UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEVE SEGAL, NICK HAMMER, ROBIN HOUGDAHL, and TODD TERRY, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

RAYMOND BITAR; NELSON BURTNICK; FULL TILT POKER, LTD.; TILTWARE, LLC; VANTAGE, LTD; FILCO, LTD.; KOLYMA CORP. A.V.V.; POCKET KINGS LTD.; POCKET KINGS CONSULTING LTD.; RANSTON LTD.; MAIL MEDIA LTD.; HOWARD LEDERER; PHILLIP IVEY JR.; CHRISTOPHER FERGUSON; JOHNSON JUANDA; JENNIFER HARMAN-TRANIELLO; ERICK LINDGREN; ERIK SEIDEL; ANDREW BLOCH; MIKE MATUSOW; GUS HANSEN; ALLEN CUNNINGHAM; PATRIK ANTONIUS and JOHN DOES 1-100,

Defendants.

Case No.: 11-CV-4521 (LBS)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Dated: September 16, 2011

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP

Lawrence P. Kolker
Thomas H. Burt
Edmund Aronowitz
Lydia A. Keaney
Beth A. Landes
270 Madison Avenue
New York, New York 10016
Telephone: 212-545-4600
Facsimile: 212-545-4653

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I. PRELIMINARY STATEMENT

This case concerns the Full Tilt Poker Umbrella (or "Full Tilt"), a group of entities and persons engaged in the business, inter alia, of providing online card rooms for poker players. Until April 15th of this year, U.S. players opened and held online player accounts with Full Tilt, in which they would deposit and withdraw funds in order to play internet poker in Full Tilt's card rooms. However, certain people and entities controlling Full Tilt caused credit card and e-check transactions between the Company and U.S. players to be processed through fraudulent means, including through front companies in violation of federal law. On April 15, 2011, the United States Attorney for the Southern District of New York ("U.S. Attorney") unsealed a criminal indictment ("DOJ Indictment") against two Full Tilt executives and commenced a civil money-laundering and forfeiture action ("DOJ Civil Pleading", and together with the DOJ Criminal Pleading, the "DOJ Pleadings") against entities that do business as and through Full Tilt. Starting on that date and every day since then, U.S. players have been prevented from accessing their player accounts or withdrawing the assets therein. Full Tilt effectively concedes that the funds belong to the players and has repeatedly promised to return the funds, as described more fully herein. The total amount of these funds is approximately $150 million.

Notably, the U.S. Attorney's actions did not prevent Full Tilt from returning the funds owed to U.S. players. Still, access to U.S. players' online accounts has not been restored, nor have the funds within been returned to those players. Plaintiffs brought suit on behalf of themselves and a putative class of U.S. online poker players (the "Class" or "Class Members") who held online player accounts ("Player Accounts") with Full Tilt on Black Friday—the day Plaintiffs' and Class Members' access to their Player Accounts was terminated. Plaintiffs seek

to restore the balance of all Player Accounts held by U.S. players (the *res*) to those players.[1] For a full recitation of the facts underlying Plaintiffs' claims, Plaintiffs respectfully refer the Court to Plaintiffs' Complaint, dated June 30, 2011, and referenced herein as Compl. ¶ ___.

Defendant Johnson Juanda filed a Motion to Dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(20) and 12(b)(6) on August 19, 2011 (ECF No. 52), supported by a Memorandum of Law ("Juanda Br.," ECF No. 54). On August 23, 2011, Defendants Tiltware, LLC ("Tiltware"); Vantage, Ltd. ("Vantage"); Filco, Ltd ("Filco").; Pocket Kings Ltd. ("Pocket Kings"); Pocket Kings Consulting Ltd. ("Pocket Kings Consulting"); Howard Lederer; Chris Ferguson; Jennifer Harman-Traniello; Erick Lindgren; Erik Seidel; Andrew Bloch; Mike Matusow; and Allen Cunningham filed a Motion to Dismiss Plaintiffs' Complaint (ECF No. 62) for lack of personal jurisdiction, and failure to allege conversion or RICO violations, supported by a Memorandum of Law ("Ifrah Br.," ECF No. 63). The same day, Allen Cunningham, Jennifer Harman-Traniello and Erick Lindgren filed a Motion to Dismiss Plaintiffs' Complaint for lack of personal jurisdiction (ECF No. 64), supported by a Memorandum of Law ("Ifrah. Jur. Br.," at ECF No. 65). In response to Defendants' three Motions to Dismiss, Plaintiffs file this omnibus Memorandum of Law in Opposition.

Plaintiffs allege that Defendants Tiltware, Vantage, Filco, Pocket Kings and Pocket Kings Consulting, the moving corporate defendants (the "Entity Defendants"), and moving Defendants, Ferguson, Harman-Traniello, Lindgren, Seidel, Bloch, Matusow and Cunningham (herein, simply the "Individual Movants" or "Individual Defendants," and, together with Entity

[1] Defendants appear to willfully misconstrue Plaintiffs' pleadings. The *res* is not, as Defendants purport to believe, composed of the funds debited from [Plaintiffs' and class members'] personal bank accounts as a result of their online poker activities" (Ifrah Br. at 37); it is the balance of Plaintiffs' and Class Members' Full Tilt Player Accounts on Black Friday.

Defendants, where appropriate in context, the "Defendants") have each had sufficient contacts with New York, and have purposefully availed themselves of New York's laws and markets, to be subject to personal jurisdiction in the State of New York. Plaintiffs allege that each Defendant is liable for conversion of Plaintiffs' funds for interfering with Plaintiffs' and class members' conceded and exclusive rights to their own funds, and that the Entity Defendants are liable for violations of the RICO statutes due to their participation in the conduct of an enterprise through racketeering activity. In addition,

Defendants' Motions should be denied in all respects; for the following reasons:

The jurisdictional challenge is infirm:

- Each Individual Defendant played poker online directly against New York players as part of their work for Full Tilt; and,
- Each entity Defendant participated in the operation of a business that continuously and systematically performed transactions with New Yorkers and alsofalls within the jurisdictional provisions of the RICO statutes (18 U.S.C.S. § 1965).

Defendants' challenge to Plaintiffs' conversion claim is flawed:

- Defendants concede the Class's right to the funds and Plaintiffs have pleaded Defendants' refusal to return it;
- Player accounts are a res over which Plaintiffs and the Class have an equitable claim.

The entity Defendants put forward a hodge-podge of challenges to the RICO claims—each fails:

- Entity Defendants seek to apply pleading specificity requirements to Plaintiffs' RICO allegations that are contrary to controlling law; and,
- Plaintiffs have fully alleged each element of the predicate acts.

II. ARGUMENT

A. Personal Jurisdiction

Despite Defendants' protestations to the contrary, the Entity Defendants and Individual Defendants all purposefully availed themselves of the benefits of New York's laws and markets and projected themselves into New York by providing New Yorkers with an interactive "real-money" online poker casino and by gambling with those New Yorkers over the Internet.[2] This action arises out of the Defendants' online gambling activities, which induced Plaintiffs and other class members to entrust funds with Full Tilt for the purpose of playing online poker for real money, and the subsequent failure of Defendants to return those funds to Plaintiffs and other class members, including specifically, a New York named-plaintiff and thousands of New York class members. The fact that the Defendants used the Internet as the means to project themselves into the homes and workplaces of Class Members nationwide does not undercut the fact that each and every Defendant either facilitated gambling, or individually participated in gambling, with New Yorkers in New York over the Internet. *See* Comp. ¶ 16 ("Many U.S. player account holders, including Plaintiff Segal, are residents of the State of New York and deposited funds in their Full Tilt Poker player account in New York, engaging with the Full Tilt Poker Enterprise in New York through their transactions and on a regular basis through the Full Tilt Poker web portal."); *see also* Compl. ¶¶ 56-58.

