

Exhibit A

DEC 31 2012 ✓

RULING

JOHN A. CLARKE, CLERK
A. Barton
BY A. BARTON, DEPUTY

HEARING DATE: **December 19, 2012**

TRIAL: Not set.

CASE: **Cardroom International LLC v. Mark Scheinberg, et al.**

CASE NO.: **SC114330**

Opposed: **Yes.**

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- (1) – (3) DEMURRERS TO FIRST AMENDED COMPLAINT (x3)**
(4) NOTICE OF JOINDER
(5) MOTION FOR JUDGMENT ON THE PLEADINGS
(6) – (10) MOTIONS TO QUASH SERVICE OF SUMMONS (x5)
(11) – (12) MOTIONS FOR PROTECTIVE ORDER (x2)
-

MOVING PARTY:

- (1) Defendant Tiltware, LLC
- (2) Defendant Chris Ferguson
- (3) Specially appearing Defendant Phil Ivey
- (4) Specially appearing Defendants Mark Scheinberg and Oldford Group, Ltd.
- (5) Defendant Philip S. Gordon
- (6) Specially appearing Defendant Phil Ivey
- (7) Specially appearing Defendants Mark Scheinberg and Oldford Group, Ltd.
- (8) Specially appearing Defendants Raymond Bitar, Howard Lederer and Pocket Kings., Ltd.
- (9) Specially appearing Defendants Erik Seidel, Andy Bloch and John Juanda
- (10) Specially appearing Defendant Perry Freidman
- (11) Defendant Tiltware, LLC
- (12) Specially appearing Defendant Phil Ivey

RESPONDING PARTY(S):

(1)-(3), (5)-(12) Plaintiff Cardroom International LLC

- **SUSTAIN Defendant Tiltware, LLC's demurrer to the first, second and third causes of action with thirty days leave to amend.**
- **GRANT Defendant Tiltware, LLC's motion for a protective order;**
- **SUSTAIN Defendant Chris Ferguson's demurrer to the first, second and third causes of action with thirty days leave to amend.**

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- SUSTAIN Defendant Phil Ivey's demurrer to the first, second and third causes of action with thirty days leave to amend.
- CONTINUE hearing on Defendant Phil Ivey's motion to quash to March 13, 2013 at 1:30 p.m.
- Defendant Phil Ivey's motion for a protective order is MOOT.
- GRANT Philip S. Gordon's motion for judgment on the pleadings as to the first, second and third causes of action with thirty days leave to amend.
- GRANT Defendants Mark Scheinberg and Oldford Group Ltd.'s joinder in Demurrers of Defendants Tiltware, LLC and Chris Ferguson;
- GRANT Defendants Mark Scheinberg and Oldford Group Ltd.'s motion to quash;
- DENY Raymond Bitar's motion to quash; GRANT Defendant Howard Lederer's motion to quash; CONTINUE hearing on the motion to quash as to Defendant Pocket Kings, Ltd. To March 13, 2013 at 1:30 p.m.;
- GRANT Defendant John Juanda's motion to quash; CONTINUE hearing on Defendants Erik Seidel and Andy Bloch's motion to quash to March 13, 2013 at 1:30 p.m.;
- GRANT Defendant Perry Friedman's motion to quash; DENY Plaintiff leave to conduct jurisdictional discovery.

ANALYSIS

DEFENDANT TILTWARE, LLC

Demurrer

1. First Cause of Action (Relief Under the Racketeering-Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964 et seq.).

The Court finds persuasive Defendant's argument that Plaintiff has failed to plead the requisite proximate causation element of a RICO cause of action.

In *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992), this Court held that a plaintiff may sue under § 1964(c) only if the alleged RICO violation was the proximate cause of the plaintiff's injury.

Anza v. Ideal Steel Supply Corp. (U.S. 2006) 547 U.S. 451, 453.

Ideal's theory is that Joseph and Vincent Anza harmed it by defrauding the New York tax authority and using the [*458] proceeds from the fraud to offer lower prices designed to attract more customers. The RICO violation alleged by Ideal is that the Anzas conducted National's affairs through a pattern of mail fraud and wire fraud. **The direct victim of this conduct was the State of New York, not Ideal.** It was the State that was being defrauded and the State that lost tax revenue as a result.

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Anza v. Ideal Steel Supply Corp. (U.S. 2006) 547 U.S. 451, 456-61 (bold emphasis and underlining added).

Hemi Group, LLC v. City of New York (U.S. 2010) 130 S. Ct. 983, 987-994 (bold emphasis and underlining added).

Plaintiff's Allegations

Plaintiff Cardroom International LLC (“Cardroom”) alleges that it “owns a mature and proven Internet poker peer-to-peer system” and “has sought to license its technology both for the real money and play money areas.” 1AC, ¶ 34. Plaintiff alleges that its efforts “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.” *Id.* ¶ 35 alleges that “the Full Tilt Defendants and the Pokerstar Defendants successfully cooperated in finding mechanisms for illegally transferring money to and from United States players after the passage of the UIGEA [Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-5367], they obtained a dominant position in the world market.”

Thus, Plaintiff’s theory is that Defendants’ RICO violations enabled them to attain a dominant position in the world market, which has harmed Plaintiff’s ability to license its technology for both the real money and play money areas. As discussed below, the allegations show that the facts pled cannot meet the U.S. Supreme Court’s proximate causation requirement.

