(1)(C), (a)(2). As a result, "[w]hen a business has both lawful and unlawful aspects, only the income attributable to the unlawful activities is forfeitable." *United States v. Hodge*, 558 F.3d 630, 635 (7th Cir. 2009). Thus, income from PokerStars' worldwide business and its players' lawful activities in the United States is not subject to forfeiture as "proceeds" of illegal gambling. Similarly, when "the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense." 18 U.S.C. § 983(c)(3). Property that was not used to commit an offense does not exhibit the necessary "substantial connection." *See $1,399,313.74 in U.S.*

Currency, 591 F. Supp. 2d at 369, 373-74 (dismissing civil forfeiture claim for failure to satisfy substantial connection requirement).

Under these controlling principles, the IGBA forfeiture allegations fail because they overlook a crucial, undisputable fact: PokerStars is a licensed, regulated, and compliant business in the Isle of Man and other jurisdictions, which legally serves hundreds of thousands of customers worldwide. The Government cannot credibly assert that *all* of PokerStars' assets are subject to forfeiture when the only alleged violation of the IGBA is, at most, that PokerStars ran afoul of a New York misdemeanor gambling statute.

Independently, the statute of limitations bars the Government's claim, at least with regard to a significant percentage of the assets it seeks. The limitations period is five years from the time that the alleged offense was discovered, or two years from the time that specific property was known to be connected to an offense. PokerStars has openly served U.S. players since 2001. Thus, to the extent that PokerStars' activities violated the IGBA, the United States knew or should have known of the violation in 2001, and its claim to forfeiture based on that violation is time-barred with respect to all or almost all of PokerStars' assets.

1. The Complaint Impermissibly Seeks Forfeiture of Property Outside this Court's Jurisdiction

The Government seeks the forfeiture of all of the assets of PokerStars, which comprises entities registered in British territories – the Isle of Man, Gibraltar, and the British Virgin Islands. *See* Complaint Schedule A, at 1. The forfeiture claims should be dismissed as to all of these non-U.S. assets because the Government has not established that these properties are within this Court's "actual or constructive control" and thus subject to its *in rem* jurisdiction. *United States*

v. All Funds on Deposit in any Accounts Maintained in Names of Meza or De Castro, 63 F.3d 148, 153 (2d Cir. 1995) ("*Meza*").[17]

In *Meza*, the Second Circuit held that control over property was an essential prerequisite to *in rem* jurisdiction. *Meza*, 63 F.3d at 153. Recognizing that property in foreign countries lies beyond the "actual control" of U.S. district courts, the court considered the circumstances in which a district court might nevertheless exercise "constructive control" over the property. *Id*. The court concluded that the district court had constructive control because the government of the United Kingdom, where the relevant property resided, had responded to U.S. requests to remit the property. *Id.* at 153. British authorities had done so because of a mutual assistance treaty whereby the United Kingdom had agreed to assist the United States "in proceedings involving the freezing, seizure or forfeiture of the proceeds and instrumentalities of drug trafficking." *Id*.

Unlike in *Meza*, the Government does not purport to have control over PokerStars' foreign assets, the vast majority of which are located in the Isle of Man.[18] Putting aside the fact that the Government has not pled adequate facts to demonstrate control, a requirement under the Supplemental Rules. Supp. R. G(2) (stating that the "complaint must ... state the grounds for subject-matter jurisdiction, in rem jurisdiction over the defendant property, and venue"). It is unclear that the Government *could* establish control over the assets. The United Kingdom has

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[17] The Second Circuit has rejected the broader theory of forfeiture jurisdiction adopted by some other circuits. *See Meza*, 63 F.3d at 152. But jurisdiction would be lacking even under a more lenient standard because the Government has not established that PokerStars engaged in activity in the Southern District of New York that would trigger forfeiture.

[18] The Government sought the forfeiture of and restrained four specifically enumerated accounts in Luxembourg and Switzerland and obtained an arrest warrant *in rem* for the PokerStars.com domain name. See Compl. Schedule A; Arrest Warrant in Rem. PokerStars does not contest *in rem* jurisdiction as to those assets or the domain name.

entered into a mutual legal assistance treaty with the United States requiring that before any assets will be seized and remitted, the underlying offense for which forfeiture is sought must be criminal under the law of *both* the United States and the United Kingdom. *See* Mutual Legal Assistance Guidelines for the United Kingdom 21 (8th ed. Apr. 1, 2010). Therefore, unlike *Meza*, which involved specific agreements relating to drug enforcement and demonstrated cooperation from United Kingdom authorities, here because the Government has not even alleged (let alone established) that Internet poker is illegal in any British territories, it cannot establish the dual criminality that could result in this Court having "constructive control" over any of PokerStars' unrestrained foreign assets. In any event, regardless of whether there is dual criminality, without actual or constructive control over the foreign defendant properties, the Court lacks *in rem* jurisdiction over them. The Government's claim to those assets should be dismissed.[19]

2. The Gambling Forfeiture Allegation Does Not Entitle the Government to Forfeiture of PokerStars' Assets

The Complaint seeks forfeiture of all of PokerStars' assets as property "used in violation" of the IGBA. *See* Compl. ¶ 123. As the Complaint acknowledges, PokerStars comprises several entities. *See* Compl. ¶ 21; *id*. Schedule A. Aside from naming these entities in the definition of PokerStars and alleging that bank accounts held by three of them (Oldford Group, Stelekram, and Sphene) have received funds transfers from U.S.-based payment processors, the Complaint never explains *how* the assets of these myriad entities are connected to IGBA violations. That dooms the Government's claim as to the assets of these entities.