In closely analogous circumstances, the United States District Court for the Eastern District of New York held that the subsidiaries that controlled and operated an online casino—

[2] Phillip Ivey, Raymond Bitar and Nelson Burtnick are non-moving individuals; they have not challenged this Court's jurisdiction over them and Plaintiffs' Omnibus Response Motion will not address that issue. Defendant Ivey is alleged to be liable for conversion, and Defendants Bitar and Burtnick ("Individual RICO Defendants") are alleged to be liable under the RICO statutes

and whose software was developed and licensed by a parent corporation—were subject to personal jurisdiction in New York because such an online casino "is a highly interactive website because its primary function is to allow the customer to gamble over the internet." *See Uebler v. Boss Media*, 363 F.Supp.2D 499, 506 (E.D.N.Y. 2005) (Spatt, J.) ("*Uebler I*"). Furthermore, following jurisdictional discovery into the parent-subsidiary corporate structure, that same Court later held that the parent software developer was also subject to personal jurisdiction in New York because "[a]bsent the existence" of the subsidiaries, there was a "reasonable certainty" that the parent corporation "would conduct [online casino operating] activities itself." *See Uebler v. Boss Media*, 432 F. Supp. 2d 301, 305-06 (E.D.N.Y. 2006) ("*Uebler II*").

Plaintiffs have also alleged and averred sufficient facts to show that each Entity Defendant either directly operated or facilitated the operation of an online casino, or that, as a parent or affiliated corporation, it would have undertaken such operating activities itself. In addition, Plaintiffs have fully alleged that each Individual Defendant is subject to personal jurisdiction, not based on their "mere ownership" of the Entity Defendants, but rather because each Individual Defendant directly gambled online with New York residents and promoted the Full Tilt enterprise. Accordingly, this Court's assertion of personal jurisdiction over all Defendants comports with New York's long-arm jurisdiction statute as well as constitutional due process.

1. Standard of Review

"On a [Fed. R. Civ. P.] 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant." *See Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996) (citing *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir. 1994)). "Prior to discovery, a plaintiff may defeat a motion to dismiss based on legally sufficient allegations of jurisdiction."

Id. (citing *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d. Cir. 1990)). "Where, as here, a district court relies on the pleadings and affidavits, and chooses not to conduct a 'full-blown evidentiary hearing,' plaintiffs need only make a prima facie showing of personal jurisdiction over the defendant." *Porina v. Marward Shipping Co.*, 521 F.3d 122, 126 (2d Cir. 2008) (citation omitted). A plaintiff can meet this burden through his "own affidavits and supporting materials." *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). When considering the allegations of the complaint, various affidavits and sworn declarations, the Court must construe them in the "light most favorable by the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation to the moving party." *A. I. Trade Finance, Inc. v. Petra Bank*, 989 F.2d 76, 79-80 (2d Cir. 1993).

In this case, where there has been no discovery, let alone an evidentiary hearing, the allegations of Plaintiffs' complaint as well as the facts stated in the Burt Declaration are more than sufficient to satisfy Plaintiffs' burden of establishing this Court's personal jurisdiction over each Defendant.

2. Jurisdictional Allegations and Averments

Plaintiffs make specific allegations or averments as to each Entity Defendant showing their integral role in the overall Full Tilt organization such that New York residents were able to participate in real-money poker at the www.fulltiltpoker.com site.

Entity Defendant **Tiltware** is the exclusive poker software developer and licensor for the aggregate Full Tilt enterprise. Tiltware is also the Full Tilt marketing wing and the parent company of Pocket Kings, Pocket Kings Consulting and Filco. Compl. ¶ 26.

Entity Defendant **Vantage** has control over the "player funds" at issue in this case[3] and is the entity with which Plaintiffs and Class members entered into an "End User License Agreement" that allowed them to download the Tiltware software needed to participate in poker tournaments and to play online interactive games of poker for real money at www.FullTiltPoker.com. Vantage is also a licensee of the Alderney Gambling Control Commission ("AGCC"); by virtue of its license, Vantage is licensed, on behalf of Full Tilt, to register new customers, accept deposits from new and existing customers, permit withdrawal of funds by existing customers and permit participation by customers in gambling transactions and game play. Compl. ¶ 27. Vantage contracted with the United States Attorney's Office for the Southern District of New York ("U.S. Attorney" or "DOJ") to use the www.fulltilt.com domain name specifically and only for the purpose of returning Player Account funds to their owners.

Entity Defendant **Filco** also holds or held, at all or some relevant time, the "eGambling" license issued by the AGCC that purportedly permitted Full Tilt's operation as an online poker casino. Filco is explicitly named in Pocket Kings documents as a related company to Pocket Kings, among others, and Filco's corporate parent is Tiltware. As a licensee of the AGCC, Filco is or was licensed, on behalf of Full Tilt Poker, to register new customers, accept deposits from new and existing customers, permit withdrawal of funds by existing customers and permit participation by customers in gambling transactions and game play. Compl. ¶ 28.

Entity Defendant **Pocket Kings** "operates" the Full Tilt website and has at all or some relevant time(s) provided "[t]echnology and [m]arketing consulting services to the online poker industry and one of the fastest growing poker sites, Full Tilt Poker." Compl. ¶ 30. Entity Defendant Pocket Kings Consulting is an exclusive consultant to Full Tilt Poker. Compl. ¶ 31.

[3] Transcript of Oral Argument ("Public Trans.") at 9, *Segal v. Bitar*, No. 11-CV-4521 (LBS) (S.D.N.Y).

In sum, Plaintiffs have shown in the summary of allegations and averments above that each of the Entity Defendants is an integral part of the overall Full Tilt online gambling operation, and that each Entity Defendant, whether directly or as a parent or affiliate, performed functions that would be carried out with reasonable certainty by any single entity (or a department thereof) that attempted to operate an online poker casino.

As for the Individual Movants, each of them directly gambled in online poker tournaments with New Yorkers through the Full Tilt site. *See* attached Declaration of Thomas H. Burt ("Burt Decl.") at ¶¶ 3-13. Furthermore, these Individual Defendants are more than "mere owners" of the various corporate entities that constitute the Full Tilt enterprise; rather, they "directly interact with U.S. internet poker players through the Full Tilt website" and are all active promoters of the Full Tilt brand. *See* Compl. ¶¶ 8, 36-40, 42-48. As admitted on the www.fulltiltpoker.com website, "Full Tilt Pros Play 1600 Hours Every Week at Our Online Tables," s*ee* http://www.fulltiltpoker.com/, and over such extended lengths of online gambling against other registered Full Tilt poker players, including thousands of New Yorkers, direct online gambling interactions between these Individual Defendants and New York residents is inevitable. As demonstrated in the attached Burt Declaration, even without the benefit of discovery, Plaintiffs are able to allege that nine of the ten Individual Movants played online on the Full Tilt website against at least one known New York resident. Given the frequency of their online play, Full Tilt's records surely show that many more of each Movant's opponents were New Yorkers.

