

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

11 Civ. 2564 (LBS)

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT  
OF THE GOVERNMENT'S MOTION TO STRIKE THE CLAIM  
OF CARDROOM INTERNATIONAL, LLC**

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- of counsel -

## **PRELIMINARY STATEMENT**

The Government respectfully submits this reply memorandum of law in further support of its motion, pursuant to Rule 12(b) and (c) of the Federal Rules of Civil Procedure and Rule G(8)(c) of the Supplemental Rules for Admiralty and Maritime Claims, to strike the claim filed in this in rem forfeiture action by Cardroom International, LLC ("Cardroom" or "Claimant"). The Government moved to strike Cardroom's claim, which sought to assert an interest in the assets of Full Tilt Poker and PokerStars based on a pending civil action filed by Cardroom against those groups of companies seeking monetary damages in the amount of \$30 million.

In its opposition to the motion to strike, Cardroom does not contest that it lacks standing to assert an interest in any property of Full Tilt Poker or PokerStars based on its pending and still-unresolved claims for money damages in California state court. Instead, Cardroom now claims an interest in funds forfeited in this action based on an entirely new theory and entirely new set of purported facts, and requests permission to file an amended claim. Cardroom now claims that the forfeiture of Full Tilt Poker's software, among other of the company's assets, and transfer of those assets to PokerStars as part of the settlement between those entities and the United States caused a breach of a 2003 agreement (an agreement that Cardroom does not attach to its opposition and claims that it

does not have a copy of) purportedly requiring Cardroom's consent to the transfer of certain of Full Tilt's copyright interests in software used by Full Tilt Poker in 2003. Cardroom's new theory, however, still fails to establish either a statutory claim under 18 U.S.C. § 983(d) or standing to assert an interest in Full Tilt Poker's forfeited assets. Cardroom has merely asserted a potential civil claim for breach of contract, not an ownership interest in Full Tilt's forfeited assets.

Moreover, Cardroom's attempt to raise a new theory of standing based on the 2003 agreement, raised for the first time a year after Cardroom's original, deficient claim and after Cardroom stipulated to the forfeiture and transfer of assets about which it now seeks to complain, smacks of undue delay, bad faith, and dilatory motive, and would cause undue prejudice to the United States.

Accordingly, the Government's motion to strike the Cardroom's claim should be granted and Cardroom's request for leave to amend should be denied.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

##### **A. Cardroom's Claim and Answer**

On September 30, 2011, Cardroom filed a claim in this action (the "Claim") asserting an interest in \$30,000,000 worth of defendant property relating to PokerStars, Full Tilt Poker, and the Full Tilt Poker insiders named in the amended complaint.

(Claim at 2).

Cardroom made its claim to the above-referenced funds:

based on damages suffered as a result of defendants' [] violation of, inter alia, the Racketeer Influenced and Corrupt Organization Act, which has caused damage to CARDROOM INTERNATIONAL, LLC, in an amount of no less than thirty million dollars (\$30,000,000). A lawsuit is being filed today, September 30, 2011, simultaneously herewith in the Santa Monica Division of the Superior Court of California, and Claimant desires to satisfy the inevitable judgment out of the Defendant Funds.

(Id. at 2-3). Cardroom contended that it will have an ownership interest in \$30,000,000 in funds based its expectation of an "inevitable judgment" in its favor in the state court action.

(Id. at 3).

On that same date, Cardroom filed a civil RICO action in California state court, Cardroom International LLC v. Mark Scheinberg, et al., No. SC114330 (Super. Ct. Cal. L.A. County, Sept. 30, 2011) (the "California Complaint"), alleging violations of the (1) Racketeer-Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964 et seq.; (2) Florida Anti-Trust Act, Fla. Stat. 542; and (3) Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq. (the "California Action").<sup>1</sup> In the California Complaint, Cardroom alleges that:

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<sup>1</sup> A copy of the California Complaint was attached to Cardroom's Answer in this matter. (Docket No. 79). Cardroom refers to the California Action in its Claim, p. 3.

34. Cardroom owns a mature and proven internet poker peer-to-peer system. It has sought to license its technology both for the real money and play money areas. However, the efforts of the company to conduct business were repeatedly stymied by the illegal conduct of the Defendants, arising from their illegal and anti-competitive servicing of United States poker players to play online.
35. . . . Because the Full Tilt Defendants and the Pokerstars Defendants successfully cooperated in finding mechanisms for illegally transferring money to and from United States players after the passage of the UIGEA, they obtained a dominant position in the world market. . .

(California Complaint, ¶¶ 34-35).

On October 21, 2011, Cardroom filed an answer (the "Answer") in which Cardroom conceded that it asserted a "contingent claim" that was "not at this time enforceable." (Answer ¶ 3). Neither Cardroom's Claim nor its Answer made any contention that Cardroom had an ownership interest in any aspects of Full Tilt's software.