[19] Because this jurisdictional argument relates to the nature of the assets, and not to the nature of the Government's claim, it applies with equal force to the Government's second and third claims for relief insofar as they seek assets located abroad.

The Government has not pled that providing poker services to players around the world (but outside of New York) violated New York law or the IGBA, and so the Complaint effectively concedes that PokerStars' non-U.S.-facing business cannot form the basis for forfeiture. Indeed, the Government has effectively conceded in the parallel criminal proceeding that the majority of state gambling statutes are ambiguous on whether they apply to Internet poker. *See supra* Part II.A.1. Under the applicable "substantial connection" test, the Government must plead not only that particular entities and assets were connected with PokerStars in general, but that they had some nexus with the allegedly unlawful portion of PokerStars' operations. *See $1,399,313.74 in U.S. Currency*, 591 F. Supp. at 369, 373-74 (dismissing civil forfeiture claim for failure to satisfy substantial connection requirement); *cf. Twombly*, 550 U.S. at 556-57 (holding that allegations of conduct which were consistent with conspiracy, but also lawful behavior, were not sufficient to support a claim for relief). Because the Complaint does not identify which parts of the company were used for illicit purposes, the IGBA forfeiture claim for PokerStars' assets must fail.

3. The Gambling Forfeiture Allegation Does Not Entitle the Government to the Funds in the Named Accounts

The Government also seeks forfeiture of all funds held in four enumerated bank accounts, as well as PokerStars' funds held in accounts of payment processors, on the theory that these accounts were "used in violation" of the IGBA or that the funds constitute proceeds of illegal gambling. Compl. ¶¶ 124-25, Schedule A, B (listing account numbers). The declaration of Agent Karaka, incorporated into the Complaint, asserts that the named PokerStars accounts received wire transfers from payment processors at various points in time. *See* Karaka Decl. ¶¶ 27-30.

The Government has not alleged, nor can it, that *all* of the funds held in the accounts were "used in violation" of the IGBA. It has not even alleged that all of the funds in the accounts

came from the United States, let alone New York. Nor has it alleged that all of the funds came from players. Indeed, even assuming that the funds came from U.S. players, the Government has not pled facts sufficient to demonstrate that the funds came from players in the ten states in which the Government is pursuing its IGBA claims. *See* Zornow Decl. Ex. A-5 at 1. Because it is the Government's burden to prove that the funds were obtained unlawfully, and not PokerStars' burden to show that they were obtained through lawful means, *see United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 77 (2d Cir. 2002) ("It must be remembered that what is adjudicated in a judicial civil forfeiture proceeding is the *government's* right to the property, not the claimant's."), the Government's claim must fail. The well-pleaded facts show neither that the funds in the named accounts are tainted nor that they were used to facilitate the allegedly unlawful portion of PokerStars' business.

Even if the Government had adequately pled that the relevant accounts contain player funds from New York, the Government is not entitled to wholesale forfeiture of the accounts or all of the funds in them. First, the forfeiture statutes authorize the forfeiture of "property." 18 U.S.C. §§ 983(a)(1)(C), 1955(d). But bank accounts are not property: "An 'account' is a name, a routing device like the address of a building; the money is the 'property.'" *United States v. $448,342.85*, 969 F.2d 474, 476 (7th Cir. 1992). Thus, the Government cannot seek forfeiture of the account as a whole – it instead must justify the forfeiture of particular funds. Because the Complaint does not identify which funds, if any, were unlawfully obtained, its claims to the funds in the enumerated accounts should be rejected.

Second, to the extent that the funds constitute player deposits, and the Government has not alleged otherwise, these funds are not "proceeds" of illegal gambling, or funds "used in violation" of the IGBA. As the Government acknowledges, PokerStars collects revenue in only

one way: it takes a fee known as a "rake" from each real-money pot or tournament entry fee. *See* Compl. ¶ 4. The Complaint thus concedes that the players' deposits – which PokerStars did not itself acquire, and which were refunded to the players – were not "proceeds." Which it must, because for funds to be "proceeds," PokerStars must have "obtained" them. 18 U.S.C. § 981(a)(2)(A). The ordinary meaning of the word "obtain" is "get something that you want or need, especially by going through a process that is difficult." MacMillan Dictionary, available at http://www.macmillandictionary.com/dictionary/american/obtain. In the related context of the Hobbs Act, the Supreme Court has held that in order to "obtain" property, one must "pursue[] or receive[] something of value . . . that they could exercise, transfer, or sell." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 405 (2003) (internal quotation marks omitted); *see also United States v. Rutledge*, 437 F.3d 917, 922, *withdrawn as moot* 448 F.3d 1080 (9th Cir. 2006) (holding that merely having control over funds is not sufficient to show that the defendant "obtained" them).