3. Online Gambling Constitutes "Transacting Business" Under New York's Long-Arm Statute, N.Y. CPLR § 302(a)(1)

N.Y. C.P.L.R. § 302(a)(1) states that "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or through an agent . . . transacts any business within the state

or contracts anywhere to supply goods or services in the state." N.Y. C.P.L.R. § 302(a)(1); *see also Uebler I*, 363 F. Supp. 2d at 504. It has been long established that a party need not be physically present in New York in order to transact business there, but rather, § 302(a)(1) extends the jurisdiction of New York State courts to nonresidents who have engaged in some purposeful activity in New York in connection with the matter in suit, and a single transaction in New York is sufficient to satisfy the transaction of business statutory requirement. *See Parke-Bernet Galleries, Inc. v. Franklyn*, 256 N.E.2d 506, 507-508 (N.Y. 1970); *see also Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 246 (2d Cir. 2007).

In order to determine whether a website or internet activity constitutes "transacting business" for purposes of personal jurisdiction, courts must look to the level of interactivity and commercial nature of the exchange of information that occurs on a website. *See Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir. 2010); *see also Uebler I,* 363 F. Supp. 2d at 505. New York courts have embraced the standards set out by Judge McLauglin of the Western District of Pennsylvania in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), dividing websites into a sliding scale of three categories based on their level of interactivity. Judge McLaughlin held:

> At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper.

Zippo Manuf. Co., 952 F. Supp. at 1124-26(citation omitted). The Court further noted that the opposite circumstance, where jurisdiction did not lie, was "where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions." *Id.* The Court then described the middle ground, of "interactive Web sites where a user can exchange information with the host computer" but without contract or knowing and repeated

exchange of files. In these cases, the Court held, "exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site." *Id.* (citation omitted). *See also Best Van Lines*, 490 F.3d at 251-52 (website's interactivity "may be useful" to determine whether the defendant 'transacts any business' in New York"); *Vandermark v. Jotomo Corp.*, 42 A.D.3d 931, 932-33, 839 N.Y.S.2d 670, 671 (N.Y. App. Div. 2007) (that website may confer personal jurisdiction where it "has significant commercial elements, which typically are found to constitute the transaction of business"); *Citigroup Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 565 (S.D.N.Y. 2000) (defining "spectrum of cases involving a defendant's use of the internet.").

Where, as here, an internet site is "highly interactive," personal jurisdiction will be found. *See, e.g., New Angle Pet Prods. v. MacWillie's Golf Prods.*, No. 06-CV-1171, 2007 U.S. Dist. LEXIS 46952, 2007 WL 1871345, at *9 (E.D.N.Y. June 28, 2007) (websites at issue were interactive because they permitted users to purchase products online by providing payment and shipping information); *Obabueki v. Int'l Bus. Machines Corp.*, No. 99-CV-11262, 2001 U.S. Dist. LEXIS 11810, 2001 WL 921172, at *2 (S.D.N.Y. Aug. 14, 2001) (website at issue was "interactive" because it was used by the defendant to operate a pre-employment screening service whereby "prospective customers download an application form which can be faxed to Choicepoint, Inc. with payment for the service; then they receive a login ID and password with which they may request background searches of potential employees through the website"); *Citigroup Inc.*, 97 F. Supp. at 565 (website at issue fell into the "middle category" of interactivity because it permitted customers in New York to apply for loans on-line, print out applications for submission by facsimile, and converse on-line with representatives through a "chat" platform on the website itself and was thus sufficient to confer personal jurisdiction over defendant); *Hsin*

Ten Enter. USA v. Clark Enters., 138 F. Supp. 2d 449, 456 (S.D.N.Y. 2000) (the website at issue was "highly interactive" where it allowed consumers to purchase products online, download order forms, and communicate with online representatives through the website); *see also Blissworld, LLC v. Kovack*, No. 125431/00 2001 N.Y. Misc. LEXIS 547, (N.Y. Sup. Ct., N.Y. Co. Jul. 9, 2001) (web site through which Internet users could order plaintiff's products, and New York sales revenues of $2,970 sufficient to support jurisdiction).

In this case, where the Full Tilt Entity Defendants either directly operated, or facilitated the operation of www.fulltiltpoker.com, an online casino in which individual New York residents were able to gamble directly against other Full Tilt members including the Individual Defendants, there can be no reasonable dispute that Plaintiffs have alleged sufficient facts to establish that the moving Entity and Individual Defendants transacted business through a highly interactive website with a nexus to Plaintiffs' claims in this case sufficient to fall within the "transacting business" prong of New York's long-arm statute. *See Uebler I*, 363 F. Supp. 2d at 506 ("The Court finds that personal jurisdiction would have been established over Boss Casinos and Webdollar had they been named as defendants given the fact that the Oriental Casino is a highly interactive website because its primary function is to allow the customer to gamble over the internet."); *see also LeCroy Corp. v. Hallberg*, 09 Civ. 8767 (PKC), 2010 U.S. Dist. LEXIS 107842 (S.D.N.Y. Oct. 1, 2010) (holding employee of New York company who worked solely in California but who also interacted with New York based employees through email and phone subject to personal jurisdiction in New York under 302(a)(1)). And because all moving Defendants allowed New York residents to register and gamble on the Full Tilt website, or directly gambled against such New York residents, each moving Defendants' contacts with New York were sufficiently purposeful to support this Court's exercise of personal jurisdiction over

them.[4] *See Zippo Manuf. Co.*, 952 F. Supp. at 1126-27 (contacts with forum were not "fortuitous" because defendant company "repeatedly and consciously chose to process Pennsylvania residents' applications and to assign them passwords. . . . If [the company] had not wanted to be amenable to jurisdiction in Pennsylvania, the solution would have been simple - it could have chosen not to sell its services to Pennsylvania residents.").

4. Plaintiffs' Tort Claims Arise Out of Each Entity and Individual Defendants Online Gambling Activities Sufficient to Confer Personal Jurisdiction under the 'Tortious Activities' Prong of New York's Long-Arm Statute, N.Y. CPLR § 302(a)(3)

A plaintiff relying on CPLR 302(a)(3)(ii) to establish personal jurisdiction over a non-domiciliary defendant "must show that (1) the defendant committed a tortious act outside New York; (2) the cause of action arose from that act; (3) the tortious act caused an injury to a person or property in New York; (4) the defendant expected or should reasonably have expected the act to have consequences in New York; and (5) the defendant derived substantial revenue from interstate or international commerce." *Penguin Group (USA) Inc. v. American Buddha*, 946 N.E.2d 159, 161-63 (N.Y. 2011) (holding "in copyright infringement cases involving the uploading of a copyrighted printed literary work onto the Internet . . . the situs of injury for purposes of determining long-arm jurisdiction under N.Y. C.P.L.R. § 302(a)(3)(ii) . . . is the location of the copyright holder" and noting "[t]he injury in the case before us is more difficult to identify and quantify because the alleged infringement involves the Internet, which by its nature is intangible and ubiquitous.")

[4] Furthermore, most or all of the Individual Movants are featured in marketing campaigns, including TV commercials that are still available online and that promoted Full Tilt online poker games nationwide including to New Yorkers. *See* Burt Decl. 15-16.

The Defendants committed the tortious act of conversion by withholding Plaintiffs' and Class Members' funds from Plaintiffs and the Class; the moving Individual Defendants contributed to this tort by gambling with New York residents to induce them to deposit funds with Full Tilt entities in the first place. Plaintiff Segal's injury, caused in New York, was foreseeable, and Defendants clearly derive substantial revenue from interstate commerce, further making such Defendants subject to specific personal jurisdiction under CPLR § 302(a)(3). *See also Citigroup, Inc.*, 97 F. Supp. 2d at 567-68. The connection between New York and Defendants' tortious activities is more than the mere fact that Plaintiffs and other Class Members experienced injury there;[5] rather, each moving Entity and Individual Defendant contributed to the conversion tort by inducing payments through facilitation of, or direct gambling with, New York residents in New York over the internet.

