

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

POKERSTARS, et. al,

Defendants,

ALL RIGHT TITLE AND  
INTEREST IN THE ASSETS OF  
POKERSTARS, et. al.,  
Defendants.

11 Civ. 2564 (KMW)

**Sur-reply in Opposition to Motion to Strike**

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## I. INTRODUCTION

In August of 2012, the United States and Cardroom International, LLC completed briefing on the United States' motion to strike the claim of Cardroom International, LLC. Cardroom requested leave to amend its claim and answer in light of the actions of the United States in reaching a settlement agreement with the Pokerstars' defendants and certain of the Full Tilt Poker defendants that transferred property in which Cardroom had an undivided joint interest as well as certain other assets to the Pokerstars defendants, releasing the forfeiture claim over all but cash assets of the Pokerstars defendants, and accepting an additional cash payment in settlement of the action as to Pokerstars.

Thus, after charging the Pokerstars defendants with a massive fraud which sought, *inter alia*, to corrupt various United States banks, the Pokerstars defendants in this case were absolved of liability while two of their biggest competitors on the date this case was filed, the Full Tilt Poker companies and the Absolute Poker companies, were put out of business.

All in all, this was an amazingly favorable resolution for the Pokerstars defendants, a transaction which would, at the time this action was unsealed, have seemed inconceivable given the allegations made and remedies sought by the United States. Indeed, the United States declined to reveal any details of the proposed settlement when it approached Cardroom's counsel for a stipulation allowing the substitution of the collateral. C. Sanai Decl. Dock. # 252 at 5. The United States did not dispute this, instead pointing out that Counsel did not raise

the existence of the co-ownership in certain of Full Tilt Poker's assets. This is true; the reason that this point was not raised with Mr. Cowley was because nothing the United States elected to reveal about the proposed settlement, which was essentially nothing, notified Cardroom that the software and other business assets would be transferred to Pokerstars and they would have a free pass to seek permission from state governments to enter the legalized real money on-line poker market. Had the United States provided notice that this might occur in its complaint, the issue would have been raised.

The United States, exercising the prerogative of the government, has filed multiple amendments to its complaint, including a Second Amended Complaint, docket no. 272, filed AFTER this motion was completely briefed. The Second Amended Complaint is the first pleading which discloses that the United States, as a remedy, might elect to transfer the assets of Full Tilt Poker to one of the other defendants, a defendant that Cardroom is suing in California court. *See* SAC at 13-15.

Cardroom has and had a due process right to amend its claim and answer in light of the pleadings and request for relief on file by the United States at any particular time, and with the filing of the Second Amended Complaint, this right is based on the Rules of Civil Procedure as well. The United States, having entered into a settlement agreement that manifestly conflicts with the relief requested in the Original and First Amended Complaint, contends that Cardroom is not permitted to have the concomitant right to amend its claim and answer in light of

the Government's jack-in-the-box settlement. Cardroom submits that the Federal Rules of Civil Procedure and due process requires that Cardroom be allowed to amend its claim and answer in light of the facts disclosed by the Second Amended Complaint and the proceedings to date. For this reason, the motion of the United States is not ripe; instead Cardroom should be allowed the opportunity to amend its claim and answer in light of the filing of the Second Amended Complaint and the prior proceedings, and then the Court may adjudicate the motion with all arguments and issues fully plead and argued.

## **II. WHAT HAS CHANGED SINCE AUGUST OF 2012**

Since the filing of the August 20, 2012 opposition to the motion to strike, claimant Cardroom has identified and located a copy of the 2003 agreement in the possession of John Melissinos, the attorney for the Trustee in Bankruptcy of BH Development, LLC. Other originals or copies are in the hands of Ian Imrich, the attorney for Chris Ferguson in California, and likely also are in the possession of Howard Lederer. In order to obtain a physical copy, Cardroom must sort through some difficult issues of permission because the documents held by Mr. Melissinos are legal files of his former law firm, Rutter Hobbs & Davidoff, that is in the course of dissolution after a multi-million dollar malpractice verdict destroyed its viability.