With regard to the accounts identified in the Complaint, the Government has not pled that PokerStars ever acquired the sort of dominion over the funds that would enable this Court to conclude that it "obtained" them. The terms of PokerStars' license and the laws governing its operations provide that participants' money, defined to include all "deposits, winnings, transfers, gratuities and redeemed bonuses," must be paid into a client account and "must be held on trust for the participant entitled to it." Isle of Man Gambling Supervision Commission, Online Gambling (Participants' Money) Regulations 2010, §§ 3.1, 4.2. The Complaint does not allege that PokerStars ever breached these obligations. Nor has the Government pled that these accounts contain anything other than player funds. As a result, the Complaint alleges neither that PokerStars nor that the payment processors "obtained" the funds. Indeed, to apply the word

"obtain" to the actions of a trustee receiving and holding funds for a beneficiary would disregard the plain meaning of the term, and violate the rule of lenity. *Cf. Scheidler*, 537 U.S. at 403 n.8 ("Surely if the rule of lenity, . . . means anything, it means that the familiar meaning of the word 'obtain' – to gain possession of – should be preferred to the vague and obscure 'to attain regulation of the fate of.'").

4. The Statute of Limitations Precludes Forfeiture

The Government's ability to recover for gambling violations is also barred by the statute of limitations. Both the general civil forfeiture statute, 18 U.S.C. § 981(a)(1)(d), and the IGBA's forfeiture provision, 18 U.S.C. § 1955(d), incorporate the statute of limitations from the customs laws. That standard provides that any forfeiture action must be "commenced within five years after the time when the alleged offense was discovered, or in the case of forfeiture, within 2 years after the time when the involvement of the property in the alleged offense was discovered." 19 U.S.C. § 1621.[20] Multiple courts of appeals have concluded that this rule applies a "known or should have known standard," so that the statute begins to run when the Government has the means to discover the alleged wrongdoing. *See United States v. James Daniel Good Prop.*, 971 F.2d 1376, 1381 (9th Cir. 1992) (citations omitted), *aff'd in part and rev'd in part on other grounds* 510 U.S. 43 (1993); *United States v. $515,060.42 in U.S. Currency*, 152 F.3d 491 (6th Cir. 1998).

[20] The Government will likely argue that 19 U.S.C. § 1621(2) would serve to toll the statute of limitations for the period during which the PokerStars assets were "absent" from the United States. But here the statute should not be tolled because the PokerStars assets were never present in the United States, and thus could not later have been absent from it. *See* MacMillan Dictionary, available at http://www.macmillandictionary.com/dictionary/american/absent (defining absent as not in the place where you should be or are expected to be). While some cases hold that presence is not a precondition for absence, they should be rejected by this Court as unpersuasive authority. *See, e.g., United States v. All Funds in Account Nos 747.034/278 (Banco Espanol de Credito)*, 295 F.3d 23, 27 (D.C. Cir. 2002).

In *$515,060.42 in U.S. Currency*, the defendant had operated an unlawful bingo business up until the time that a criminal indictment and civil complaint were filed against her, and the Government had evidence of the violation for more than five years. The district court dismissed the Government's claim on statute of limitations grounds, and the Government appealed, arguing that "there was a continuing violation of gambling laws and that the currency seized was from relatively recent bingo operations and therefore the statute of limitations had not run." *$515,060.42 in U.S. Currency*, 152 F.3d at 502. The court rejected that argument, holding that it "misapprehend[ed] the onset of the running of the statute of limitations. The statute of limitations does not run from the date of a particular violation, but from the date of '*discovery*' of an offense." *Id*. at 502-03 (citations omitted) (emphasis added). Reasoning that the statute of limitations serves the purposes of repose and fair notice, the court held that the Government could not "disregard its discovery of earlier occurring offenses in preference for later offenses which would produce a more favorable timeline." *Id*. at 504; *see also United States v. 5443 Suffield Terrace*, 607 F.3d 504, 509 (7th Cir. 2010) (differentiating the IGBA from the offense in question and stating that because a gambling business is "a single, continuing offense," the statute of limitations begins to run when the offense begins, and not when it ends) *cert denied sub nom. Connors v. United States*, 131 S. Ct 493 (2010).

The statute of limitations precludes recovery here because PokerStars, since December 12, 2001, has openly allowed U.S. residents to join its real-money poker games hosted abroad. Thus, the Government should have known that PokerStars was serving customers in the United States, and to the extent that it alleges that poker games violate the IGBA, the Government should have known about that as well. All of the purposes animating statutes of limitations are well satisfied when, as here, the Government did nothing for almost a decade and then launched

a surprise attack on PokerStars' business. The statute of limitations should protect all PokerStars' assets, but at a minimum, it must protect the corporate entities that compose PokerStars and the domain name, which has been public knowledge for more than five years.

III. This Court Should Dismiss the Fraud Allegations

The Government's second claim for relief, which alleges that the defendant properties are subject to forfeiture as proceeds of wire and bank fraud under 18 U.S.C. § 981(a)(1)(C) fails because the Complaint does not adequately plead a violation under either statute. The Government's allegations refer, at most, to deception[21] – though they often fail to plead that necessary element. But deception alone is not fraud. The Complaint never alleges that PokerStars had any *intent* to expose the banks to harm, much less that the banks actually suffered loss. Nor does the Complaint plead fraud with adequate specificity: It fails to identify which banks were allegedly deceived, when they were allegedly deceived, and PokerStars' role in any alleged deception.