5. Personal Jurisdiction Over Each Entity and Individual Defendant Comports with Constitutional Due Process

Defendants' argument that they lack sufficient minimum contacts with the State of New York such that the exercise of personal jurisdiction would offend due process ignores Plaintiffs' allegations that each Entity and Individual Defendant had extensive contacts with New York and New York residents through the www.fultiltpoker.com website and servers. "New York decisions . . . at least in their rhetoric, tend to conflate the long-arm statutory and constitutional analyses by focusing on the constitutional standard: whether the defendant's conduct constitutes 'purposeful availment.'" *Best Van Lines*, 490 F.3d at 247 (brackets and citations omitted). By

[5] Allegation of only payment termination in New York may not be enough to allege jurisdiction under NY CPLR § 302(a)(3) according to Eastern District of New York case, *Uebler I*, 363 F. Supp. 2d at 508 (rejecting assertion of personal jurisdiction pursuant to that provision over online casino operator based on "mere fact that [Plaintiff's] experience of having the payments terminated occurred in New York"). Here, however, Plaintiffs also allege inducement and contribution, meeting the requirements of NY CPLR § 302(a)(3).

enabling New York residents to deposit funds in an online account and play online poker and by promoting the Full Tilt business nationwide, all Defendants purposefully availed themselves of the privilege of transacting business in New York and should reasonably expect to be hailed into court there when a dispute arises as a result of those online gambling activities. Full Tilt Entity Defendants also "obtain[ed] contact and personal information, including bank account information, from U.S. players in New York through the internet," making plain the fact that Defendants knew it was providing services to New York residents in New York. *See* Compl. ¶ 57; *see also* Burt Decl. at ¶ 14 ("New York resident and named-plaintiff Segal provided his New York billing address to Defendants when he created his Full Tilt player account."). Accordingly, extension of personal jurisdiction over each Defendant comports with traditional notions of fair play and substantial justice such that this Court's exercise of personal jurisdiction over each of them is proper. *See Citigroup*, 97 F.2d at 569 (holding "personal jurisdiction over the individual defendants would not offend the standards of due process" where personal jurisdiction based only on operation of website in "medium" category of interactivity); *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) ("[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which the business is conducted."); *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 128-29 (2d Cir. 2002) (where "a law firm which seeks to be known in the New York legal market, makes efforts to promote and maintain a client base there, and profits substantially therefrom" there is "nothing fundamentally unfair about requiring the firm to defend itself in the New York courts when a dispute arises from its representation of a New York client--a representation which developed in a market it had deliberately cultivated and which, after all, the

firm voluntarily undertook."); *Uebler II*, 432 F. Supp. 2d at 304, 306 ("As a preliminary matter, the Court was satisfied that it would be appropriate to exercise jurisdiction over the subsidiaries and the licensee" that operated the online casino and received and distributed player funds and the Court further denied motion to dismiss complaint against online gambling software developer parent company on basis that the parent company would perform those functions itself in absence of subsidiaries).[6]

B. Plaintiffs Have Adequately Pleaded Their Claims for Conversion Against Each Defendant under the Liberal Pleading Standard of Fed. R. Civ. P. 8.

Plaintiffs' conversion claim is straightforward in light of Full Tilt's admissions, and the statements of the United States Attorney, and as such Plaintiffs have stated a claim for conversion under the liberal pleading standard of Rule 8 in their Complaint. Defendants do not deny Plaintiffs' superior right to the contents of their Full Tilt Player Accounts. Defendants admit as much in their Motion to Dismiss, stating that "there is no dispute that U.S players have account balances that need to be repaid." (Ifrah. Br. at 21). Through their conversion claim, Plaintiffs and class members seek precisely that: the return of their account balances, *i.e.*, the funds over which Defendants are exercising unauthorized control.

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[6] Defendants' contention that Plaintiffs failed to affect proper service under the Hague Convention is flawed. Courts have held that "where a plaintiff has attempted in good faith to comply with the Hague Convention, and where a defendant received sufficient notice despite the technical defect, it is within a court's discretion to declare service properly perfected." *Burda Media Inc., v. Blumenberg*, No. 97 Civ. 7167, 2004 U.S. Dist. LEXIS 8804; at *19 (S.D.N.Y. May 18, 2004)(quoting *Greene v. LeDorze*, CA 3-96-CV-590-R 1998 U.S. Dist. LEXIS 4093, at *3 (N.D. Tex Mar. 24, 1998); *see also U.S. v. Islip*, 18 F. Supp. 2d 1047, 1052 (Ct. Int'l Trade 1998) In this case, where Plaintiffs have exercised good faith in their attempt to provide service to the Defendants, produced sufficient evidence of service, and the Defendants cannot dispute that service was effective, service should be deemed perfected. Moreover, even if proof of service had been inadequate (it is not), Fed. R. Civ. P. 4(l)(3) provides that the failure to prove service has no effect on the validity of service and the Court may permit the plaintiff to amend proof of service. *See id.* at *26. (citing Fed.R.Civ.P. 4(l)).

Under New York law, "conversion occurs when a defendant exercises unauthorized dominion over personal property in interference with a plaintiff's legal title or superior right of possession." *Newbro v. Freed*, 409 F. Supp. 2d 386, 394 (S.D.N.Y. 2006) (citing *LoPresti v. Terwilliger*, 126 F.3d 34, 41 (2d Cir. 1997)). "To establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question, to the alteration of its condition or to the exclusion of the plaintiff's rights." *Pioneer Commercial Funding Corp. v. United Airlines, Inc.*, 122 B.R. 871, 884 2296 (S.D.N.Y. 1991) (citation omitted).

Crucially, a claim for conversion is considered under the "liberal pleading standard" of Federal Rule of Civil Procedure ("Rule") 8, and not the "pled with particularity" standard applicable to fraud claims under Rule 9(b). *See, e.g., Schottenstein v. Schottenstein*, No. 04 Civ. 5851 (SAS), 2004 U.S. Dist. LEXIS 22648, at *54 (S.D.N.Y. Nov. 8, 2004) (finding that plaintiff had stated a claim for conversion of her accounts and trusts under Rule 8 even though no explicit demand was made when the defendant knew the plaintiff desired the funds and refused to return them); *In re Refco Sec. Litig.*, No. 07-md-1902, 2010 U.S. Dist. LEXIS 33642, at *124-25 (S.D.N.Y. Mar. 2, 2010) (applying the "liberal pleading standards of Rule 8" to a claim for conversion of funds in an account). Unlike fraud, "[c]onversion does not require defendant's knowledge that he is acting wrongfully, but merely an intent to exercise dominion or control over property in a manner inconsistent with the rights of another." *Newbro*, 409 F. Supp. 2d at 396-97 (citing *LoPresti*, 126 F. 3d at 42)[7].

[7] As a general matter, Defendants appear to misconstrue the meaning of the term "intent" in the context of a conversion claim. Defendants repeatedly state that Plaintiffs must show that Defendants "intended" to (continued...)

