

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x
:
UNITED STATES OF AMERICA, :
:
Plaintiff, : 11 Civ. 2564 (LBS)
- v. - :
:
POKERSTARS, et al. :
:
Defendants; :
:
ALL RIGHT, TITLE AND INTEREST IN :
THE ASSETS OF POKERSTARS, et al.; :
:
Defendants-in-rem. :
- - - - - x

**MEMORANDUM OF LAW IN SUPPORT OF THE GOVERNMENT'S MOTION
FOR EXPEDITED DISCOVERY RELATING TO FUGITIVE DISENTITLEMENT
AND TO STAY CONSIDERATION OF POKERSTARS' MOTION TO DISMISS**

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PRELIMINARY STATEMENT

The Government respectfully submits this memorandum of law in support of its motion to take limited, expedited discovery relating to the application of the fugitive disentitlement statute to claims filed by PokerStars and for an interim stay of consideration of the PokerStars motion to dismiss.¹ Isai Scheinberg, a founder, owner, and principal decision-maker of PokerStars, was charged last year with gambling offenses, bank and wire fraud offenses, and money laundering in a related indictment and has chosen not to return to the United States to face those charges. Accordingly, as explained below, the fugitive disentitlement statute likely applies to PokerStars' claims.

The defendants-in-rem in this matter include, among others, all right, title and interest in the assets of several online gambling businesses, including the assets of the

¹ The Government also notes that on today's date it served special interrogatories and document requests pursuant to Rule G(6) of the Supplemental Rules on the PokerStars Claimants relating to their claimed interest in funds held in a variety of third-party payment processing accounts. Pursuant to that Rule, the Government "need not respond to a claimant's motion to dismiss the action under Rule G(8)(b) until 21 days after the claimant has answered these interrogatories." Rule G(6)(c) of the Supplemental Rules. Thus, the present response deadline of July 30, 2012 would be moved in any event.

corporate entities identified as the PokerStars Claimants² and funds held in account by various third-party payment processors (collectively, "the Defendant Property"). Civil money laundering claims have also been brought against the PokerStars Claimants and others. As alleged in a pending related Indictment, United States v. Isai Scheinberg et al., S3 10 Cr. 336 (LAK), the PokerStars Claimants are ultimately controlled by Isai Scheinberg, who is a fugitive for purposes of the fugitive disentitlement statute. Under the fugitive disentitlement statute, Title 28, United States Code, Section 2466, a court may bar a corporation from asserting a claim if a majority shareholder or person asserting the claim on behalf of that corporation is a fugitive. Because fugitive disentitlement is a threshold issue that should be resolved before a potential fugitive claimant is permitted to litigate a forfeiture action while at the same time avoiding the court's jurisdiction in the related criminal matter, the Court should stay consideration of the PokerStars Motion to Dismiss until issues relating to fugitive disentitlement are resolved.

² The Pokerstars Claimants are Oldford Group Ltd., Rational Entertainment Enterprises Ltd., Pyr Software Ltd., Stelekram Ltd., and Sphene International Ltd.

BACKGROUND

A. The Criminal Indictment of Isai Scheinberg and Others for Various Gambling, Fraud, and Money Laundering Offenses

On or about March 10, 2011, a superseding indictment, S3 10 Cr. 336 (LAK) (the "Indictment") (attached as Ex. A to the Declaration of A.U.S.A. Jason H. Cowley), was filed under seal in the Southern District of New York, charging Isai Scheinberg, Raymond Bitar, Scott Tom, Brent Beckley, Nelson Burtnick, Paul Tate, Ryan Lang, Bradley Franzen, Ira Rubin, Chad Elie, and John Campos with conspiring to violate the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. § 5363, in violation of Title 18, United States Code, § 371; violating the UIGEA; operating illegal gambling businesses, in violation of Title 18, United States Code, Sections 1955 and 2; conspiring to commit wire fraud and bank fraud, in violation of Title 18, United States Code, Section 1349; and conspiring to launder money, in violation of Title 18, United States Code, Section 1956(h). It was unsealed on or about April 15, 2011.