The forfeiture allegations have an additional fundamental defect. The Complaint seeks forfeiture of all funds held in four enumerated bank accounts as "proceeds" of wire and bank fraud, on the basis that those funds were sent to the Oldford Group and Sphene by payment processors. However, as noted above, to the extent these funds are player deposits, they are not "proceeds" because they were not "obtained" by PokerStars when they were transferred into player trust accounts. The Complaint fails to allege that they are not player deposits. Furthermore, even if some of these funds are subject to forfeiture, it is only to the extent that

[21] While the Court must accept well-pleaded facts for purposes of this motion, PokerStars denies that it ever deceived any bank, instructed anyone to deceive any bank, conspired with anyone to deceive any bank, or had the intent to do any of these things.

their value exceeds PokerStars' direct costs, and only to the extent that the financial institutions suffered a net loss on the extension of credit.

A. The Complaint Does Not Plead a Violation of the Wire and Bank Fraud Statutes

The Government alleges that PokerStars and its payment processors lied to banks regarding the destination of the funds, *id*. ¶ 41-44, so that the banks would engage in transactions they would not otherwise have completed. As the Complaint puts it, the goal was "to trick United States banks and financial institutions into processing gambling transactions on the Poker Companies' behalf." *Id*. ¶ 34. This alleged fraud, however, is legally insufficient to support the Complaint. It fails to plead the key element of "intent to deceive" for much of PokerStars' conduct, and under binding Second Circuit precedent, the conduct alleged does not amount to a "scheme or artifice to defraud."

1. The Complaint Fails to Properly Plead PokerStars' Intent to Deceive

The Complaint itself acknowledges that PokerStars acted to prevent misrepresentations to banks from 2009 forward, and it therefore fails to properly plead an intent to deceive with respect to any such activity. Intent to deceive is a necessary element under both the bank and wire fraud statutes, *United States v. Chandler*, 98 F.3d 711, 715 (2d Cir. 1996). As the Complaint notes, at least as early as 2009, PokerStars had no intent to deceive, because it enacted measures to ensure that banks knew the destination of funds and nature of transactions, including by demanding an acknowledgment from banks that they knew that they were processing poker transactions. *Id*. ¶¶ 45-50. Instead of alleging this necessary element of fraud, the Complaint relies on innuendo to imply, without ever actually alleging, that transparency was somehow a

sham. In the absence of any such allegation, bank and wire fraud claims for relief must be dismissed as to all banks that processed under the "transparency initiative."[22]

Neither do the Complaint's allegations relating to stored value cards, Compl. ¶ 30, allege deception. With regard to stored value cards, the Complaint alleges that offshore banks issued cards to individuals in the United States, who loaded funds onto those cards, and then used the cards to fund their online poker accounts. But the Complaint does not allege that these transactions ever involved deception. Accordingly, every one of the Complaint's allegations regarding transparent processing and stored value cards are consistent with legitimate business between the poker sites, the payment processors, and the banks. These allegations fail to state a claim and should be dismissed.

2. The Complaint Does Not Demonstrate that PokerStars Engaged in a "Scheme to Defraud"

The Complaint's bank and wire fraud allegations suffer from a fundamental defect: they fail to allege that PokerStars engaged in a "scheme or artifice to defraud." Both the wire and bank fraud statutes contain this element. *See* 18 U.S.C. §§ 1343 (wire fraud), 1344 (bank fraud). The element requires "a plan to deprive a person 'of something of value by trick, deceit, chicane or overreaching.'" *United States v. Autuori*, 212 F.3d 105, 115 (2d Cir. 2000) (quoting *McNally v. United States*, 483 U.S. 350, 358 (1987)). In this case, in order to plead bank or wire fraud, the Government would have had to allege that PokerStars *intended*, through deception, to cause "actual harm" to the banks or some other victim, namely by seeking to expose a bank "to actual or potential loss." *United States v. Shellef*, 507 F.3d 82, 107 (2d Cir. 2007); *United States v.*

[22] As explained below in Section III.B, the Complaint's admission that no deception occurred as to a substantial number of transactions renders it invalid because it prevents a court from tracing the "proceeds" of the offense.

Barrett, 178 F.3d 643, 647-48 (2d Cir. 1999). Where both crimes are charged, the common "scheme to defraud" element allows a court to analyze both charges under the same standards. *Shellef*, 507 F.3d at 107 (internal citation omitted). The Complaint in this case fails to allege this element and accordingly, the bank and wire fraud claim for relief must be dismissed.

The Second Circuit has made clear that a "scheme[] that do[es] no more than cause [an alleged victim] to enter transactions [it] would otherwise avoid . . . do[es] not violate the mail or wire fraud statutes" because it does not amount to a "scheme or artifice to defraud." *Shellef*, 507 F.3d at 108. In *Shellef*, the defendants purchased a restricted chemical by promising the manufacturer that they would sell the product internationally (and, hence, without collecting an excise tax). In fact, the defendants sold the product domestically without paying the requisite tax. Just as the Complaint does in this case, the indictment in *Shellef* relied on an allegation that counterparties would not have engaged in transactions had they known the nature of the transaction: "[D]efendant DOV SHELLEF induced Allied Signal to sell additional amounts of virgin CFC-113 to Poly Systems that it would not have sold had it known that SHELLEF in fact intended to sell the product domestically." *Id*. at 109 (citation omitted). The Second Circuit vacated the defendants' convictions, holding such an allegation is insufficient to support the "scheme to defraud" element, no matter what the Government's later proof may be. *Id*. *See also United States v. Novak*, 443 F.3d 150, 159 (2d Cir. 2006) (holding that absent intent to harm or actual harm, deception alone does not constitute fraud); *United States v. Starr*, 816 F.2d 94, 98-99 (2d Cir. 1987) (holding that because the scheme was designed to satisfy, rather than harm, the customers, the deception did not constitute fraud); *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1181 (2d Cir. 1970) (rejecting Government's theory that merely inducing the customers "to part with their money because of the false representations . . . amounted to fraud").