Network licensing: ¶ 36 of the 1AC alleges that “Cardroom sought to license its software to major media companies for use on their sports-related sites.” The Pokerstars Defendants and Full Tilt Defendants had entered into agreements to provide play money services to ESPN/ABC, Fox and NBC. *Id.* The CEO of Cardroom was informed at a meeting with one of the networks “that the adoption of his system faced the barrier of the purchase of airtime on the network by the Pokerstars Companies, as the Pokerstars Companies were tying continued purchase of airtime to use of its software and system on the network’s website.” *Id.* This comment was apparently made before the network had even entered into such an agreement because a subsequent announcement was made regarding a deal with Pokerstars. *Id.*

Plaintiff alleges that funds illegally obtained from United States poker players (due to the methods used to circumvent bank prohibitions on the authorization of Internet gambling transactions) subsidized the Pokerstars purchase of time for poker television programs. *Id.* Plaintiff admits that Full Tilt did not directly interfere in the potential transaction between Cardroom and the network, but Plaintiff alleges that there was a joint conspiracy between the Pokerstars Defendants and Full Tilt Defendants to circumvent bank prohibitions on the authorization of Internet gambling transactions which allowed both companies to achieve their dominant positions in online poker. ¶ 36. The scheme and methods “**designed to trick United States banks and financial institutions** into processing gambling transactions on their behalf, **or bribe the owners thereof** to process such transactions” (bold emphasis added) is alleged in ¶¶ 41-53.

As alleged, the direct cause of Plaintiff’s inability to license its software to one network was Pokerstars’ agreement with that network, which included a permissible contractual exchange

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of the purchase of airtime on the network (presumably a show featuring professional poker players) conditioned upon the network using Pokerstars' software and system on the network's website. Whether Pokerstars were in the position to leverage such an arrangement (Plaintiff admits Full Tilt did not) as a result of RICO violations is too attenuated a connection.

Moreover, the banks and financial institutions were the direct victims of the alleged fraud.

Casino licensing: ¶ 37 alleges that "Cardroom was also stymied in seeking relationships with major casino companies to provide services in the US and abroad as legalization and regulation advances." The Pokerstars Defendants and Full Tilt Defendants "announced strategic relationships with two major United States casino companies that needed software systems." ¶ 37. ¶ 63 alleges that these strategic alliances were with gambling interests of Steven Wynn and Station Casino. "The only reason these casino companies entered into these relationships was the dominant position obtained by the Full Tilt Defendants and the Pokerstars Defendants." *Id.*

¶ 38 alleges that the Pokerstars and Full Tilt Defendants' dominant positions "discouraged new entrants from the international, regulated markets, **thus leaving only a small number of potential clients for Cardroom** and other competing software companies." (Bold emphasis added.)

Plaintiff's allegations are that Defendants entered into strategic relationships with two casino companies. However, the fact that Defendants entered into such relationships does not preclude Plaintiff from entering into such relationships with other companies, and Plaintiffs admit there are a small number of potential clients remaining for Cardroom. Proximate causation of injury to Plaintiff is not apparent.

Barrier to Entry: ¶ 54 alleges that the Pokerstars Companies and Full Tilt Companies were competitors which ran their businesses differently. The Pokerstars Companies held players funds and returned players balances when required. *Id.* However, the Full Tilt Companies immediately spent funds obtained from players on promotional expenses to expand influence in the professional poker world. *Id.* Player cash outs were paid from funds transferred from other players, as opposed to funds the players had won or retained in playing poker, thus resembling a Ponzi scheme. *Id.* These players were the direct victim of the Ponzi scheme.

¶ 56 alleges that the Full Tilt Companies' expenditure of players' money on receipt enabled it to effectively limit competition from new entrants into markets where online poker was legal and to ensure that companies looking to offer online poker on a play money basis in the United States would be discouraged from entering into license agreements with software companies because the Full Tilt Companies "would offer strategic alliances on terms that no company making a fair profit could match."

¶ 62 alleges that the Pokerstars and Full Tilt Defendants proximately caused injury to Plaintiff by: (1) "[D]ominating the on-line poker business in the United States," giving Defendants "a base of players that no international company could easily compete with," resulting in "fewer participants in the market for legal Internet poker **willing to consider licensing the software of Cardroom.**" "Those companies that did license software

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necessarily preferred software which linked together multiple websites of different companies” instead of the “bespoke (i.e., custom-made) system offered by Cardroom, which is intended to be used by a single operator.” ¶ 62 (bold emphasis added).

This appears to be the most direct cause of Plaintiff’s injury—its product was modeled on a system that was not preferred by companies looking to license software. It was the companies’ preference for other software—not Defendants’ alleged illegal conduct (which as alleged may not even constitute “predicate acts” of “racketeering activity” under RICO), which was the proximate cause of Plaintiff’s failure to license its software to certain companies.

Plaintiff also alleges that “Defendants used their extraordinary profits from their illegal activities to fund poker-related television programs which purchased airtime on NBC, Fox, ESPN, and other cable and television networks.” ¶ 62. Defendants “then used this market power to tie the use of their software for free or fantasy poker offerings on websites offered by these media companies, which do not aggregate players.” *Id.* “Pokerstars deprived Plaintiff of the opportunity to license software to one of these networks in the fall of 2010.” *Id.* The reason why this is insufficient to constitute proximate cause is discussed above.

Plaintiff further alleges that “the market dominance of the pokerstars.com and fulltiltpoker.com websites meant that **investors until April 15, 2011 were highly skeptical of the business prospects of independent software houses seeking to advance and develop software systems for legal on-line poker.**” ¶ 62 (bold emphasis added). The reasons why investors were skeptical in this regard is speculative.

¶ 63 alleges that despite the fact that Defendants have ceased offering services to United States players, Pokerstars’ “huge stockpile of cash and huge quantity of marketing information” is being used to offer games to foreign players and “**continues to hamper Plaintiff from entering into profitable agreements or obtaining equity funding that would otherwise be ordinarily available to a startup Internet company.**” (Bold emphasis added.) The Full Tilt Defendants are currently out of the online poker business but are trying to reenter. *Id.* For the reasons discussed above, the reason that Plaintiff is unable to enter into profitable agreements and obtain equity funding as a startup Internet company is not proximately caused by Defendants’ allegedly illegal activities.

Plaintiff’s alleged damages: Plaintiff alleges that it has suffered losses to its business in the amount of at least ten million dollars, consisting of out-of-pocket losses and income and investment capital Plaintiff could have earned but for the conduct of the criminal enterprise by Defendants. ¶¶ 64, 66. For the reasons discussed above, these purportedly losses were not proximately caused by Defendants’ alleged violations of RICO.