As set forth in the Indictment, from at least in or about November 2006, the three leading internet poker companies doing business in the United States were PokerStars, Full Tilt Poker, and Absolute Poker/Ultimate Bet (collectively, "the Poker Companies"). (Ind. ¶ 1). In regard to PokerStars specifically, the Indictment alleges:

At all times relevant to this Indictment, ISAI SCHEINBERG, the defendant, was a founder, owner, and principal decision-maker for PokerStars, an internet poker company founded in or about 2001 with headquarters in the Isle of Mann. Through its website, pokerstars.com, PokerStars provided real-money gambling on internet poker games to United States customers. At various times relevant to this Indictment, PokerStars did business through several privately-held corporations and other entities, including but not limited to Oldford Group Ltd., Rational Entertainment Enterprises Ltd., Pyr Software Ltd., Stelekram Ltd. and Sphene International Ltd. (collectively, "Pokerstars").

(Ind. ¶ 4).

As described in the Indictment, because internet gambling businesses such as those operated by the Poker Companies were illegal under United States law, internet gambling companies, including the Poker Companies, were not permitted by United States banks to open bank accounts in the United States to receive proceeds from United States gamblers. Instead, the principals of the Poker Companies operated through various deceptive means designed to trick United States banks and financial institutions into processing gambling transactions on the Poker Companies' behalf. (Ind. ¶ 16).

For example, as described more fully in the Indictment, the defendants and others worked with and directed others to deceive credit card issuers and to disguise poker payments made using credit cards so that the issuing banks would

process the payments. (Ind. ¶¶ 17-18). These deceptive and fraudulent practices included, for example, creating phony non-gambling companies that the Poker Companies used to initiate the credit card charges (Ind. ¶ 19), and creating pre-paid cards designed for United States gamblers to use to transfer funds to the Poker Companies and other gambling companies, with the purpose of the cards disguised by fake internet web sites and phony consumer "reviews" of the cards making it appear that the cards had some other, legitimate, purpose. (Ind. ¶ 20).

In addition, as described more fully in the Indictment, the defendants and others worked with and directed others to develop another method of deceiving United States banks and financial institutions into processing their respective Poker Companies' internet gambling transactions through fraudulent e-check processing. (Ind. ¶ 21). The Poker Companies used poker processors to establish payment processing accounts at various United States banks and disguised from the banks the fact that the accounts would be used to process payments for internet poker transactions by making the transactions appear to relate to phony internet merchants. (Ind. ¶¶ 22-26).

B. The In Rem Forfeiture and Civil Money Laundering Complaint

On or about April 14, 2011, this action was commenced by the filing of a sealed in rem forfeiture and civil money

laundering complaint (the "Complaint"). The Complaint sought the forfeiture of all right, title and interest in the assets of the Poker Companies, including but not limited to certain specific properties set forth in the Complaint. As alleged in the Complaint, the defendants-in-rem are subject to forfeiture pursuant to (1) Title 18, United States Code, Section 1955(d), as properties used in violation of the provisions of Section 1955; (2) Title 18, United States Code, Section 981(a)(1)(C), as properties constituting or derived from proceeds traceable to violations of Section 1955; (3) Title 18, United States Code, Section 981(a)(1)(C), as properties constituting or derived from proceeds traceable to a conspiracy to commit wire fraud and bank fraud; and (4) Title 18, United States Code, Section 981(a)(1)(A), as properties involved in transactions and attempted transactions in violation of Sections 1956 and 1957, or property traceable to such property. The Complaint also sought civil monetary penalties for money laundering against the Poker Companies and the entities that operated those companies for the conduct set forth above.

On or about September 21, 2011, the United States filed an Amended Complaint in this action, adding additional fraud allegations against Full Tilt Poker and the members of its Board of Directors, and naming certain of their assets as defendants-in-rem.

On or about October 31, 2011, the PokerStars Claimants filed claims³ to certain of the Defendant Property in this action.