As these cases show, bank and wire fraud allegations cannot rest solely on an allegation that the defendant sought to deceive the alleged victim into entering into a transaction, where the transaction occurred as contemplated and all parties received the benefits they bargained for. Since that is all the fraud allegations offer against PokerStars, they are insufficient and must be dismissed.

The Complaint itself demonstrates that PokerStars acted to ensure there was no deceit and that transactions were completed under the terms of applicable agreements with banks. As the Complaint notes, PokerStars made a concerted effort to avoid "jeopardiz[ing] the relationship with the processor and their banks." Compl. ¶ 43(e) (quoting "a PokerStars document from in or about May 2009"). Here, as in *Starr*, "satisfied [banks] were a necessary ingredient in the successful operation of [the defendants'] business," 816 F.2d at 99, and to the extent that depriving the banks the benefits of the bargain would have threatened that business, the defendants could not have intended such harm. And as the Complaint concedes, the banks received significant fee income from processing these transactions. *See, e.g.*, Compl. ¶ 49 (noting that SunFirst Bank earned $1.6 million in fees for transparent poker processing).

Finally, the Complaint's lack of specificity dooms this claim for relief. The Complaint does not identify which banks were allegedly deceived, when they were deceived, how they were harmed, or the role that PokerStars itself played. Instead, the Complaint impermissibly pleads in gross, without explaining what PokerStars – as opposed to Full Tilt Poker or Absolute Poker – did to violate the fraud statutes. The Complaint labels all three companies as the "Poker Companies," as if they were an undifferentiated whole. Compl. ¶ 1. But, of course, they are entirely separate; indeed, they are and always have been competitors in the marketplace. PokerStars is entitled to know what *it* allegedly did wrong. PokerStars cannot be treated

interchangeably with two other companies whose only common tie is that they are all involved in the same industry and they all allegedly engaged in similar practices. Just as no one can sue "Wall Street" or "Silicon Valley," no one can use a generalized allegation against an entire industry to surmount the stringent pleading requirements provided in the Federal Rules. As a result of the Complaint's vagueness, PokerStars cannot "commence an investigation of the facts and . . . frame a responsive pleading." Supp. R. E(2)(a). Because the heightened pleading requirements for civil forfeiture actions and fraud actions apply here – and are not satisfied – the claim must be dismissed.

B. The Fraud Forfeiture Allegations Also Fail Because the Funds Sought Are Not "Proceeds" of Any Violation of the Fraud Statutes

The Complaint seeks forfeiture of all funds held in four of PokerStars' bank accounts as proceeds traceable to wire and bank fraud. *See* Compl. ¶ 126. Even if the Government had alleged that PokerStars joined a conspiracy to commit wire and bank fraud, the Complaint does not show that the identified funds are forfeitable as "proceeds" of that offense.

First, as with the gambling allegations, *see* Part II.B., *supra*, funds are forfeitable only to the extent that they can be traced to fraudulent activity. But the Complaint concedes that PokerStars implemented a transparency initiative over two years ago, and it does not identify which funds in the enumerated accounts relate to allegedly fraudulent transactions, as opposed to transparent ones. This pleading fails to satisfy Rule E(2)'s requirement that a Complaint "assert specific facts supporting an inference that the property is in fact subject to forfeiture." *$1,399,313.74 in U.S. Currency*, 591 F. Supp. 2d at 369 (internal citations omitted). Indeed, it fails to name a single bank that PokerStars allegedly defrauded, a period for which it was defrauded, or an amount of money which PokerStars received from such a bank. As a result, this claim must fail.

Second, the definition of "proceeds" subject to forfeiture under the wire and bank fraud claim for relief is limited to only the net profit that PokerStars obtained from the alleged offense. The services involved in the alleged bank fraud – "[t]ransferring funds" – were lawful services allegedly provided in an unlawful manner. *See In re 650 Fifth Ave. & Related Properties*, 777 F. Supp. 2d 529, 551 (S.D.N.Y. 2011) (noting that funds transfers are a lawful service). For such services, "proceeds" are "'the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services.'" 18 U.S.C. § 981(a)(2)(B). In this case, the applicable definition of "proceeds" includes any money "acquired" by PokerStars as the result of alleged fraud, less any direct costs, *i.e.*, fees paid to payment processors, and other direct costs associated with the relevant transactions.

Moreover, even before any deductions for PokerStars' costs, the Government is not entitled to any forfeiture from the PokerStars accounts because PokerStars did not "acquire" those funds when they were transferred into player accounts on the site. The Isle of Man law governing PokerStars' business has required, at all relevant times, that PokerStars segregate these funds and hold them in trust for the players. *Supra*, Part II.B.3. Thus, it cannot be said that PokerStars or the payment processors "acquired" the relevant funds within the meaning of the statute.[23]

Finally, the wire and bank fraud forfeiture claims fail in yet another critical regard: The civil forfeiture statute, 18 U.S.C. § 981(a)(2)(C), provides that "[i]n cases involving fraud in the process of obtaining . . . extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the . . . debt was satisfied, without any financial loss to the

[23] Even if this Court applies the broader definition of "proceeds" to funds from the fraud charges, those funds were not "proceeds" for the reasons set forth in Part II.B.3., supra.

victim." This provision applies in the instant case because the Complaint alleges that PokerStars "tricked" U.S. banks into "allow[ing] the extension of credit for Internet gambling." Compl. ¶ 37. The Government's claim should therefore be dismissed to the extent that it seeks forfeiture beyond the banks' losses. And because the Government has not alleged that *any* bank suffered *any* loss, that means that the entire second forfeiture claim must be dismissed.