1. The Defendants Have Exercised Unauthorized Dominion over Plaintiffs' Funds, and have Ignored Plaintiffs' Demand that Their Funds be Returned

Defendants readily acknowledge that they hold funds that rightfully belong to the players, including Plaintiffs and other Class Members. As alleged in the Complaint, Full Tilt repeatedly informed U.S. players who attempted to access their Full Tilt accounts in order to withdraw their funds after April 15th that:

> [w]e are deeply sorry for this inconvenience, but these events are beyond our control. Please be assured that **your funds are safe**, and we thank you for your patience while we do everything in our power **to have your money returned to you** as soon as possible.

(Compl. ¶ 106). In their Motion to Dismiss, the Defendants fully acknowledge that "there is no dispute that U.S. players have account balances that need to be repaid." Ifrah Br. at 21.

Nor do the Defendants dispute that the Defendants have exercised and are currently exercising unauthorized dominion and control over the funds. As set forth in the Complaint, as of April 15, 2011, U.S. account holders with Full Tilt, including the Plaintiffs and class members, have been unable to access their own funds. Compl. ¶ 104. Prior to April 15, 2011, U.S. account holders with Full Tilt could "cash out" their accounts with ease, usually by navigating to a prominent button on the account holder's screen entitled "cashier," and then

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(...continued)

exercise dominion or control over Plaintiffs' funds. Defendants conflate the use of the term "intent" in conversion cases with the higher pleading standard required in fraud cases under Rule 9(b). Plaintiffs need not show that Defendants acted with any sort of bad faith, only that they are improperly exercising control over Plaintiffs' property. *See, e.g., Singapore Recycle Ctr. PTE Ltd. v. Kad Int'l Marketing, Inc.*, No. 06-CV-4997 (RRM)(RER), 2009 U.S. Dist. LEXIS 68635, at *54 (E.D.N.Y. Aug. 6, 2009) ("Where money is turned over by a plaintiff to a corporate defendant to be used for a specific purpose for the benefit of the plaintiff but is not used for that purpose, an action for conversion may be maintained.") *Mfrs. Hanover Trust Co, v. Chemical Bank*, 559 N.Y.S.2d 704, 712, 160 A.D. 2d 113, 124-25 (App. Div. 1st 1990)). Plaintiffs have adequately alleged demand and Defendants' refusal to comply, sufficiently pleading the requisite "dominion and control" required under the liberal pleading standard of Rule 8. *See, e.g., Schottenstein*, 2004 U.S. Dist. LEXIS 22648, at *54.

selecting a withdrawal amount and withdrawal method (ACH or credit card). Compl. ¶ 66. However, since April 15, 2011, no U.S. account holder, including Plaintiffs and class members, has been able to "cash out" any amount of the funds held in his or her account. Compl. ¶ 104. Defendants do not dispute any of these facts in their motion to dismiss. Ifrah Br., *passim*.

Instead, the Defendants claim (1) that Plaintiffs "failed to allege that the Defendants intend to exercise dominion or control over the player funds," (Ifrah Br. at 21) and (2) that Plaintiffs did not make a proper demand on Defendants (Ifrah Br. at 22). Defendants misinterpret the law on both points.

First, by refusing to permit Plaintiffs to "cash out" their accounts, Defendants are clearly exercising "dominion or control" over the Plaintiffs' funds. "Where money is turned over by a plaintiff to a corporate defendant to be used for a specific purpose for the benefit of the plaintiff but is not used for that purpose, an action for conversion may be maintained. When a plaintiff turns over specific, identifiable funds, the recipients have an obligation to either utilize the funds in a specific manner or return them." *Singapore Recycle Ct. PTE Ltd.* 2009 U.S. Dist. LEXIS 68635, at *54 (E.D.N.Y. Aug. 6, 2009) (citing *Mfrs. Hanover Trust Co. v. Chemical Bank*, 559 N.Y.S.2d 704, 712, 160 A.D.2d 113, 124-25 (App. Div.-1st 1990)). As set forth more fully below, Plaintiffs and other Class Members granted Full Tilt temporary and limited control of the monies in their Full Tilt Player Accounts for the sole purpose of accessing those funds in the course of online gambling. Compl. ¶ 87. A component of that access is the ability to withdraw the funds at any point in time. Compl. ¶ 88. Full Tilt does not, and cannot, assert that the players, by depositing their funds into player accounts advertised as safe and secure, were in fact granting Full Tilt the full and exclusive right to the contents of those accounts. Like assets in a safe deposit box held by a bank, the funds within Full Tilt Player Accounts remain the property

of the Player Accountholder, notwithstanding the limited grant of dominion a depositor gives the bank by using the bank's safe-deposit box services.

The Defendants themselves point out that Full Tilt players had no reason for material dissatisfaction regarding payouts before April 15, 2011. Ifrah Br. at 10. This perfectly exemplifies Plaintiffs' claim – prior to April 15, Plaintiffs could navigate to a link on the Full Tilt website that granted them access to the funds held in their Full Tilt Player Accounts. (Compl. ¶ 66). After April 15, this link no longer granted Plaintiffs access to their funds, and Defendants readily admit that they are simply not providing Plaintiffs and other class members any means by which to access the monies in their Full Tilt Player Accounts. Ifrah Br. at 21. This is a clear exercise of "unauthorized dominion or control" of Plaintiffs' funds.

The Defendants then allege that Plaintiffs did not make a proper "demand" on the Defendants for the return of their funds. Ifrah Br. at 22. This proposition is groundless. As set forth in the Complaint and as acknowledged by the Defendants in their brief, the Defendants intentionally refused to honor the Plaintiffs' and other class members' "cash out" requests as of April 15, 2011, and no Plaintiff or class member has been able to gain access to his or her funds since that date. Compl. ¶ 118; Ifrah Br. at 22.

Courts have been clear that a demand for funds subject to a conversion claim need not be perfectly explicit in order to meet the "liberal pleading standard" of Rule 8. Indeed, so long as the plaintiff has made the defendant aware that the plaintiff wishes to gain access to the funds, a "demand" has been made for the purposes of a conversion claim. In *Schottenstein*, the court held that although the Plaintiff's complaint did not explicitly set forth a demand for the funds at issue, because the plaintiff alleged that she was in need of the funds and the defendant refused to return them to her, the Plaintiff had adequately stated a claim for conversion. 2004 U.S. Dist. LEXIS

22648, at *54. Likewise, the Plaintiffs in this action made their desire to regain access to their funds extremely clear to Defendants by attempting to access their accounts after April 15, 2011, to no avail. Compl. ¶¶ 104-107. Defendants even acknowledged these fruitless attempts by the Plaintiffs and other class members to access their money by sending a message to U.S account holders who attempted to access their accounts after April 15, 2011 which stated that Defendants were unable to "accept 'real money' play from U.S. players at the current time, and this includes any deposits or withdrawals...we thank you for your patience while we do everything in our power to have your money returned to you as soon as possible." Compl. ¶ 107. Contrary to Defendants' allegations, this message absolutely does not constitute an "assurance that the money would be returned." Ifrah Br. at 22. Assurance that funds will one day be returned, presumably at Defendants' leisure, if ever, is further assertion of dominion and control, and is also a woefully inadequate response to a dire situation.