#### **B. The Government's Motion to Strike**

On or about July 9, 2012, the Government moved to strike Cardroom's claim based on the fact that Cardroom did not assert an interest in any specific res, but rather, "grounds its claim on a hypothetical future judgment against Full Tilt Poker and PokerStars in the California Action." (Gov. Mot. at 11). As set forth in that motion:

Even assuming arguendo that Cardroom were to prevail in the California Action and obtain a \$30,000,000 judgment against Full Tilt Poker and PokerStars, such a judgment still would not confer standing in this matter. It is well established that even holding an in personam judgment against a party does not confer an interest sufficient to assert a claim against that party's assets in a forfeiture action.

(Gov. Mot at. 12 (citing United States v. All Assets Held at Bank Julius Baer & Co., 772 F. Supp. 2d. 191, 199 (D.D.C. 2011))).

**C. Cardroom's Consent to the Forfeiture of Certain Assets of Full Tilt Poker and Transfer of Those Assets to PokerStars**

On or about July 27, 2012, in anticipation of the settlement agreements that were eventually entered in this action between the Government and the Full Tilt Poker entities ("Full Tilt") and PokerStars entities ("PokerStars"), the Government and Cardroom entered into a written stipulation (the "Cardroom Stipulation" or "Cardroom Stip.", Exhibit B to the Sanai Declaration). The stipulation expressly noted that the settlements involved "the forfeiture of certain assets of the Full Tilt Group . . . and the transfer of those assets to the PokerStars Companies . . ." (Cardroom Stip. at 3). Pursuant to the stipulation, (a) Cardroom consented to the forfeiture of certain assets of the Full Tilt Group as part of the settlement reached between the United States and Full Tilt Poker and PokerStars, and (b) the Government agreed to "to hold \$30,000,000 in funds received by the United States in connection with the

settlement with the Full Tilt Group and the PokerStars Companies (the 'Substitute Res') as substitute res for the Forfeited Full Tilt Assets subject to Cardroom's claim." (Cardroom Stip. ¶ 2).

During the Government's communications with Cardroom's counsel about the potential settlements with Full Tilt Poker and PokerStars and about the proposed Cardroom Stipulation, Cardroom's counsel never raised any purported ownership interests claimed by Cardroom in any of Full Tilt Poker's specific assets, including any ownership interests in software or copyright interests in software; and never raised any purported restrictions on the transfer of any forfeited assets of Full Tilt Poker, including any software or copyrights. (Declaration of Jason H. Cowley ¶ 6).

On or about July 31, 2012, the Court entered the stipulated orders of settlement involving Full Tilt and PokerStars. (D.E. 240 & 241).

**D. Cardroom's Opposition to the Motion to Strike and its Request for Leave to Amend**

On or about August 20, 2012, Cardroom filed its response to the Government's motion to strike. In its opposition, Cardroom does not contest the Government's motion to dismiss its Claim and Answer - indeed, Cardroom does not even address the arguments raised in the motion to strike. Accordingly, there is no dispute that Cardroom's Claim is deficient.

Instead, Cardroom seeks to assert an entirely new claim based on entirely different facts than those set forth in its Claim and Answer and seeks permission to amend its pleadings. Cardroom argues that, as a result of the settlements with Full Tilt Poker and PokerStars and the Cardroom Stipulation, Cardroom now has an ownership claim either in aspects of Full Tilt Poker's forfeited software or in the Substitute Res. In an attorney declaration, Cardroom claims that in 2003, a predecessor of Cardroom (BH Development) entered into a settlement agreement with a group of investors (the "Jesus Coalition") that later formed the Full Tilt Group (the "2003 Agreement"). (Sanai Decl. ¶¶ 3-4). According to Cardroom's counsel, the 2003 Agreement resolved disputes between BH Development and the Jesus Coalition over BH Development software by, among other things, (1) giving the Jesus Coalition a joint copyright interest in the software, excluding certain graphics elements, and (2) providing that neither BH Development nor the Jesus Coalition could transfer their copyright interests to unaffiliated persons or entities without permission from the other side. (Id. ¶ 5). Cardroom purportedly succeeded to BH Development's interests under the 2003 Agreement as a result of BH Development's 2006 bankruptcy and 2007 transfer of its software and other interests to a corporate affiliate of Cardroom's. (Id. ¶¶ 7-9). Cardroom does not attach the agreement to its opposition. (Id. ¶ 8).