Moreover, as to alleged re-entry into the market by Defendants, the Ninth Circuit has held that injunctive relief under RICO is not available to a private plaintiff in a civil action. Religious Technology Center v. Wollersheim (9th Cir. Cal. 1986) 796 F.2d 1076, 1084.

For the foregoing reasons, Plaintiff’s theory of causation requires too many steps, too much speculation, and much difficulty in attributing damages to Defendant’s alleged violations of RICO.

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The demurrer to the first cause of action is SUSTAINED with leave to amend. Plaintiff will be given one more opportunity to amend to state a RICO cause of action.

2. Second Cause of Action (Relief Under Florida Anti-Trust Act, Florida Statutes 542).

Although not properly identified in the 1AC, the Florida Antitrust Act is codified at Fla. Stat. § 542.12. The Court is left to guess at which section of this act was allegedly violated by Defendants as “Florida Statutes 542” does not exist.

Plaintiff alleges that from January 1, 2007 to April 15, 2011, Defendants Pokerstar Companies had an approximate 55% share of the market of online real money poker players worldwide and in Florida, and the Full Tilt Companies had an approximately 25% share of such players. 1AC, ¶ 69. The Court notes that this still leaves a 20% share of the market to other competitors.

Plaintiff alleges Defendants were able to maintain this dominant position because they utilized illegal payment processing methods with persons in the United States. *Id.* Also, the Full Tilt Companies immediately spent player deposits on promotional expenses such as sponsorship and promotional agreements with the bulk of the world’s professional poker players. *Id.* Plaintiff alleges that because most of the online poker players are from the United States, dominance in the U.S. market gave Defendants the largest liquidity of players, which in turn attracted foreign players. *Id.*

Plaintiff alleges that Defendants used their dominant position in real-money play, maintained by criminal activities, “to tie use of their software system with the purchase of airtime or advertising time on broadcast and cable networks in the United States, including . . . Fox, ESPN, and NBC,” which “made it impossible for Plaintiff to license its software to such media companies. ¶ 70. Presumably, Plaintiff refers to its software for fantasy poker play (¶ 36—play money service agreement with ESPN/ABC, Fox and NBC) which is legal in the United States and “partially served by companies such as Zynga.” ¶ 70. Again, the allegation that a third competitor, Zynga, is able to license software for fantasy poker play tends to undercut Plaintiff’s allegations of anti-trust injury upon the market.

Plaintiff alleges that although the Full Tilt Companies and Pokerstars Companies are nominally competitors, they directly cooperated in creating multiple fraudulent payment processing mechanisms. ¶ 71. Plaintiff alleges that:

the purpose of this conspiracy was to strangle competition in the market for providing on-line real-money poker worldwide, including the United States, and to develop sufficient cash balances (in the case of the Pokerstars Defendants), control over poker player endorsements (in the case of Full Tilt Defendants), marketing reputations, and customer information to ensure that **when** on-line poker was explicitly legalized in the United States and elsewhere, [Defendants] would, along with their strategic alliance partners, have a dominant position in the United States market and in the Florida market.

¶ 71 (bold emphasis added).

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These allegations are that, as to the United States market, Defendants stifled competition in an illegal market, i.e., online real money poker, after the passage of the UIGEA. See 1AC, ¶ 41. Thus, Plaintiff's allegations in ¶ 71 are directed toward a future market that has not yet been legalized.

Plaintiff has allegedly suffered out-of-pocket losses as well as "the income and investment capital that Plaintiff could have earned but for the conduct of the anti-competitive, criminal enterprise by Defendants." ¶ 74.

Frustrated Attempt to Enter Market

Plaintiff's 1AC alleges facts which suggest that one of its theories of antitrust liability against Defendants is that Plaintiff has been unable to enter the market for online poker.

When a plaintiff seeks to recover for an antitrust injury that arises from a frustrated attempt to enter a market, the plaintiff must demonstrate "(1) an intention to enter the business, and (2) a showing of preparedness to enter the business." *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987)(quoting *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979)). The Eleventh Circuit has stated that "as long as the plaintiff made a reasonable attempt to enter the market, our Circuit's case law recognizes that the plaintiff has standing to contest antitrust violations which create barriers to that market." *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991).

ErinMedia, LLC v. Nielsen Media Research, Inc., 401 F. Supp. 2d 1262, 1268 (M.D. Fla. 2005)

[A]ntitrust standing is lacking under § 4 of the Clayton Act where the antitrust injury alleged is remote and highly speculative. The Supreme Court has on several occasions pointed to indirectness and speculativeness of asserted injury as indicia for finding no standing. See, e.g., *Associated General Contractors*, 459 U.S. at 543-544, 103 S. Ct. at 911; *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-477, 102 S. Ct. 2540, 2546-47, 73 L. Ed. 2d 149 (1982).

Austin v. Blue Cross & Blue Shield (11th Cir. Ala. 1990) 903 F.2d 1385, 1392

Antitrust injury is defined as: injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect anticompetitive effect either of the violation or of anticompetitive effects made possible by the violation. It should be, in short, the type of loss that the claimed violation would be likely to cause. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). That is, an antitrust plaintiff must show that **his own injury coincides with the public detriment tending to result from the alleged violation**. See *Todorov*, 921 F.2d at 1450; see also *Amey, Inc. v. Gulf Abstract & Title, Inc.*,

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758 F.2d 1486, 1493 (11th Cir. 1985).