Finally, Defendants make much of Plaintiffs' alleged failure to identify which individual Defendant(s) are responsible for which specific acts of conversion of the Plaintiffs' funds. Ifrah Br. at 22-23; Juanda Br. at 8. Without citing any authority to support their position, Defendants argue that Plaintiffs must identify which specific Defendant(s) exercised unauthorized control over the Plaintiffs' account, but ***such specificity is not required*** at the pleading stage under Rule 8. *See, e.g., Schottenstein,* 2004 U.S. Dist. LEXIS 22648, at *54; *In re Refco Sec. Litig.*, 2010 U.S. Dist. LEXIS 33642, at *124-25. Indeed, Plaintiffs have clearly stated that "[a]ll Defendants, by virtue of their control and ownership of the Full Tilt Companies that comprise the Full Tilt umbrella, and/or their ownership stakes in the umbrella undertaking, are liable for conversion of Plaintiffs' and class members' monies and assets (the "property") held in Plaintiffs' and class members' Full Tilt Player Accounts." (Compl. ¶ 116). Such allegations are

sufficient under the liberal pleading standard of Rule 8. *See e.g., Schottenstein*, 2004 U.S. LEXIS 22648, at *54.

2. The Monies in Plaintiffs' Full Tilt Players Accounts are the Proper Subject of a Conversion Claim

Despite Defendants' allegations to the contrary, Plaintiffs have clearly identified the funds that were the subject of improper conversion by Defendants. Those funds are the monies in the Plaintiffs' accounts with Full Tilt (the Full Tilt Player Accounts). (Compl. ¶ 116). Defendants' arguments regarding the supposed inadequacy of Plaintiffs' pleadings are belied by the authority cited in Defendants' own brief.

Under well-established New York law, "'[m]oney may be the subject of conversion if it is specifically identifiable and there is an obligation to return it or treat it in a particular manner.'" *Newbro*, 409 F. Supp. 2d at 394 (citing *Hoffman v. Unterberg*, 9 A.D.3d 386, 388, 780 N.Y.S. 2d 617 (N.Y. App. Div. 2004). Indeed, New York courts regularly find that monies held in accounts (with banks or other entities) are the proper subject of claims for conversion. In *Pioneer Commercial Funding Corp.*, 122 B.R. at 885 (S.D.N.Y. 1991), a case cited by Defendants, this Court found that certain accounts receivable were sufficiently specific and identifiable to be the subject of a conversion claim. Likewise, in *Newbro*, another case cited by Defendants, the plaintiff brought a conversion claim against certain individuals who had received funds from the plaintiff's bank account as the result of a transaction with a fraudulent financial consultant who had been hired by both the plaintiffs and the defendant. The court noted that "[c]ourts have...found accounts outside the banking context to be sufficiently 'specific' and 'identifiable' such that their unauthorized use can give rise to conversion claims." *Id.* at 395 (citing *Lo Presti,* 126 F.3d at 42). The court concluded that the plaintiff had succeeded on his summary judgment motion with respect to his conversion claim. *Id.* at 397; *see also Payne v.*

White, 101 A.D.2d 975, 976, 477 N.Y.S. 2d 456, 458 (N.Y. App. Div. 1984) (finding that lower court erred in dismissing conversion claims regarding funds held in a bank account, stating that "money can be the subject of a conversion action when it can be identified and segregated as a chattel can be"); *Steinberg v. Sherman*, No. 07-cv-1001, 2008 U.S. Dist. LEXIS 35786, at *12-13 (S.D.N.Y. May 2, 2008) (finding that monies transferred from plaintiff's account to defendant's account as a result of a third party's scheme were properly the subject of plaintiff's conversion claim); *LoPresti*, 126 F. 3d at 42 (monies that were supposed to be set aside by employer as union dues were proper subject of conversion claim).[8]

Defendants claim that Plaintiffs have failed to properly identify these accounts and the precise amounts of monies held therein, but Plaintiffs have more than met the liberal pleading standard established by Rule 8. *See Schottenstein,* 2004 U.S. Dist. LEXIS 22648, at *54. In their Complaint, Plaintiffs clearly state that the Defendants are "liable for conversion of

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[8] The cases cited by Defendant Juanda (Juanda Br. at 8-9) are readily distinguishable from the instant matter. In *Fiorenti v. Cent. Emergency Physicians,* 762 N.Y.S.2d 402 (N.Y.App. Div. 2003) the court held that plaintiffs failed to state a conversion claim over bonuses they were allegedly entitled to receive as part of their employment agreement with the defendant. The court determined that, because the plaintiffs could not establish "title, possession, or control of the funds alleged to have been converted," they could not state a claim for conversion. *Id.* at 404; *see also Chateaugay Corp. v. LTV Steel Co.*, 10 F.3d 944 (2d Cir. 1993) (no conversion claim regarding allegedly misappropriated tax benefits because plaintiffs could not show any possessory interest in the tax benefits, and the claim properly lay in contract, not tort). In this case, none of the Defendants can or do argue that the Plaintiffs do not have "title possession or control" of what Defendants concede are Plaintiffs' own funds held in their Full Tilt Player Accounts.

In *Fundacion Museo de Arte Contemporaneo de Caracas-Sofia Imber v. CBI-TDB Union Bancaire Privee*, 160 F.3d 146 (2d Cir. 1998), the court held that funds deposited in a bank account were not "sufficiently specific and identifiable" to support a conversion claim. This decision was explicitly distinguished in *Newbro*, wherein the court noted that the rationale for that rule is that "funds deposited with the bank become an asset of the bank, and the bank, in turn, become indebted to the depositor" leaving the depositor with a contract – not tort – remedy. 409 F. Supp. 2d at 396. Here, the funds at issue are not like those held in a bank account and instead analogous to those held in a safety deposit box – or to the accounts receivable at issue in *Pioneer Commercial Funding Corp.*, which represented "tangible, marketable assets" (an obligation to pay) which were also "specific and identifiable property belonging to another." 122 B.R. at 885.

Plaintiffs' and class members' Full Tilt Player Accounts." (Compl. ¶ 116). The Full Tilt U.S. Player Accounts are accounts established by Plaintiffs and other class members with Full Tilt. (Compl. ¶¶ 65-66). Plaintiffs and other class members deposited monies into these Full Tilt Player Accounts and would use the funds to play online poker. (Compl. ¶ 65). Plaintiffs could "cashout" or withdraw the funds in their account at any time up until April 15, 2011. (Compl. ¶ 66). Defendants lied to Plaintiffs, stating that "any money you have on deposit with Full Tilt Poker is completely safe and secure" and thereby led Plaintiffs to believe that their accounts were not common contributions to a commingled fund, but were in fact separate and identifiable. (Compl. ¶ 88).

Further, it is Defendants alone that have kept, and continue to keep, all the records documenting the value of each Full Tilt Player Account. The players do not have access to information about their account because their accounts cannot be accessed through the Full Tilt website.[9] Plaintiffs and other class members who were not prescient enough to check their Full Tilt player account balances and record the contents thereof before the surprise events of Black Friday now have no reliable way to specifically identify the assets in their Full Tilt Player Accounts.[10] However, just as the holder of a safe deposit box need not identify the precise contents of that box, neither must the holder of an account specify exactly how much money is in that account to state a claim for conversion. *See, e.g.*, *Pioneer Commercial Funding Corp.*, 122

[9] The U.S. Attorney Bharara entered into an agreement specifically permitting Full Tilt to use its internet domain, previously seized, to redistribute funds to accountholders, and Full Tilt has repeatedly announced its intention to do so but simply has not followed through.

[10] Defendants misunderstand Plaintiffs' clearly-stated claims to the balance of Plaintiffs' and class members' Full Tilt Player Accounts. The amounts held in the Plaintiffs' and other class members' Full Tilt Player Accounts are ***not*** equivalent to the value of the funds debited from the Plaintiffs' and other class members' bank accounts and transferred to their Full Tilt Player Accounts. Instead, the *res* at issue in this litigation is the full balance of the ***Full Tilt Player Accounts***, which in many cases may differ from the separate and irrelevant amount of funds initially debited from the Plaintiffs' and other class members' ***bank accounts*** and transferred to those Full Tilt Player Accounts.