C. The PokerStars Motion to Dismiss

On or about July 9, 2012, the PokerStars Claimants filed a Motion to Dismiss the Complaint (D.E. 201) 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 "Supplemental Rules"). The PokerStars motion to dismiss (the "PokerStars Motion") seeks to have the claims asserted in the Complaint dismissed on a number of grounds, almost all of which involve the merits of the claims set forth in the Complaint.

ARGUMENT

A. Relevant Law

1. The Fugitive Disentitlement Doctrine

The doctrine of fugitive disentitlement states that courts may disregard the forfeiture claims of a fugitive from a criminal action. At common law, the fugitive disentitlement doctrine arises from the concept that, while "an escape does not strip the case of its character as an adjudicable case or

³ The Oldford Group Ltd., Rational Entertainment Enterprises Ltd., Stelekram Ltd., and Sphene International Ltd. submitted a claim jointly. Pyr Software submitted a separate claim.

controversy . . . it disentitles the defendant to call upon the resources of the Court for determination of his claims."

Molinaro v. New Jersey, 396 U.S. 365, 366 (1970). As one court has explained:

The doctrine's emphasis on the use of judicial powers and the propriety of a party's attempt to invoke those powers is reminiscent of the other threshold inquiries. It bars a claimant from invoking judicial process and waives all of his defenses-and improper venue is a waivable defense-such that if disentitlement applies here, this case will be, "by operation of the fugitive from justice doctrine, essentially an uncontested action." Disentitlement is thus a "threshold" issue, as envisioned by these cases, albeit one that is likely to produce a different prevailing party.

United States v. \$6,976,934.65 Plus Interest, 486 F. Supp. 2d 37, 38 (D.D.C. 2007) rev'd on other grounds, 554 F.3d 123 (D.C. Cir. 2009) (quoting United States v. One Parcel of Real Estate at 7707 S.W. 74th Lane, 868 F.2d 1214, 1217 (11th Cir. 1989)) ("Soulbury Ltd. II").

Prior to the 2000 statutory change described below, some courts applied this doctrine to civil forfeiture proceedings. See United States v. Eng, 951 F.2d 461, 466 (2d Cir. 1991); 7707 S.W. 74th Lane, 868 F.2d at 1217; United States v. \$45,940 in U.S. Currency, 739 F.2d 792, 798 (2d Cir. 1984). The Supreme Court declined to uphold the extension of the doctrine to civil forfeiture cases in Degen v. United States,

517 U.S. 820, 823 (1996). In response, Congress codified the doctrine at Title 28, United States Code, Section 2466 as part of the Civil Asset Forfeiture Reform Act of 2000. Section 2466 provides:

- (a) A judicial officer may disallow a person from using the resources of the courts of the United States in furtherance of a claim in any related civil forfeiture action or a claim in third party proceedings in any related criminal forfeiture action upon a finding that such person--
 - (1) after notice or knowledge of the fact that a warrant or process has been issued for his apprehension, in order to avoid criminal prosecution--
 - (A) purposely leaves the jurisdiction of the United States;
 - (B) declines to enter or reenter the United States to submit to its jurisdiction; or
 - (C) otherwise evades the jurisdiction of the court in which a criminal case is pending against the person; and
 - (2) is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction.
- (b) Subsection (a) may be applied to a claim filed by a corporation if any majority shareholder, or individual filing the claim on behalf of the corporation is a person to whom subsection (a) applies.

Title 28, United States Code, Section 2466.

The disentitlement provision addresses the "unseemly spectacle" of "a criminal defendant who, facing both incarceration and forfeiture for his misdeeds, attempts to invoke from a safe distance only so much of a United States court's jurisdiction as might secure him the return of alleged criminal proceeds while carefully shielding himself from the possibility of a penal sanction." Collazos v. United States, 368 F.3d 190, 200 (2d Cir. 2004). In Collazos, the Second Circuit identified the following five elements that must be met for the fugitive disentitlement doctrine to apply under Section 2466:

- (1) a warrant or similar process must have been issued in a criminal case for the claimant's apprehension;
- (2) the claimant must have had notice or knowledge of the warrant;
- (3) the criminal case must be related to the forfeiture action;
- (4) the claimant must not be confined or otherwise held in custody in another jurisdiction; and
- (5) the claimant must have deliberately avoided prosecution by
 - (A) purposefully leaving the United States,
 - (B) declining to enter or reenter the United States, or

(C) otherwise evading the jurisdiction of a court in the United States in which a criminal case is pending against the claimant

Collazos v. United States, 368 F.3d 190, 198 (2d Cir. 2004); see also United States v. \$6,976,934.65 Plus Interest, 554 F.3d 123, 128 (D.C. Cir. 2009) (adopting and discussing the five Collazos elements). If these five elements are met, the decision of whether to order disentitlement is within the discretion of the court. Collazos, 368 F.3d at 198.

Section 2466 includes both "leav[ing]" or "declin[ing] to enter or reenter the United States" as grounds for invoking the disentitlement doctrine. While the common-law doctrine applied to defendants who committed crimes in the United States and then fled and refused to reenter, Section 2466 applies also to claimants who commit crimes while outside the United States and refuse to enter the country to face charges. See Collazos, 268 F.3d at 197-99 ("the text of § 2466 makes plain that statutory disentitlement extends beyond common-law fugitives to encompass persons who may never previously have been in the United States"). For example, in United States v. Up to \$6,100,000 on Deposit, 07 Civ. 4430 (RJS), 2009 WL 1809992, *4 (S.D.N.Y. June 24, 2009), the court held that Section 2466 applies to a claimant who had never been to the United States

but refused to enter the United States to answer criminal charges.

2. The Doctrine's Applicability to Corporate Claimants

Section 2466 also applies the fugitive disentitlement doctrine to corporations. Subsection (b) of the statute states that the statute "may be applied to a claim filed by a corporation if any majority shareholder, or individual filing the claim on behalf of the corporation is a person to whom" the statute applies. Courts have held that even without a finding that a fugitive is a "majority shareholder," Section 2466(b) can still apply if a fugitive controls the corporate claimant or the corporate claimant essentially operates as the fugitive's alter ego. See United States v. \$6,976,934.65 Plus Interest, 478 F. Supp. 2d 30, 43 (D.D.C. 2007), rev'd on other grounds, 554 F.3d 123 (D.C. Cir. 2009) ("Soulbury Ltd. I").

3. Fugitive Disentitlement is a Threshold Issue That Should Be Addressed Prior to the PokerStars Motion to Dismiss

Because the fugitive disentitlement doctrine is rooted in the notion that a fugitive "should not be able to exploit judicial processes to his advantage in one matter while scoffing at them in another," courts have considered the application to be a threshold issue, "most similar to a subject matter jurisdiction or standing inquiry, not a merits inquiry."

Soulbury, Ltd. I, 478 F. Supp. 2d at 35; Soulbury Ltd. II, 486 F. Supp. 2d at 38.

Threshold issues like fugitive disentitlement should be addressed before reaching the merits of a case. See Soulbury Ltd. II, 486 F. Supp. 2d at 38 (citing Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 (1998)). This applies even when the threshold issue is discretionary. See, e.g., Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422 (2007) (holding that court could dismiss action under forum non conveniens doctrine even before determining court's own jurisdiction); Steel Co., 523 U.S. at 100-01 (declining jurisdiction of state law claim on discretionary grounds before determining issue of pendant jurisdiction); Armentero v. I.N.S., 412 F.3d 1088, 1088 (9th Cir. 2005) (invoking common-law fugitive disentitlement before considering merits); 7707 S.W. 74th Lane, 868 F.2d at 1217 (allowing court to apply fugitive disentitlement doctrine without "tak[ing] testimony" or "mak[ing] a finding of probable cause that the allegations in the forfeiture complaint were true"); United States ex rel. Bailey v. U.S. Commanding Officer of Office of Provost Marshal, U.S. Army, 496 F.2d 324, 325 (1st Cir. 1974) (invoking common-law fugitive disentitlement before considering mootness).