JES Props., Inc. v. USA Equestrian, Inc. (M.D. Fla. May 9, 2005) 2005 U.S. Dist. LEXIS 43122, 35-38 (bold emphasis added).

where a plaintiff's antitrust claim merely alleges harm to an individual competitor, dismissal is warranted. See Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Comms., Inc., 376 F.3d 1065, 1069 (11th Cir. 2004) ("Critically, under both sections [One and Two of the Sherman Act], **an antitrust plaintiff must show harm to competition in general, rather than merely damage to an individual competitor.**"); Pierson v. Orlando Reg'l Healthcare Sys., Inc., 619 F.Supp.2d 1260, 1276 (S.D. Fla. 2009)

OSGI, Inc. v. IBM Global Fin. (S.D. Fla. Mar. 13, 2012) 2012 U.S. Dist. LEXIS 49601, 5-11 (bold emphasis added).

As discussed above, Plaintiff has alleged that Defendants' alleged conspiracy to deceive banks into processing prohibited online gambling transactions have enabled it to host United States real money players, which in turn, makes Defendants' online poker attractive worldwide. However, Plaintiff admits that "the Pokerstars Defendants and the Full Tilt Defendants are currently not offering services to United State players, they are threatening to re-enter the Florida market as soon as they can, or to create new entities to enter the Florida market." ¶ 76. Thus, in alleging that Defendants are not currently offering services to United States players, Plaintiff has admitted that Defendants are not currently dominating the market share for United State players. Indeed, Plaintiff admits that, as to fantasy online poker, Zynga is a company which offers such legal services in the United States. ¶ 70. To the extent Plaintiff alleges it suffered harm in the past because of Defendants' tricking banks into processing prohibited online gambling transactions, by Plaintiff's own admission, this was illegal, and Plaintiff does not allege that it engaged or attempted to engage in offering such illegal online gambling. To the extent Plaintiff is claiming that its future opportunities to host United States players if and when online real money poker becomes legalized, such damages are too remote and speculative to constitute antitrust injury.

Thus, to the extent that Plaintiff claims its inability to enter the online poker market is a result of Defendants' violation of antitrust laws, the 1AC fails to allege facts sufficient to state a claim under such a theory of liability.

Monopoly Leveraging

Plaintiff's 1AC also alleges facts which suggest that another of its theories of antitrust liability against Defendants is that Defendants have engaged in monopoly leveraging by using its dominance in real money play "to tie use of their [presumably fantasy play] software system with the purchase of airtime or advertising time on broadcast and cable networks in the United States . . . [which] made it impossible for Plaintiff to license its software to such media companies." ¶ 70.

The monopoly leveraging cause of action is insufficient as a matter of law

where the defendant has not monopolized or attempted to monopolize the secondary market but merely seeks to "gain a competitive advantage." Thus, as the Court has already concluded that Plaintiff's complaint fails to state a claim for attempted monopolization in the markets for cigars and U.S. non-Cuban premium cigars, Plaintiff's claim for monopoly leveraging must also be dismissed.

Gen. Cigar Holdings, Inc. v. Altadis, S.A. (S.D. Fla. 2002) 205 F. Supp. 2d 1335, 1351-54 (bold emphasis added).

But anticompetitive conduct alone does not establish a monopolization claim; rather, the plaintiff must connect that anticompetitive conduct to a corresponding antitrust injury in order to establish "antitrust standing." See *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990). The Ninth Circuit has established a four-part definition of antitrust injury: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999). **In practice, then, a plaintiff must show how defendant's anticompetitive conduct harms both competition and plaintiff.**

CareFusion Corp. v. Medtronic Spine LLC (N.D. Cal. Nov. 1, 2010) 2010 U.S. Dist. LEXIS 122004, 13-14 (bold emphasis added).

Here, to the extent Plaintiff intends to rely on a monopoly leveraging argument, Plaintiff only points to a specific licensing contract with one television network which Plaintiff was unable to procure (¶ 62—"Pokerstars deprived Plaintiff of the opportunity to license software to one of these networks in the fall of 2010"; ¶ 36—"Full Tilt did not directly interfere in the potential transaction between Cardroom and the network"), and that there were two other networks as to which Plaintiff does not allege an attempt to license. ¶ 70. However, Plaintiff does not allege that either Defendant has monopolized or attempted to monopolize the secondary market of licensing software to such media companies. By implication, there are still other networks available to which Plaintiff can license its software. Thus, Plaintiff has only identified harm to itself, not to competition.

In alleging "the anticompetitive effect of the defendant's conduct," an antitrust plaintiff must show harm to competition rather than to competitors. That is, the "anticompetitive effects" are measured by their impact on the market rather than by their impact on competitors. See, e.g., *Dickson v. Microsoft Corp.*, 309 F.3d 193, 206 (4th Cir. 2002) ("To have an 'anticompetitive effect,' conduct 'must harm the competitive process and thereby harm consumers [*1072] . . . Harm to one or many competitors will not suffice.") (quoting *United States v. Microsoft Corp.*, 346 U.S. App. D.C. 330, 253 F.3d 34, 58 (D.C. Cir. 2001)). In order to prove this anticompetitive effect on the market, the plaintiff "may either prove that the defendants' behavior had an actual detrimental effect on competition, or that the behavior had the potential for genuine adverse effects on competition." *Levine*, 72 F.3d at 1551 (internal quotations omitted).

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Tying

Plaintiff alleges that Defendants “used their dominant position in real-money play, maintained by criminal activities, to tie use of their software systems with the purchase of airtime or advertising time on broadcast and cable networks in the United States,” which “made it impossible for Plaintiff to license its software to such media companies.” ¶ 70. However, this does not constitute the type of tying arrangement prohibited under the federal Sherman Act and Clayton Act.

"A tying arrangement is 'an agreement by a party to **sell** one product but only on the condition that **the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.**'" Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 462, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514-6 (1958)). The Supreme Court explained in Jefferson Parish, 466 U.S. at 12 that "the essential characteristic of an invalid tying arrangement lies in the **seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied [*1355] product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.**" In order for the seller to be able to "force" its tied product on an otherwise unwilling buyer, the seller must have sufficient market power in the tying market. Id. at 14.