Cardroom's attorney declaration contains no further information about the terms of the 2003 Agreement. Cardroom's counsel does not say, for example, whether the 2003 Agreement creates remedies for any breach of the transfer provisions or whether the 2003 Agreement governs derivative works or improvements of BH Development's 2003 software code.<sup>1</sup>

In its opposition brief, Cardroom goes further and also argues that: (1) the 2003 Agreement applies to BH Development's 2003 software as well as "all derivative works subsequently created" by Full Tilt Poker (Cardroom Opp. at 1);<sup>2</sup> (2) Cardroom is a joint owner of assets transferred to PokerStars (id. at 2); and (3) Cardroom did not consent to the transfer of Full Tilt Poker's software to PokerStars, and thus Cardroom now is the sole owner of the Substitute Res. (Id. at 2, 8, 10). Cardroom seeks permission to amend its claim to include the Substitute Res and, potentially, additional funds forfeited by the United States. (Id. at 10). Cardroom does not attach any proposed amended pleadings to its opposition.

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<sup>1</sup> Cardroom's attorney declaration contains additional allegations about communications with the Government which are inaccurate but irrelevant to the merits of this motion and to Cardroom's request for leave to amend. Accordingly, while the Government does not concede those allegations, we do not specifically address them here.

<sup>2</sup> Cardroom relies on 17 U.S.C. § 103 for this assertion, but does not say whether the 2003 Agreement addresses derivative works or how.

## ARGUMENT

### **I. CARDROOM'S CLAIM SHOULD BE STRICKEN**

In its response, Cardroom does not even contest the Government's motion to strike the Claim as filed by Cardroom in September 2011. Cardroom's claim was explicitly premised on an "inevitable judgment" for monetary damages in an action Cardroom filed in California state court on the same day it filed its claim in this action. Cardroom does not dispute that this is utterly insufficient to confer standing for a claim for any of the defendant property in this action.

Thus, Cardroom's claim should be stricken. And, for the reasons discussed below, Cardroom's request for permission to amend its claim should be denied.

### **II. LEAVE TO AMEND SHOULD BE DENIED BASED ON FUTILITY, UNDUE DELAY, AND UNDUE PREJUDICE**

#### **A. Relevant Law**

Though courts generally grant a party leave to amend its claim, it may also deny a motion to amend a pleading "where there is 'undue delay, bad faith, dilatory motives or undue prejudice to the opposing party,' or where such amendment would be futile." Orthocraft, Inc. v. Sprint Spectrum L.P., 98 CV 5007 (SJ), 2002 WL 31640477, at \*1 (E.D.N.Y. Nov. 16, 2002) (citing Fed. R. Civ. P. 15(a)); see also In re Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 220 (2d Cir. 2006) ("[W]here amendment would be futile, denial of leave to amend is proper").

"Granting leave to amend is futile if it appears that plaintiff cannot address the deficiencies identified by the court and allege facts sufficient to support the claim." Panther Partners Inc. v. Ikanos Comms., Inc., 347 F. App'x 617, 622 (2d Cir. 2009). "In considering whether to grant a motion for leave to amend, the court may properly take into account the futility associated with the newly-added claims or defenses." Clarke v. Max Advisors, LLC, 235 F. Supp. 2d 130, 151 (N.D.N.Y. 2002) (citations omitted) (denying leave to amend to assert certain affirmative defenses) (citations omitted).

## **B. Discussion**

Cardroom's attempt to assert an entirely new claim in this matter based on an entirely new theory of standing should be roundly rejected by the Court. Even assuming the accuracy of the facts alleged in Cardroom's attorney declaration, those facts do not show a meritorious claim or standing to assert an interest in any assets forfeited from Full Tilt Poker. Accordingly, the amendment Cardroom requests would be futile. Furthermore, Cardroom could have asserted its purported joint interest in software and copyrights owned by Full Tilt Poker nearly a year ago when Cardroom filed its original, deficient claim. Accordingly, Cardroom's proposed amendment should be denied on the grounds of undue delay and prejudice.

## 1. Undue Delay, Prejudice, and Bad Faith

Though Cardroom attempts to argue that it could not have asserted its purported interests under the 2003 Agreement prior to the Cardroom Stipulation and the settlement stipulations with Full Tilt Poker and PokerStars, the joint rights Cardroom seeks to assert were, under Cardroom's own allegations, created in 2003 and acquired by Cardroom in approximately 2007. See Cardroom Opp. at 1 (the 2003 Agreement resulted in the Jesus Coalition receiving "an undivided joint ownership interest alongside BH Development" and discussing "BH Development's joint ownership in the copyright and other associated rights in the software"); id. at 1-2 ("BH Development and the Full Tilt Poker group used the jointly-owned software"); id. at 5 (describing the transfer of "the joint copyrights in the software" from the BH Development bankruptcy estate to an affiliate of Cardroom); id. at 8 (discussing Cardroom's "joint ownership of the software" prior to the Full Tilt Poker and PokerStars settlements); id. at 10 (asserting that "Cardroom co-owned a substantial portion" of assets transferred to PokerStars).