IV. This Court Should Dismiss the Money Laundering Allegations

The Complaint also fails to adequately plead the money laundering offenses for civil asset forfeiture and civil penalties because (i) all the money laundering allegations depend upon erroneously pled violations of the IGBA, (ii) the Complaint fails to properly plead promotional, concealment, criminal property, and international money laundering, and (iii) the Complaint fails to sufficiently plead that the Funds were "involved" in money laundering. Accordingly, the Government's third claim for relief seeking forfeiture of property involved in money laundering offenses under 18 U.S.C. § 981(a)(1)(A) and its claim for civil monetary penalties under 18 U.S.C. § 1956(b) should be dismissed.

A. The Complaint Does Not Plead a Violation of the Money Laundering Statutes

All of the alleged money laundering violations are predicated on the claim that PokerStars' business violates the IGBA. If this Court dismisses the IGBA claims, then it should also dismiss the money laundering claims as a matter of course. *See United States v. D'Alessio*, 822 F. Supp. 1134, 1146 (D.N.J. 1993) (dismissing money laundering charges because underlying charges failed). Moreover, the Complaint's vagueness – specifically its failure to identify the relevant transactions and explain how they constitute money laundering, means that

the third claim for relief does not meet the heightened pleading requirements applicable to a civil forfeiture case.

Not only do the money laundering claims fail because the IGBA claims fail, but each individual money laundering claim fails for reasons separate and apart from the IGBA claims, primarily due to the government's failure to show that the transactions at issue involved "proceeds of a crime."

1. All of the Money Laundering Allegations Are Flawed Because They Merge Into the Alleged Underlying Offenses

"[I]t is well settled that the transaction charged as money laundering cannot be the same transaction through which the funds became tainted by crime." *Shellef*, 732 F. Supp. 2d at 72-73 (citing *United States v. Napoli,* 54 F.3d 63, 68 (2d Cir.1995), *abrogated on other grounds by U.S. Sentencing Guidelines as stated in United States v. Genao,* 343 F.3d 578, 584 (2d Cir. 2003)); *see also United States v. Hall*, 613 F.3d 249, 255 (D.C. Cir. 2010) (holding that "[t]he offense of money laundering must be separate and distinct from the underlying offense that generated the money to be laundered"), *cert. denied* 131 S.Ct. 1471 (2011). As a matter of law, the transactions at issue here cannot constitute money laundering because they are an integral part of the alleged gambling violation. *See, e.g.*, Compl. ¶ 125 (alleging that PokerStars facilitated online poker in the United States, and that the relevant funds were property "used in violation" of the IGBA); Superseding Indictment ¶ 42.

Other courts have consistently recognized that money laundering requires additional conduct beyond the commission of the underlying wrongdoing. For example, the Tenth Circuit in *Johnson* held that because "[t]he defendant did not have possession of the funds nor were they at his disposal until the investors transferred them to him," the defendant could not have obtained the proceeds. *United States v. Johnson*, 971 F.2d 562, 570 (10th Cir. 1992). As a result, the court

held that the funds were not "criminally derived property," and the defendant had not committed money laundering by receiving them.

The reasoning of *Johnson* applies with force here. The Complaint merely refers to transfers of funds from the players' bank accounts to the players' poker accounts, and transfers from the players' PokerStars accounts to their banks. Because PokerStars could not host a poker game if it could not accept deposits or transfer winnings to players, every transaction identified in the Complaint occurred before the alleged crime was completed, and cannot constitute a separate offense of money laundering.

Because the Complaint does not identify any transactions apart from those integral to the alleged underlying offense, the money laundering claim should be dismissed.

2. The Individual Money Laundering Claims Fail

Although this Court need not reach the issue of whether each individual money laundering claim survives, it is nevertheless true that each fails in turn. The Complaint erroneously alleges that PokerStars violated or conspired to violate four separate prohibitions. First, it alleges that PokerStars engaged in "promotional money laundering" by engaging in financial transactions using the proceeds of crime for the purpose of promoting unlawful activity. *See* Compl. ¶ 146; 18 U.S.C. § 1956(a)(1)(A). Second, it alleges that PokerStars engaged in "concealment money laundering" by engaging in financial transactions using the proceeds of unlawful activity for the purpose of concealing the source of the funds. *See* Compl. ¶ 146; 18 U.S.C. § 1956(a)(1)(B). Third, it alleges that PokerStars engaged in "criminal property money laundering" by engaging in transactions involving "criminally derived property." *See* Compl. ¶ 148; 18 U.S.C. § 1957. Fourth, the Complaint alleges that PokerStars engaged in "international money laundering" by transferring funds across U.S. borders for the purposes of promoting a

specified unlawful activity. *See* Compl. ¶ 147; 18 U.S.C. § 1956(a)(2). The Complaint also includes a conspiracy allegation. *See* Compl. ¶ 149.