B.R. at 885 (monies in account proper subject of conversion claim); *LoPresti*, 126 F. 3d at 42 (monies that were supposed to be set aside as union dues were proper subject of conversion claim).

Finally, to the extent that Defendants argue that the monies in the Plaintiffs' and other class members' Full Tilt Player Accounts are not "specifically identifiable" because Defendants have co-mingled these funds (Ifrah Br. at 24-25; Juanda Br. at 9), this defense to liability for conversion has already been considered and summarily rejected by the Second Circuit. In *LoPresti*, 126 F. 3d at 42, the Second Circuit (applying New York law) determined that the district court erred in failing to find the defendant employer liable for the conversion of the plaintiff union's dues, stating that "[t]he fact that the employees' Union dues were not segregated, but instead placed in the Company's general account does not mean that those monies are not a 'specific identifiable thing' for purposes of imposing liability for conversion.'" *Id*; *see also In re Refco Sec. Litig.*, 2010 U.S. Dist. LEXIS 33642, at *122 ("The Plaintiffs cannot be required to establish identifiability [of their funds] *after* [the defendant] wrongly took identifiable funds and commingled them."). Therefore, Defendants' failure to keep the Player Accounts segregated cannot be used as a defense to conversion.

C. Plaintiffs Have Sufficiently Pleaded Their Claims Against the RICO Defendants for Violations of the RICO Statutes

1. Plaintiffs Have Adequately Alleged the RICO Enterprise

Defendants consistently cite to caselaw that is no longer controlling authority to attack Plaintiffs' allegations of a RICO Enterprise. The holdings of the Supreme Court in the 2009 matter *Boyle v. U.S.* contradict Defendants' position. 129 S. Ct. 2237, 2244 (2009). *Boyle* holds that the RICO enterprise element of a § 1962(c) claim is satisfied by showing a common "purpose, relationships among those associated with the enterprise, and longevity sufficient to

permit these associates to pursue the enterprise's purpose." *Boyle,* 129 S. Ct. at 2244. In fact, the Supreme Court has rejected any pleading standard that requires the level of detail Defendants demand in this context, and the Court specifically refuted Defendants' assertion[11] that Plaintiffs are required to show the hierarchy of the enterprise:

> [A]n association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods--by majority vote, consensus, a show of strength, etc.

Boyle, 129 S. Ct. at 2245-2246.

a) Organizational Structure

A pleading alleging the existence of a RICO enterprise should be evaluated under the standard announced in *Bell Atlantic Corp. v. Twombly* and not under the Rule 9(b) standard applicable to allegations of fraud or mistake. (550 U.S. 544 (2007). The Third Circuit stated the pleading standard for allegations of an association-in-fact RICO enterprise in a recent case applying *Boyle*: Plaintiffs must allege "facts plausibly implying the existence of an enterprise with the structural attributes identified in *Boyle*." Those attributes are "a shared 'purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.'" *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 369-70 (3d Cir. N.J. 2010) (quoting *Boyle*, 129 S. Ct. at 2244.

Contrary to Defendants' assertions, Plaintiffs are not required to plead the "specific inner-workings of the purported enterprise" Ifrah Br. at 33. The cases cited by Defendants in

[11] Defendants rely on *Manhattan Telecomms. Corp. v. DialAmerica Mktg., Inc.*, 156 F. Supp. 2d 376. 381-82 (S.D.N.Y. 2001), to state that "Plaintiffs must plead facts sufficient to show the hierarchy, organization, and activities of the association." That standard appears to be abrogated, at least in part, by *Boyle*, 129 S. Ct. at 2244-2246.

support of their heightened pleading standard are effectively abrogated by *Boyle*, which states that "[m]embers of the group need not have fixed roles . . . . [t]he group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiaition ceremonies." *Boyle*, 129 S. Ct. at 2245-2246. Plaintiffs need not plead "hierarchy, organization, and activities of the association" (Ifrah Br. at 32) but simply common purpose, relationships and enough longevity to permit members to pursue the purpose of the enterprise.

In their Complaint, Plaintiffs plainly state that Entity and Individual Defendants joined together for the purpose of obtaining and processing U.S. players' funds; that the Entity Defendants are privately held organizations through which Individual RICO Defendant Bitar did business; and that the Enterprise was in existence for sufficient time for the RICO Defendants to successfully achieve the common purpose of obtaining U.S. player funds. *See e.g.*, Compl. ¶¶ 4-5, 54, 56, 58-63, 103.

b) Operation and Management

"The Second Circuit has observed that the 'operation or management' test 'has proven to be a relatively low hurdle for plaintiffs to clear. . . especially at the pleading stage.'" *Fuji Photo Film U.S.A., Inc. v. McNulty*, 640 F. Supp. 2d 300, 309 (S.D.N.Y. 2009) (quoting *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 176 (2d Cir. 2004)). The test was established in *Reves v. Ernst & Young*, which stated: one is not liable under [§ 1962(c)] unless one has participated in the operation or management of the enterprise itself." 507 U.S. 170, 183 (1993). However, *Reves* qualified its statement by explaining that "RICO liability is not limited to those with primary responsibility for the enterprise's affairs," nor is it "limited to those with a formal

position in the enterprise." . . . *Id.* at 179 (footnote omitted).[12] Accordingly, "[a]n enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." *Id.* at 184.

In *Fuji Photo Film*, cited by Defendants, the Southern District of New York held that allegations that entities exercised *mere discretion* in carrying out the directions of higher-ups in the enterprise are sufficient to meet the operation or management test. 640 F. Supp. 2d at 314. In addition, the Southern District of New York held that entities that act as alter egos to a higher-up of an enterprise and were utilized to carry out acts in furtherance of the scheme to defraud are alleged to play a sufficient role, for pleading purposes, in the operation or management of the enterprise. *Mezzonen, S.A. v. Wright*, No. 97 Civ. 9380, 1999 U.S. Dist. LEXIS 17625, at *34-35 (S.D.N.Y. Nov. 15, 1999).

Here, Plaintiffs have alleged sufficient facts to create a reasonable inference that Bitar, who has been indicted but has not appeared in this action, was a higher-up, operating and managing Full Tilt directly and through the Entity RICO defendants. Bitar controlled the Entity RICO defendants and Individual RICO defendant Bitar through his position as "principal decision maker" in Tiltware (DOJ Criminal Pleading ¶ 5), the effective parent or controlling entity of other Entity RICO defendants. [13]

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[12] The "operation *and* management test" is referred to, in some cases, as the "operation *or* management test". *E.g.*, *Fuji Photo Film*, 640 F. Supp. 2d at 314.

[13] Tiltware is the parent entity of Pocket Kings, Pocket Kings Consulting, and Filco; Bitar is one of only two board members at Pocket Kings and Pocket Kings Consulting. Compl. ¶¶ 23, 26, 28, 30-31. Meanwhile, Vantage is the recipient of the deposits, and other assets, transferred into Player Accounts. Compl. ¶ 27; Public Trans. at 9. The Entity RICO defendants are a set of interlocking organizations that connect back to Bitar through director and officerships, equity ownership and common management for a common purpose of maintaining Full Tilt's stake in the U.S. market through any means necessary.