A motion to dismiss for failure to state a claim submitted under Federal Rule of Civil Procedure 12(b)(6), for

example, is a "judgment on the merits." Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 399 (1981) (citation omitted); see also Ciales v. Am. Airlines, Inc., 105 F.3d 93, 97 (2d Cir. 1997) ("dismissals under Rule 12(b)(6) are generally considered judgments on the merits, unless the court specifies otherwise"); Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir. 1996) ("dismissal under Rule 12(b)(6) is a dismissal on the merits of the action-a determination that the facts alleged in the complaint fail to state a claim upon which relief can be granted"). Likewise, fugitive disentitlement would preclude a claimant from asserting any defenses, not just defenses related to the merits. Soulbury Ltd. II, 486 F. Supp. 2d at 38. Accordingly, a motion to dismiss should be considered only after the threshold issue of fugitive disentitlement has been resolved.

4. Expedited Discovery May Be Granted to Confirm the Applicability of Fugitive Disentitlement

Any proper consideration of the application of Section 2466 will involve reference to documents outside the four corners of the Complaint and the PokerStars Claimants' claims in this action. As the district court explained in Soulbury Ltd. I:

It is especially appropriate for a court to look at matters outside the pleadings when fugitive disentitlement is at issue, for several reasons. First, this inquiry is concerned, at heart, with a person's eligibility to invoke the authority of a court, and with the court's deployment of judicial resources. In that sense, it resembles a court's inquiry into its subject matter jurisdiction, in which courts routinely look beyond the pleadings. . . . Second, while the disentitlement decision generally will be made at an early stage of the proceedings, a court should consider as much information as is available before deciding whether to invoke the significant measure of disallowing a claim.

Soulbury Ltd. I, 478 F. Supp. 2d at 38 (citing Lipsman v. Secretary of the Army, 257 F. Supp. 2d 3, 5-6 (D.D.C. 2003)). See also United States v. Real Property Known as 479 Tamarind Dr., 98 Civ. 2279 (DLC), 2005 WL 2649001, at *4 (S.D.N.Y. October 14, 2005) (granting Government's request for discovery to determine relationship between fugitive and corporate claimants; if fugitive is a majority shareholder of either corporation, that corporation's claim will be dismissed under § 2466(b)).⁴

⁴ Rule G(6) of the Supplemental Rules provides an analogous framework for expedited discovery to resolve threshold standing issues. That rule permits the Government to serve special interrogatories and document requests related specifically to a claimant's standing to assert an interest in the defendant res before responding to motions to dismiss. See United States v. Approximately \$658,830.00 in U.S. Currency, 2011 WL 5241311, *3 (E.D. Cal. Oct. 31, 2011) (claimant could submit motion to

B. Discussion

In order for the Court to ensure that a fugitive is not "exploit[ing] judicial processes to his advantage in one matter while scoffing at them in another" (Soulbury Ltd. I, 478 F. Supp. 2d at 35), the Court should stay consideration of the PokerStars Motion and permit the government to take limited, expedited discovery for all facts relevant to the application of the fugitive disentitlement doctrine. After the close of such expedited discovery, the Government will likely move for summary judgment on this issue, with both parties being able to submit whatever facts they wish the Court to consider.

1. The Fugitive Disentitlement Statute Likely Applies

A preliminary review of the facts relevant to the Collazos elements and Section 2466(b) strongly indicates that the fugitive disentitlement statute applies to the PokerStars Claimants. As alleged in the Complaint and the Indictment, Isai Scheinberg "was a founder, owner, and principal decision-maker for PokerStars." (Ind. ¶ 4; Compl. ¶ 21). According to public source reporting, Isai Scheinberg and his family have a majority stake in PokerStars. See, e.g., Isai Scheinberg biographical page on the website gamblingsites.com, screenshot attached as Ex. C to Cowley Declaration.

dismiss only after responding to Government's special interrogatories).