As explained below, the Complaint fails to adequately plead all four types of money laundering.

a. The Complaint Fails to Plead Promotional Money Laundering

Promotional money laundering occurs when a person engages in a transaction involving the "proceeds" of specified unlawful activity for the purpose of "promoting" that unlawful activity. *See United States v. Quinones*, 635 F.3d 590, 597 (2d Cir. 2011), *cert. denied sub nom. Quinones v. United States*, 132 S. Ct. 830 (2011). The Complaint does not plead these elements.

The Complaint first fails to plead that the transactions at issue involved "proceeds." Only transactions involving proceeds of crime can constitute promotional money laundering. 18 U.S.C. § 1956(a)(1)(A)(1). But the Complaint does not allege either that the funds in question were generated by unlawful activity, as opposed to lawful parts of PokerStars' operations, or that PokerStars obtained the funds for its own use. The Karaka Declaration, on which the government relied to establish probable cause for seizure of the funds, states only that funds were wired from SunFirst Bank, All American Bank, and Intabill (an Australian processor) to the PokerStars accounts. *See* Karaka Decl. ¶¶ 27-30. But the Complaint never alleges that funds from New York were part of those wire transfers, and the Complaint concedes that SunFirst Bank knew that it was processing poker transactions, so the transfer could not have been fraudulent. *See* Compl. ¶¶ 48-50.

Moreover, even if the funds came from New York (or another jurisdiction in which PokerStars' activities were allegedly unlawful), the funds are not "proceeds" because they are neither profits nor receipts for PokerStars. The money laundering statute's definition of

"proceeds" has changed during the time period relevant to the Complaint. Prior to May 20, 2009, the money laundering statute did not define "proceeds." The Supreme Court held in *United States v. Santos*, 553 U.S. 507, 514 (2008), that the undefined term "proceeds," in the context of money laundering related to an IGBA violation, could not refer to the gross receipts of the business, but instead only to the profits. Congress amended the money laundering statute on May 20, 2009 to specify that the word "proceeds" refers to "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." 18 U.S.C. § 1956(c)(9).

Under the *Santos* Court's definition of "proceeds," which applies to all conduct prior to May 20, 2009, transfers of player funds from their bank accounts to their poker accounts (and back) did not involve the proceeds of any crime, as these funds were not PokerStars' profits. PokerStars' profits were its revenues (*i.e.*, rake fees collected during the course of poker games), less all of the costs of providing the poker games. The deposits and withdrawals mentioned in the Complaint were not those funds. Therefore, PokerStars could not have engaged in promotional money laundering by transferring funds to and from player bank and poker accounts before May 20, 2009.

Even under the broader, amended definition of "proceeds," PokerStars did not engage in money laundering because it never "obtained or retained" the funds at issue. The deposits were player funds, held in trust for players. As such, the player funds were not "obtained or retained" by the company. Rather, like the defendant in *Johnson*, PokerStars "did not have possession of the funds nor were they at [its] disposal until" after the players joined poker games and PokerStars collected "rakes" from those games. *Johnson,* 971 F.2d at 570. The Complaint does not allege that PokerStars violated its legal obligation to hold those funds on trust for the players.

The deposit and withdrawal activities discussed in the Complaint thus cannot form the basis for money laundering charges.

Moreover, the amended definition of "proceeds" reintroduces the "merger problem" that the *Santos* Court remedied – *i.e.*, that the same conduct may be punishable both as a predicate act and as money laundering. To cure this problem, multiple Justices suggested that the word "promote" in the money laundering statute should be construed narrowly not to include activities that are integral to the predicate offense. *See Santos*, 553 U.S. at 530 (Breyer, J., dissenting); *id*. at 547-48 (Alito, J., dissenting). This Court should adopt that interpretation, which is consistent with the law of money laundering generally, and hold that any transaction undertaken as part of PokerStars' gambling business cannot also be regarded as promotional money laundering.

b. The Complaint Fails to Plead Concealment Money Laundering

The Complaint also fails to plead concealment money laundering. Concealment money laundering occurs when a person engages in a transaction involving the proceeds of specified unlawful activity, "knowing that the transaction is designed . . . to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B). The Complaint alleges that PokerStars and the payment processors conducted financial transactions involving player funds, and that those transactions sometimes misstated the name of the vendor debiting or crediting the player's U.S. bank account. For three reasons, that allegation does not state a claim for concealment money laundering.

First, as with the claim for promotional money laundering, the concealment money laundering claim fails because the funds identified in the Complaint are neither "profits" nor "receipts" that qualify as "proceeds," and because PokerStars did not "obtain" them in any event. The funds are player funds held in trust for the players.

Second, again like the promotional money laundering claim, the alleged money laundering transactions also merge into the bank and wire fraud allegations. The misstatements that might constitute concealment are the same misstatements that support the underlying wire and bank fraud allegations. But the offense of money laundering must involve separate conduct from the underlying specified unlawful activity. *See, e.g.*, *Hall*, 613 F.3d at 255.