To allege a tying claim, therefore, a plaintiff must identify the relevant market in which the tying product exists, and must allege that the **seller** has sufficient power within that market to be able to force buyers to purchase the tied product. Id. at 21 (stating that "a tying arrangement cannot exist unless two separate product markets have been linked"). To do this requires a "determination [of] precisely what the tying and tied product markets are." Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 443 (3d Cir. 1997) (dismissing the plaintiff's tying claim because the proposed tying market was "not a relevant market for antitrust purposes").

Gen. Cigar Holdings, Inc. v. Altadis, S.A. (S.D. Fla. 2002) 205 F.Supp.2d 1335, 1353-1356 (bold emphasis added).

Here, Plaintiff's purported tying claim alleges that Defendants are buyers, not sellers, of airtime or advertising time—which is a limited resource sold by the networks. ¶ 70. In return, Defendants are acting as “sellers” of their fantasy poker play software for use on the network seller’s sports-related websites. Id. Thus, Defendants are not forcing the networks to purchase two products tied together.

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For the foregoing reasons, the 1AC fails to state a cause of action for relief under the Florida Anti-Trust Act. The demurrer to the second cause of action is SUSTAINED with leave to amend.

3. Third Cause of Action (Relief Under The Cartwright Act, Bus. & Prof. Code § 16700 et seq.).

The third cause of action is based upon essentially the same allegations as the second cause of action.

“Federal cases interpreting the Sherman and Clayton Acts are applicable to the interpretation of California's antitrust legislation, the Cartwright Act. (Citations omitted.)” Rosack v. Volvo of Am. Corp. (1982) 131 Cal.App.3d 741, 751.

n5 Federal authorities interpreting the Sherman Antitrust Act are persuasive authority as to the meaning of the Cartwright Act. (Citations omitted.) California courts also rely on the federal cases construing the Clayton Act to the extent the Cartwright Act also incorporates the substance of the Clayton Act. (Citation omitted.)

Classen v. Weller (1983) 145 Cal.App.3d 27, 36 n.5.

However, “[u]nlike the Clayton Act, the Cartwright Act does not require a direct relationship between plaintiffs and those alleged to have violated the state antitrust laws. (Bus. & Prof. Code, § 16750, subd. (a).)” Boccardo v. Safeway Stores, Inc. (1982) 134 Cal.App.3d 1037, 1044.

In that neither Defendant nor Plaintiff identifies a difference between the Cartwright Act, Florida's Anti-Trust Act, or the federal Sherman Act and Clayton Act for purposes of this demurrer, the Court incorporates by reference its analysis above re: the second cause of action for relief under Florida Anti-Trust Act.

As such, the demurrer to the third cause of action is SUSTAINED with leave to amend.

12/31/2012

Protective Order

Request For Judicial Notice

Defendant requests that the Court take judicial notice of the following: (1) Order issued by the Honorable Margaret M. Morrow on May 6, 2010; (2) Order issued by the Honorable Margaret M. Morrow on May 7, 2010; (3) Order issued by this Court on December 22, 2010; (4) Order issued by the Honorable Margaret M. Morrow on August 24, 2012.

Defendant Tiltware seeks a protective order staying all discovery in this case directed to any party in this case, i.e., a global stay, until the Court determines that Plaintiff has stated facts to support at least one viable cause of action, rendering the case at issue.

The discovery act vests the trial court with discretion to grant a protective order that limits the scope of discovery if the court determines the “burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.” (§ 2017.020, subd. (a).)

Pratt v. Union Pacific Railroad Co. (2008) 168 Cal.App.4th 165, 181.

CCP § 2017.020(a) provides that the court may make this determination pursuant to a motion for protective order by a party or other affected person. This motion shall be accompanied by a meet and confer declaration under Section 2016.040.

Here, Defendant’s counsel has submitted a sufficient meet and confer declaration. Decl. of Erik Jackson, ¶ 9.

Given the number of parties involved, and the broad discovery requests propounded, as represented by Defendant in its motion, the burden, expense and intrusiveness of Plaintiff’s discovery requests is currently outweighed by the likelihood that the information sought will not lead to the discovery of admissible evidence. There are no viable causes of action by virtue of this Court’s ruling on the demurrers and motion for judgment on the pleadings. As argued by Defendant, until Plaintiff can plead at least one viable cause of action, it is in the interests of all parties to avoid the expense and burden of discovery.

Accordingly, Defendant’s motion for a global protective order is GRANTED. Neither Plaintiff nor any Defendant is to serve any discovery requests pending the determination of jurisdiction as to all Defendants.

DEFENDANT CHRIS FERGUSON

Demurrer

The Court incorporates by reference its discussion pertaining to Defendant Tiltware, LLC’s demurrer, above. For the reasons stated therein, the 1AC fails to allege facts sufficient to

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state a cause of action against Defendant Chris Ferguson as to the first, second and third causes of action.

The demurrer to the first, second and third causes of action is SUSTAINED with leave to amend.

SPECIALLY APPEARING DEFENDANT PHIL IVEY

Demurrer

The Court incorporates by reference its discussion pertaining to Defendant Tiltware, LLC's demurrer, above. For the reasons stated therein, the 1AC fails to allege facts sufficient to state a cause of action against Defendant Phil Ivey as to the first, second and third causes of action.

The demurrer to the first, second and third causes of action is SUSTAINED with leave to amend.

Motion To Quash

Defendant Phil Ivey moves to quash service of summons and first amended complaint on the ground that Ivey is not a resident of California and minimum contacts do not exist to establish personal jurisdiction over him.

On a motion to quash for lack of personal jurisdiction, the plaintiff has the initial burden of proof:

Where a nonresident defendant challenges jurisdiction by way of a motion to quash, **the plaintiff bears the burden of establishing by a preponderance of the evidence** that minimum contacts exist between the defendant and [*1313] the forum state to justify imposition of personal jurisdiction. (Citations omitted.) The plaintiff must present facts “demonstrating that the conduct of defendants related to the pleaded causes [of action] is such as to constitute constitutionally cognizable “minimum contacts.” [Citation.]” (Citation omitted.)