Scheinberg is a defendant in the related criminal case and a warrant for his arrest has been issued. See Arrest Warrant, attached as Ex. B to Cowley Declaration. He is undoubtedly aware of the pending charges against him, having engaged U.S. counsel to represent him in regard to the criminal action and civil forfeiture action. The illegal activity alleged in the Complaint is essentially parallel to that alleged in the Indictment. Finally, upon information and belief, Scheinberg resides in the Isle of Man and has intentionally refused to enter the United States in order to avoid criminal prosecution.

2. Fugitive Disentitlement Should Be Addressed Prior to the PokerStars Motion to Dismiss

The Court should stay consideration of the PokerStars Motion until the applicability of fugitive disentitlement is resolved.⁵ As explained above, fugitive disentitlement is a "threshold question" that is akin to standing. As the Supreme Court has made clear, threshold issues, such as fugitive disentitlement, should be decided prior to any substantive

⁵ Once again, Rule G of the Supplemental Rules provides an apt comparative framework in the context of a motion to strike in relation to standing. Rule G(8)(c) provides that any motions to strike a claim must be considered before a claimant's motion to dismiss.

consideration of the merits of the case, including motions to dismiss.⁶

A stay in this case is particularly appropriate here, where the PokerStars' Motion to Dismiss attempts to raise many of the arguments that other criminal defendants have raised and that Isai Scheinberg presumably seeks to litigate in the context of civil forfeiture rather than his criminal case. For example, in the criminal case, defendants Elie and Campos each moved to dismiss the Indictment on the grounds that online poker is not a "gambling business" under UIGEA, that their activities took place solely overseas and therefore did not violate any state laws, and that UIGEA has no extraterritorial application. On February 7, 2012, Judge Kaplan issued an order denying those arguments as a basis to dismiss the Indictment. See Kaplan Order at 5 (attached as Ex. D to Cowley Declaration). The PokerStars Claimants seek to re-litigate the same issues in an effort to create conflicting decisions that may inure to the benefit of Isai Scheinberg in the criminal case.

This actually goes beyond the "unseemly spectacle" of "a criminal defendant who, facing both incarceration and forfeiture for his misdeeds, attempts to invoke from a safe

⁶ In order to promote judicial efficiency and have all related issues resolved at the same time, the Government requests a stay of consideration of the motion to dismiss as it relates to the in personam claims against PokerStars.

distance only so much of a United States court's jurisdiction as might secure him the return of alleged criminal proceeds while carefully shielding himself from the possibility of a penal sanction," (Collazos, 368 F.3d at 200) that animates the fugitive disentitlement doctrine. In this case, the fugitive is attempting to invoke the Court's powers in ways that could benefit him in the criminal action while at the same time refusing to consent to the Court's jurisdiction.

3. The Court Should Allow the Government to Take Expedited, Limited Discovery

The Court should allow the Government to take limited and expedited discovery on this issue so that the Court may consider the issue with all relevant facts before it. Courts have routinely allowed such targeted discovery in regard to fugitive disentitlement. See Soulbury Ltd. I, 478 F. Supp. 2d at 45 (allowing claimant opportunity to supplement record regarding application of fugitive disentitlement and attempt to prove it was not a fugitive). See also 479 Tamarind Dr., 2005 WL 2649001 at *4-5 (allowing Government to investigate relationship of fugitive to corporate claimants to determine whether Section 2466(b) applies).

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court enter the Proposed Order, attached as Ex. 1, ordering:

(1) That consideration of the motion to dismiss filed by the PokerStars Claimants shall be stayed pending expedited discovery by the Government and the Court's consideration regarding the applicability of the fugitive disentitlement statute to the PokerStars claimants, and terminating the present response and reply deadlines related to that motion to dismiss;

(2) That the Government shall be permitted to serve document requests and interrogatories, take depositions, and serve requests for admissions relating to the applicability of the fugitive disentitlement statute to the PokerStars Claimants. Such discovery period shall close ninety days from the date of the entry of Proposed Order unless otherwise ordered by the Court; and

(3) That the Government shall have 30 days from the close of discovery on this issue to file a motion for summary judgment on the issue of fugitive disentitlement.

Dated: New York, New York
July 18, 2012

Respectfully submitted,

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