Finally, the Complaint does not plead the element of concealment, which "requires that the purpose, not merely the effect, of the endeavor must be to conceal or disguise a listed attribute of the proceeds." *United States v. Garcia*, 587 F.3d 509, 512 (2d Cir. 2009) (citing *Cuellar v. United States*, 553 U.S. 550 (2008)). As the Supreme Court has explained, "[t]here is a difference between concealing something to transport it, and transporting something to conceal it." *Cuellar*, 553 U.S. at 566 (internal quotation marks and citation omitted). Only the latter is punishable as money laundering. In this case, the most that the Complaint alleges is that PokerStars and the payment processors concealed the true parties in the transactions in order to facilitate the transactions themselves. But the transactions were not done to conceal money – rather, they were done to permit poker players to fund their player accounts on PokerStars, and later to collect their winnings. Once the funds reached PokerStars, they were held in client accounts, which were regulated and subjected to transparency measures by the Isle of Man. Because the facts alleged do not state a claim for concealment money laundering, this claim fails.

c. The Complaint Fails to Plead Criminal Property Money Laundering

The Complaint's third money laundering allegation, of criminal property money laundering, also fails. Criminal property money laundering occurs when a person conducts a monetary transaction involving $10,000 or more in criminally derived property. *See* 18 U.S.C. § 1957. "Criminally derived property" means "any property constituting, or derived from, proceeds

obtained from a criminal offense." 18 U.S.C. § 1957(f)(2). Thus, the funds involved must constitute proceeds in order for their transportation to qualify as money laundering. The criminal property money laundering claim fails because, as explained above, the funds in these accounts are not "proceeds."

d. The Complaint Fails to Plead International Money Laundering

The Complaint finally alleges that PokerStars engaged in international money laundering by transmitting funds across the U.S. border with the intent to promote the carrying on of a specified unlawful activity. *See* Compl. ¶ 147; 18 U.S.C. § 1956(a)(2)(A). This statutory provision, like promotional money laundering, requires that the transfers in question be executed with the intent to promote a specified unlawful activity. For the reasons explained in Parts IV.A.1. and IV.A.2.a., *supra*, the Government cannot plead promotion in this case.

B. The Money Laundering Forfeiture Allegations Also Should Be Dismissed for Failure to Allege That the Funds Were "Involved in" Money Laundering

Even if the Government could establish that PokerStars had engaged in money laundering charges, its forfeiture claim must be dismissed. The relevant forfeiture statute, 18 U.S.C. § 981(a)(1)(C), authorizes the forfeiture of any property "involved in a transaction" that violates the money laundering statute, or property "traceable" thereto. The Complaint relies on this statute to justify its claimed forfeiture of the PokerStars domain as well as *all funds* held in four enumerated PokerStars accounts. But the Government has not alleged – nor could it – that all of the enumerated funds were "involved in" money laundering. The only way that the Government can obtain forfeiture of funds that were not themselves laundered, or of the PokerStars domain, is to show that these assets were "involved in" money laundering because they facilitated the laundering transactions. The Government has not pled such a claim.

This Court has acknowledged that property "involved in" money laundering can include both money that was actually laundered, as well as property that was used to facilitate the laundering. *See In re 650 Fifth Ave. & Related Properties*, 777 F. Supp.2d 529, 564 (S.D.N.Y. 2011). "Facilitation of a laundering offense occurs when the property makes the prohibited conduct less difficult or more or less free from obstruction or hindrance." *Id*. (quoting *United States v. Huber*, 404 F.3d 1047, 1060 (8th Cir. 2005)). When the Government seeks the forfeiture of lawfully obtained funds that have been commingled with unlawfully obtained funds, however, "the mere pooling or commingling of tainted and untainted funds in an account does not, without more, render the entire contents of the account subject to forfeiture." *United States v. Nicolo*, 597 F. Supp.2d 342, 351 (W.D.N.Y. 2009) (internal quotation marks omitted). Instead, the forfeiture of commingled funds is proper only when "the government demonstrates that the defendant pooled the funds to facilitate or 'disguise' his illegal scheme." *Id*. Forfeiture is not available unless "the innocent funds" were "used in some way to hide the nature of the tainted funds." *United States v. Contents in Account No. 059-644190-69*, 253 F. Supp. 2d 789, 799 (D. Vt. 2003). Allowing the Government to obtain forfeiture of clean money merely because it was commingled with unlawfully obtained funds would render "the tracing requirement . . . a dead letter." *Id*. at 800.

As a result, to justify forfeiture, the Complaint must plead either that funds were themselves laundered, or that lawfully obtained funds were commingled with unlawfully obtained funds *for the purpose* of hiding them. The Complaint includes no allegations that would support forfeiture under the latter theory. Thus, this Court should dismiss the Complaint insofar as it seeks the forfeiture of lawfully obtained funds.

The PokerStars.com domain is also not subject to forfeiture as facilitating property because there is no allegation that it was involved in the relevant transactions. Although players input instructions to deposit and withdraw funds through the PokerStars software, the players are not alleged to have engaged in money laundering. Nor could they be. The Complaint never alleges that the players had the requisite intent. Nor does it allege that the PokerStars.com domain did anything to "facilitate" those transactions. The Complaint does not allege that the domain made the allegedly illicit transactions less difficult, nor does it allege that the domain removed obstructions or hindrances from the allegedly illicit transactions. Indeed, the Complaint does not allege that the domain had anything to do with inter-account transfers.

Finally, the Government's failure to explain how the assets it has identified were "involved in" money laundering means that its claim for relief neither rises above a speculative level nor satisfies the heightened pleading requirements applicable in this case. Accordingly, the Complaint's final claim for relief should be dismissed.

CONCLUSION

For the reasons stated above, the Complaint should be dismissed as to the PokerStars Defendants and defendants *in rem*.

Respectfully submitted,

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