Thus, Cardroom's purported interests in Full Tilt Poker's software and copyrights could have been asserted in Cardroom's original claim. Cardroom's late effort to assert those interests in an effort to rescue its facially deficient claim and answer is the result of undue and unjustifiable delay.

Rule G(5) (a) of the Supplemental Rules for Certain Admiralty and Maritime Claims establishes the deadlines for filing claims in a forfeiture action. "A claim is an important safeguard against the filing of false or frivolous claims because the Government has an opportunity to know the nature of the interest in the property at the outset of the forfeiture action" so that it can seek standing discovery. United States v. \$25,790 in U.S. Currency, 2010 WL 2671754, at \*3 (D. Md. July 2, 2010) (emphasis added). Similarly, a claimant's claim informs the Government's decisions about resolving claims and filing motions. Cardroom's untimely request to file a claim asserting a new interest in property and premised on a new theory of standing undermines these policy considerations.

Moreover, Cardroom seeks to use its facially deficient claim -- a claim that Cardroom does not even attempt to defend in its opposition -- to bootstrap an interest in the Substitute Res based on a previously un-asserted interest. Had Cardroom never filed its original, deficient claim, it never would have been in a position to obtain the United States' agreement to maintain any forfeited assets as a substitute res. Indeed, the Cardroom Stipulation explicitly sets forth the assets for which Cardroom asserts a claim and states that the Substitute Funds will serve as "substitute res for the Forfeited Full Tilt Assets subject to Cardroom's claim." (Cardroom Stip. ¶ 4 (emphasis added)). The

Stipulation does not provide that the Substitute Funds can be treated as a substitute res for new and different claims that Cardroom never asserted at the time the stipulation was executed. Thus, Cardroom's late request to amend smacks of gamesmanship by Cardroom and would prejudice the Government.

## **2. Futility**

In addition to Cardroom's undue delay in seeking to raise a claim based on the 2003 Agreement, such a claim would be futile. Though Cardroom repeatedly asserts that it can claim an ownership interest in the Substitute Res, Cardroom's allegations about the 2003 Agreement would support, at most, potential civil claims against Full Tilt Poker and/or PokerStars.

Cardroom claims a joint interest in software and copyrights also jointly owned by Full Tilt Poker, but only Full Tilt Poker's assets were forfeited and transferred. See, e.g., 1 Melvin B. and David Nimmer, NIMMER ON COPYRIGHT §§ 6.10 & 6.11 (2012) (unless otherwise agreed, a joint owner of copyright interests may exploit, license, or transfer its interests without the consent of other joint owners); cf. Thomson v. Larson, 147 F.3d 195, 205 (2d Cir. 1998) (co-authors' "rights in a joint work are non-exclusive"). Cardroom's interests, whatever they are, were not forfeited or transferred.

Thus, even under the most generous reading of Cardroom's opposition, the forfeiture and transfer of Full Tilt

Poker's software and copyright interests would have resulted, at most, in a breach of the 2003 Agreement's terms concerning the transfer of the relevant interests. Cardroom's remedy for any such breach would be a civil claim for breach of contract against the breaching party, or possibly a civil infringement suit against any unauthorized users of the relevant copyrights. Indeed, Cardroom at times characterizes the Substitute Res as a pool of funds to compensate Cardroom for monetary damages Cardroom purportedly has suffered as a result of Full Tilt Poker's and PokerStars' actions. See Cardroom Opp. at 2 (the Substitute Res "completely satisfies Cardroom's claim" in the California action); 10 (discussing Cardroom's intent to potentially assert a claim for additional forfeited assets on the theory that the Full Tilt Poker and PokerStars settlements "exacerbate[ ] the very anti-competitive advantages obtained by the PokerStars Group" alleged in the California action).

Thus, even under Cardroom's allegations, Cardroom's and Full Tilt Poker's interests in software and related copyrights were joint but non-exclusive, and Cardroom did not have and cannot assert a direct interest in Full Tilt's joint but separate interests that were forfeited and transferred. Cardroom can only assert, at most, a complaint about the manner in which Full Tilt's interests were forfeited and transferred. Accordingly, Cardroom's contentions about the 2003 Agreement do nothing to

remedy its failure to demonstrate standing or its failure to demonstrate a meritorious claim under 18 U.S.C. § 983(d). Amendment would be futile and Cardroom's request should be denied.

**CONCLUSION**

For the foregoing reasons, the Government respectfully requests that the Court enter an order striking the claim of Cardroom International for lack of standing, without leave to amend.

Dated: New York, New York  
September 4, 2012

Respectfully submitted,

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