Having had his memory refreshed by reading the actual provision, counsel can state that his characterization of the agreement was fundamentally accurate. He did not mention that there were exceptions to the non-assignability provision,

such as inter-affiliate transfers, but none of the exceptions were even close to being met.

Accordingly Cardroom will be able to adequately plead the content of the relevant agreement, as it has the right to view it, but it may take some additional negotiation, or in the worst case, a subpoena proceeding in the Central District of California, to bring an executed copy of the agreement before this Court.

Second, and the primary grounds for the request for a sur-reply, the United States filed a Second Amended Complaint on September 26, 2012, Dock. #272.

### **III. IN LIGHT OF THE FILING OF THE SECOND AMENDED COMPLAINT, THIS COURT MUST ALLOW THE FILING OF AN AMENDED ANSWER AND CLAIM**

The critical point this Court must realize is that Cardroom had no cognizable claim in respect of the software assets of Full Tilt Poker while Full Tilt Poker enjoyed its co-ownership interest in the software. Likewise, if the United States chose to forfeit the software and erase it, Cardroom suffered no injury and had no relief to request. The only circumstances under which a claim could arise is if the United States elected to obtain ownership of the software and then sell it to some entity that could injure Cardroom. However, Cardroom had no notice that the United States would ever contemplate such an action, and no reason to believe that it would not have the opportunity to raise objections upon being given notice.

However, the United States took a unique tack with respect to Cardroom: it unilaterally proposed to liquidate Cardroom's claim in the amount of \$30 million if

Cardroom raised no objections to the settlement agreement, the terms of which would remain secret. Cardroom's consent explicitly provided that neither side's consent waived any arguments that could be raised, and the rights of Cardroom would be the same over the substitute res as over the original res.

The proposal of the United States was explicitly designed to induce Cardroom to waive its objections by giving it only upside. However, having offered Cardroom a glittering prize in exchange for Cardroom consenting to a settlement the terms of which the United States demanded be kept secret, the United States now claims that it is prejudiced because Cardroom did not disclose the existence of co-ownership rights that were made relevant and enforceable by the terms of the settlement entered into by the United States—terms it refused to disclose to Cardroom. To put in in a sports metaphor United States hid the ball, and now complains that the hiding place turns out to be co-owned by Cardroom. But any prejudice against the United States arises because it chose to negotiate and conduct the forfeiture and sale in secret, and then obtain the consent of parties with claims without disclosing the terms of the secret forfeiture and sale.

However, now that the United States has elected to file a Second Amended Complaint that discloses its plans (albeit a disclosure made post-hoc), the Federal Rules of Civil Procedure require that Cardroom be given the opportunity to likewise amend its pleadings in light of the new facts disclosed.

The United States does not dispute that in civil forfeiture proceedings, the Court must evaluate the request to amend or supplement the answer in the same

manner as a request to amend or supplement a complaint in a civil proceeding. *See, e.g. US v. Premises Known as 281 Syosset Woodbury Rd.*, 791 F. Supp. 61, 64-65 (E.D.N.Y. 1992). Under the Federal Rules of Civil Procedure, the amendment of a complaint triggers the right to file an answer. Fed.R.Civ.Proc. 15. Because the Second Amended Complaint is the first complaint filed by the United States to even discuss the possibility that the United States would transfer the assets of Full Tilt Poker to one of its co-defendants, Cardroom has the right to amend its answer and claim to account for the new information.

The United States may argue that if Cardroom believed it has the right to amend its answer, it should have done so without waiting. However, the United States was on record as opposing the right to amend, and the Federal Rules of Civil Procedure apply to these proceedings pursuant to case law. Accordingly, given that the request for leave to amend had been pending for a month at the time the United States filed its motion, Cardroom was entirely justified in awaiting a ruling on the pending request for leave to file an amended answer and claim rather than unilaterally doing so without waiting to hear from the Court.

#### **IV. CONCLUSION**

For the forgoing reasons, the Court should find that the motion is not ripe to address on the merits and order that Cardroom has 30 days to amend its claim and answer.

Dated: January 4, 2012

Respectfully submitted

By: : \_\_\_\_\_ /s/  
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