Elkman v. National States Ins. Co. (2009) 173 Cal.App.4th 1305, 1312-13 (bold emphasis and underlining added).

The motion to quash is CONTINUED. The continued hearing on the motion to quash will be deemed applicable to the service of the second amended complaint.

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Motion for Protective Order

The relief sought by Defendant Phil Ivey’s motion for a protective order is encompassed within the order granting Defendant Tiltware, LLC’s motion for a protective order above. As such, the motion is MOOT.

DEFENDANT PHILIP S. GORDON

Motion For Judgment On The Pleadings

A motion for judgment on the pleadings involves the same type of procedures that apply to a general demurrer. Richardson-Tunnell v. School Ins. Program for Employees (2007) 157 Cal.App. 4th 1056, 1061. “ ‘A motion for judgment on the pleadings may be made at any time either prior to the trial or at the trial itself. [Citation.]’ (Citation omitted.) Such motion may be made on the same ground as those supporting a general demurrer, i.e., that the pleading at issue fails to state facts sufficient to constitute a legally cognizable claim or defense. (Citation omitted.)” Stoops v. Abbassi (2002) 100 Cal.App.4th 644, 650.

The Court incorporates by reference its discussion pertaining to Defendant Tiltware, LLC’s demurrer, above. For the reasons stated therein, the 1AC fails to allege facts sufficient to state a cause of action against Defendant Joseph Gordon as to the first, second and third causes of action.

The motion for judgment on the pleadings is GRANTED with leave to amend as to the first, second and third causes of action.

SPECIALLY APPEARING DEFENDANTS MARK SCHEINBERG AND OLDFORD GROUP, LTD.

Notice of Joinder

Defendants Mark Scheinberg and Oldford Group, Ltd.’s joinder in the demurrers of Defendants Tiltware, LLC and Chris Ferguson is GRANTED.

Defendants Mark Scheinberg and Oldford Group Ltd. designate themselves as specially appearing, and invoke CCP § 418.10(e), which allows a specially appearing defendant to move to quash service of summons on the ground of lack of jurisdiction, and simultaneously bring a demurrer, without being deemed to have made a general appearance.

In that regard, Defendants Scheinberg and Olford Group Ltd. also have filed a motion to quash. Thus, their notice of joinder in the demurrer of Defendants Tiltware, LLC and Chris Ferguson does not constitute a general appearance.

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Motion to Quash

The Court will allow this motion to be quash to be heard per CCP § 418.10(a) (“A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion [to quash service of summons on the ground of lack of jurisdiction].

A. Re: Ineffective Service of Process.

Specially appearing Defendants Mark Scheinberg and Oldford Group, Ltd. move to quash service on the ground that there was ineffective service of process in that Scheinberg is an Isle of Man resident, while Oldford Group is a British Virgin Islands company, both of which were purportedly mail-served by Plaintiff without proof that the summons and complaint were actually delivered to or received by either of these two defendants.

“When a defendant challenges the court’s personal jurisdiction on the ground of improper service of process ‘the burden is on the plaintiff to prove the existence of jurisdiction by proving, inter alia, the facts requisite to an effective service.’” Summers v. McClanahan (2006) 140 Cal. App. 4th 403, 413.

Hague Convention

We think the view that article 10(a) allows service of process by mail represents the better position. As discussed above, permitting service by mail under article 10(a) is consistent with the logic and structure of the [Hague] Convention itself, with the interpretative materials on the issue, including the Special Commission Report, the Handbook, and State Department documents, is consistent with the understanding of some of the signatories, and also furthers the Convention’s primary purpose of establishing a uniform, simple and efficient system for establishing service abroad. Allowing service of process by mail, **so long as the signatory does not object**, promotes a smooth and efficient international legal system. Indeed, as methods of communicating continue to evolve, disallowing service of process by mail seems antiquated and out of step with the modern world. For all these reasons, we conclude that article 10(a) provides for service of process by mail.

Denlinger v. Chinadotcom Corp. (2003) 110 Cal.App.4th 1396, 1404-05 (bold emphasis added).

Defendants argue that territories subject to the laws of the United Kingdom require personal service by a judicial officer or competent person other than a judicial officer based upon the United Kingdom Declaration regarding Article 10 of the Hague Convention. However, the scope of this declaration has been narrowly construed:

Hiller claims the United Kingdom objected to article 10, paragraph (c) of the Convention. She relies upon the declaration in which the United Kingdom

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resolved: "With reference to the provisions of paragraphs (b) and (c) of Article 10 of the Convention, documents for service through official channels will be accepted in the United Kingdom only by the central or additional authorities and only from judicial, consular or diplomatic officers of other Contracting States." (Italics added; see Appen. to Fed. Rules Civ. Proc., rule 4, 28 U.S.C.) **Hiller urges that this resolution means that in the United Kingdom, service pursuant to article 10 paragraph (c) is valid only if routed through judicial, consular or diplomatic officers to the central authorities. This identical argument was made and rejected** in *Tax Lease Underwriters v. Blackwell Green, Ltd.* (E.D.Mo. 1985) 106 F.R.D. 595. There, a solicitor personally served the defendant in England. The defendant urged the service did not comply with the Convention because it was not routed through the official authorities designated by the United Kingdom. The court held: [*1765] "[T]he summons and complaint served on [the defendant] **did not constitute 'documents for service through official channels,' as that phrase was used in the United Kingdom's objections to paragraphs (b) and (c) of Article 10.** The 'service through official channels' declaration does not preclude direct service The 'service through official channels' declaration was intended to apply to documents from an embassy or consular official. Because the service on [the defendant] complied with paragraphs (b) and (c) of Article 10 of the Hague Convention, [this argument] in support of [the] motion to quash must be rejected." (*Id.* at pp. 596-597, italics added.)

Balcom v. Hiller (1996) 46 Cal. App. 4th 1758, 1764-65 (bold emphasis added).

Service by Mail on Out-Of-State Defendant

CCP § 415.40 provides that:

A summons may be served on a person outside this state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, **requiring a return receipt**. Service of a summons by this form of mail is deemed complete on the 10th day after such mailing.

(Bold emphasis added.)

CCP § 417.20(a) provides:

Proof that a summons was served on a person outside this state shall be made:

(a) If served in a manner specified in a statute of this state, as prescribed by Section 417.10, **and if service is made by mail pursuant to Section 415.40, proof of service shall include evidence satisfactory to the court establishing actual delivery to the person to be served, by a signed return receipt or other evidence;**

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(Bold emphasis and underlining added.)

CCP § 417.20(a) requires either a signed return receipt or other evidence of actual delivery to the person to be served. Plaintiff does not produce a signed return postal receipt. Instead, Plaintiff argues that service was mailed on March 5, 2012 at addresses Defendants provided for service of process. Subsequently, on April 10, 102 DRS Entertainment LLP filed to dissolve itself, and two days after that, counsel emailed Plaintiff's counsel a letter attached which included copies of the original proofs of service filed by Plaintiff's counsel. Sanai Decl., ¶ 9. Here, the fact that Defendants retained counsel, who contacted Plaintiff's counsel on April 12, 2012 (Sanai Decl., ¶ 9), a little over a month after the notice was mailed, is sufficient evidence of actual notice to Defendants. As noted, the modern trend is to liberally construe service of process statutes and "uphold jurisdiction if actual notice has been received by the defendant." Summers v. McClanahan (2006) 140 Cal. App. 4th 403, 410-411 (bold emphasis and underlining added).

Where a nonresident defendant is served by mail, "hard evidence of actual delivery" is required in order to enter the default against that nonresident defendant. Johnson & Johnson v. Superior Court (1985) 38 Cal. 3d 243, 254-55; Woods v. Stallworth (1960) 177 Cal.App.2d 517, 520: ("The clerk has no authority to enter the default of a defendant in the absence of valid proof of service of summons.") However, service on a person outside a state pursuant to CCP § 415.40 is effected on the date of mailing of a summons in the form provided for in CCP § 415.40 (Johnson & Johnson, supra, 38 Cal.3d at 252), and is deemed complete on the 10th day after such mailing. CCP § 415.40. An effective return of service made pursuant to CCP § 415.40:

need not satisfy [*255] all of the requirements for proof of service. Other provisions requiring hard evidence of actual delivery **before a default may be entered** (see §§ 417.20, 417.30; Woods v. Stallworth, supra, 177 Cal.App.2d at p. 520) provide ample guarantee that a court will not improperly adjudicate the rights of a defendant over whom it has no jurisdiction. Section 581a, subdivision (a) is satisfied where a plaintiff effects substituted service by mail pursuant to section 415.40 and files a return consisting of the original summons and a duly executed affidavit of service by mail within three years of the commencement of the action.

Johnson & Johnson, supra, 38 Cal.3d at 254-55 (bold emphasis added).

B. Re: Lack of personal jurisdiction.

Defendants Mark Scheinberg and Oldford Group Ltd. also move to quash service of summons and first amended complaint on the ground that they are foreign defendants and minimum contacts do not exist to establish personal jurisdiction over them.

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As noted above, on a motion to quash for lack of personal jurisdiction, the plaintiff has the initial burden of proof by a preponderance of the evidence. Elkman v. National States Ins. Co. (2009) 173 Cal.App.4th 1305, 1312-13.

The motion to quash is CONTINUED to March 13, 2013 at 1:30 p.m.. The continued hearing on the motion to quash will be deemed applicable to the service of the second amended complaint.

**SPECIALY APPEARING DEFENDANTS RAYMOND BITAR, HOWARD LEDERER
AND POCKET KINGS., LTD.**

Motion To Quash

Request For Judicial Notice

Defendants' request that the Court take judicial notice of an article regarding *Zynga Poker*, an online Poker game developed by the company Zynga that is referenced in ¶ 79 of the 1AC is DENIED. This article is being offered for the truth of the matters asserted therein and is not subject to a hearsay exception.

The hearsay rule applies to statements contained in judicially noticed documents, and precludes consideration of those statements for their truth unless an independent hearsay exception exists. (See 1 Witkin, Cal. Evidence (4th ed. 2000) Judicial Notice, § 25, p. 119.)

North Beverly Park Homeowners Assn. v. Bisno (2007) 147 Cal.App.4th 762, 778.

Defendants' Evidentiary Objections

No. 1: OVERRULED.
No. 5: OVERRULED.
No. 6: SUSTAINED.
No. 7: SUSTAINED.
Unspecified: OVERRULED.
Unspecified: SUSTAINED.
Unspecified: SUSTAINED.
No. 8: SUSTAINED.

A. Re: Ineffective Service of Process.

Specially appearing Defendants Pocket Kings, Ltd., Howard Lederer and Raymond Bitar move to quash service on the ground that there was ineffective service of process in that Bitar and Pocket Kings reside in Ireland, Lederer is a resident of Nevada, and all were purportedly mail-served by Plaintiff without proof that the summons and complaint were actually delivered to or received by either of these defendants.

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As noted above, “[w]hen a defendant challenges the court's personal jurisdiction on the ground of improper service of process ‘the burden is on the plaintiff to prove the existence of jurisdiction by proving, inter alia, the facts requisite to an effective service.’” Summers v. McClanahan (2006) 140 Cal. App. 4th 403, 413.

In its opposition, Plaintiff purports to have served Defendant Bitar personally in Glendora, CA on November 25, 2012. See Exh. A to Opposition. This would appear to render MOOT the motion to quash as to Bitar. “Due process permits the exercise of personal jurisdiction over a nonresident defendant . . . where the defendant is personally served with process while he or she is physically present in the forum state.” In re Marriage of Fitzgerald & King (1995) 39 Cal.App.4th 1419, 1425-26.

However, although, Pocket Kings was served by virtue of the November 25, 2012 personal service in Glendora, CA on Bitar as authorized agent for service of process (Exh. B to Opposition), this is insufficient to confer personal jurisdiction over a non-resident defendant if the lawsuit does not arise out of the corporation’s contacts with California. DVI, Inc. v. Superior Court (2002) 104 Cal.App.4th 1080, 1095-96. Because Plaintiff only relies upon the fact that Bitar was served in California as Pocket Kings authorized agent, this is an insufficient showing to moot the motion to quash based on lack of personal jurisdiction (discussed below).

As to Howard Lederer, Plaintiff offers a Verified Second Amended Complaint incorporating the declaration of an FBI agent verifying the civil forfeiture complaint which seeks to divest Lederer of the 99 Hawk Ridge Drive property to which the summons and complaint was sent. Exh. D to Opposition. Plaintiff also attached a Certified Mail Receipt reflecting a mailing to Howard Lederer.

The Court incorporates by reference its discussion above re: the motion to quash of Defendants Mark Scheinberg and Oldford Group, Ltd. Plaintiff has not submitted evidence that it **either** complied with the requirements of CCP § 415.40 (return receipt) or § 417.20(a)(signed return receipt **or** other evidence of actual delivery), **or actual notice** (under the modern liberal construction of service statutes discussed in Summers v. McClanahan (2006) 140 Cal.App.4th 403, 410-411).

As such, there is insufficient evidence that Defendant Lederer was properly served with a copy of the summons and first amended complaint. Lederer’s motion to quash on this ground is successful.

B. Re: Lack of personal jurisdiction.

Given the foregoing discussion, the motion to quash is MOOT as to Defendants Ray Bitar and GRANTED as to Defendant Howard Lederer. Even if Plaintiff files and serves a second amended complaint in light of the Court’s ruling on the demurrers/motion for judgment on the pleadings above, the Court does not lose jurisdiction:

“[W]here jurisdiction of the person . . . has once attached it is not defeated by the removal of the person . . . beyond the jurisdiction of the court. (15 C.J., p. 824[; 21

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C.J.S. (2006) Courts, § 93.] Jurisdiction once acquired is not defeated by subsequent events which might have prevented jurisdiction had they occurred before personal service of the action was made. [Citation.]” (Citations omitted.)

Goldman v. Simpson (2008) 160 Cal.App.4th 255, 264.

See also Cadle Co. II, Inc. v. Fiscus (2008) 163 Cal.App.4th 1232, 1240-41 (holding that a court retains personal jurisdiction over a defendant in an independent action to renew a prior judgment even if the defendant had no additional contacts with the forum state since the original California litigation).

Defendant Raymond Bitar’s motion to quash is DENIED. Defendants Howard Lederer’s motion to quash is GRANTED. The hearing on the motion to quash as to Defendant Pocket Kings, Ltd. is CONTINUED to March 13, 2013 at 1:30 p.m.. The continued hearing on the motion to quash will be deemed applicable to the service of the second amended complaint.

SPECIALY APPEARING DEFENDANTS ERIK SEIDEL, ANDY BLOCH AND JOHN JUANDA

Motion To Quash

Specially appearing Defendants Erik Seidel, Andy Bloch and John Juanda move to quash service of summons and first amended complaint on the ground that they are foreign defendants and minimum contacts do not exist to establish personal jurisdiction over them.

As noted above, on a motion to quash for lack of personal jurisdiction, the plaintiff has the initial burden of proof by a preponderance of the evidence. Elkman v. National States Ins. Co. (2009) 173 Cal.App.4th 1305, 1312-13.

The motion to quash is GRANTED as to Defendant John Juanda and CONTINUED as to Erik Seidel and Andy Bloch to March 13, 2013 at 1:30 p.m.. The continued hearing on the motion to quash will be deemed applicable to the service of the second amended complaint.

SPECIALY APPEARING DEFENDANT PERRY FRIEDMAN

Motion To Quash

Request For Judicial Notice

Defendant requests that the Court take judicial notice of the following: (1) First Amended Complaint filed on November 9, 2011; (2) Proof of Service of Summons filed on February 28, 2012; (3) Amended Proof of Service of Summons filed on August 10, 2012. Requests Nos. 1-3 are GRANTED per Evid. Code § 452(d)(court records).

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Supplemental Request for Judicial Notice

Defendant request that the Court take judicial notice of the Notice of Special Appearance For Sole Purpose Of Filing Motion To Quash Service Of Summons And Complaint filed on July 30, 2012. The request is GRANTED per Evid. Code § 452(d)(court records).

The Court will allow this motion to be quash to be heard per CCP § 418.10(a) (“A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion [to quash service of summons on the ground of lack of jurisdiction].

A. Re: Ineffective Service of Process.

Specially appearing Defendant Perry Friedman moves to quash service on the ground that there was ineffective service of process in that the proofs of service of summons purporting to show service in Nevada and then to an unknown address are ineffective.

As noted above, “[w]hen a defendant challenges the court's personal jurisdiction on the ground of improper service of process ‘the burden is on the plaintiff to prove the existence of jurisdiction by proving, inter alia, the facts requisite to an effective service.’” Summers v. McClanahan (2006) 140 Cal. App. 4th 403, 413.

The Court incorporates by reference its discussion above re: the motion to quash of Defendants Mark Scheinberg and Oldford Group, Ltd. Plaintiff has not submitted evidence that it **either** complied with the requirements of CCP § 415.40 (return receipt) or § 417.20(a)(signed return receipt **or** other evidence of actual delivery), **or actual notice** (under the modern liberal construction of service statutes discussed in Summers v. McClanahan (2006) 140 Cal.App.4th 403, 410-411.

As such, there is insufficient evidence that Defendant Friedman was properly served with a copy of the summons and first amended complaint. Friedman’s motion to quash on this ground is successful.

The motion to quash is GRANTED.

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