The DOJ Pleadings allege (and RICO Defendants have never denied) that the RICO Defendants did business as Full Tilt Poker, effectively acting for Bitar and the Full Tilt Poker brand:

> Raymond Bitar . . . was a founder, owner and principal decision maker for Full Tilt Poker .... [which] did business through several privately held corporations and other entities, including but not limited to Tiltware LLC, Kolyma Corporation A.V.V., Pocket Kings Ltd., Pocket Kings Consulting Ltd., Filco Ltd., Vantage Ltd., Ranston Ltd.., Mail Media Ltd., and Full Tilt Poker Ltd.

DOJ Indictment at ¶ 5.

2. Conspiracy

By pleading that each defendant committed the requisite predicate acts, Plaintiffs have adequately alleged the RICO conspiracy. However, the standard for pleading a RICO conspiracy requires even less. "[T]o be found guilty of RICO conspiracy, a defendant need only know of, and agree to, the general criminal objective of a jointly undertaken scheme." *U.S. v. Yannotti,* 541 F.3d 112, 121-22 (2d Cir. 2008) (citations omitted). The defendant does not even need to commit an overt act in furtherance of the conspiracy to be a member of the conspiracy. *Salinas v. U.S.*, 118 S. Ct. 469, 477 (1997) ("The RICO conspiracy statute, § 1962(d), broadened conspiracy coverage by omitting the requirement of an overt act.")

Fuji Photo Film, 640 F. Supp. 2d at 312, provides that "[a] defendant's consent to join a RICO conspiracy may be . . . 'inferred from circumstantial evidence of the defendant's status in the enterprise or knowledge of the wrongdoing.'" Citing *First Interregional Advisors Corp. v. Wolff*, 956 F. Supp. 480, 488 (S.D.N.Y. 1997) (citations and quotation marks omitted). Here, the DOJ Pleadings and Plaintiffs' Complaint adequately allege, at the very least, that Bitar and the entities doing business as Full Tilt Poker (including the Entity RICO Defendants) knew of and agreed to the criminal objective of the scheme to defraud. Pocket Kings and Pocket Kings

Consulting provided services to the U.S. players that were necessary for the Enterprise to obtain the U.S. players' funds. Filco and Vantage held the licenses through which the games were offered to the U.S. players. Tiltware provided the software through which the games were played and money was deposited, and Vantage ultimately controlled the funds that U.S. players deposited.

3. Plaintiffs Are Injured by Reason Of Defendants' Wrongful Conduct

Plaintiffs and Class Members are wrongfully deprived of funds that even Defendants concede belong to the Plaintiffs and other Class Members.[14] Plaintiffs' injuries, and Plaintiffs' allegations that the injuries are sustained by reason of the RICO Defendants' conduct, are set forth in the Complaint *See e.g.*, ¶¶ 93-96, 104, 113-14.

First, Plaintiffs and other Class Members were induced by Defendants' conduct—which included promotion of the brand to the Class through use of numerous false statements—to enter into transactions that, unbeknownst to the Class Members, put their funds at severe risk of loss. That risk manifested itself and Class Members are now deprived of access to those funds. Second, Class Members would not be injured but for Full Tilt's commission of wire and bank fraud and money laundering offenses because absent those offenses, Full Tilt would not have been shuttered for criminal activity and Class Members would not, as a result, be deprived access to their funds. Absent the frauds committed by the Defendants, it would have been impossible, as a practical matter, for Class Members to deposit the funds necessary to open Full Tilt Player Accounts through credit card or ACH, and Class Members would have been spared their current injuries. Compl. at ¶¶ 10, 11, 109-114.

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[14] *E.g.*, Excerpt of message sent to U.S. account holders seeking to withdraw their money from their Full Tilt player accounts: "Please be assured your funds are safe, and we thank you for your patience while we do everything in our power to have your money returned to you as soon as possible." Compl. ¶ 107.

4. Predicate Acts are Pleaded with Sufficient Particularity

Defendants challenge both Plaintiffs' Complaint and the DOJ Pleadings, claiming that they "fail to specify in detail the who, what, when, where, and how of the alleged fraud. . . . [and] fail to attribute the fraudulent acts to any one particular defendant, instead naming various defendants, all of whom are considered to have furthered the purported scheme to defraud." Ifrah Br. at 29, n.14.

Generally, Plaintiffs need only allege facts that support a reasonable inference that RICO Defendants violated the provisions of the RICO Statute (18 U.S.C.S. § 1961 et seq.). However, in connection with the predicate acts of fraud alleged by Plaintiffs—and only in connection with those acts—Plaintiffs' pleadings are subject to the heightened pleading standard of Rule 9(b).

Defendants assert that "[t]o satisfy the requirements of Rule 9(b), Plaintiffs must provide 'a detailed description of the underlying scheme and the connection therewith of the mail and/or wire communications.'" Ifrah Br. 27, citing *In re Sumitomo Copper Litigation*, 995 F. Supp. 451, 456 (S.D.N.Y. 1998)[15]. In fact, communications in furtherance of the fraud require only "a detailed description of the underlying scheme and the connection therewith of the mail and/or wire communications" to satisfy Rule 9(b). *Id.*(citing *Spira v. Nick*, 876 F. Supp. 553, 559 (S.D.N.Y. 1995)).[16]

Plaintiffs allege in their Complaint that specific wire and bank transmissions and communications were themselves fraudulent *and* that the wires were used in furtherance of a

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[15] The Southern District of New York does *not* construe Rule 9(b) so strictly in the context of civil RICO actions that all plaintiffs, including those with valid claims, are obstructed from initiating a civil RICO suit. *Sumitomo,* 995 F. Supp. at 456.

[16] For communications which were themselves fraudulent, "the complaint should specify the fraud involved, identify the parties responsible for the fraud, and where and when the fraud occurred." *Sumitomo,* 995 F. Supp. at 456 (citing *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)).

master plan to defraud in situations where the communication itself did not contain fraudulent information (e.g. communications among the Defendant entities and co-conspirators). Plaintiffs, in fact, allege dozens of specific fraudulent transactions between the Enterprise and a U.S. player and class member. *See* Compl. ¶ 103,

"Once the plaintiff alleges with particularity the circumstances constituting the fraudulent scheme, neither the reputational interests nor the notice function served by Rule 9(b) would be advanced in any material way by insisting that a complaint contain a list of letters or telephone calls." *Sumitomo* 995 F. Supp., at 456 (quoting *Spira*, 876 F. Supp. at 559). The plaintiff need only "delineate, with adequate particularity in the body of the complaint, the specific circumstances constituting the *overall* fraudulent scheme." *Id.* (citing *Madanes v. Madanes*, 981 F. Supp. 241, 254 (S.D.N.Y. 1998) (emphasis added) (additional citations omitted). Rule 9(b) is designed provide the defendant fair notice, protect the defendant from unfair harm to his reputation and reduce the number of strike suits.[17] "Specific pieces of information, such as the identity of the speaker, are required under Rule 9(b) only as necessary to serve its underlying purposes." *In re Parmalat Sec. Litig.*, 477 F. Supp. 2d at 611-612.[18]

a) Bank and Wire Fraud

As to bank fraud, Defendants assert that Plaintiffs failed to allege "that the Defendants obtained, or attempted to obtain, from the banks any funds that the Defendants did not rightfully possess." Ifrah Br. at 30. As to wire fraud, Defendants assert that Plaintiffs do not sufficiently

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[17] *DiVittorio v. Equidyne Extractive Indus.*, 822 F.2d 1242, 1247 (2d Cir. 1987); *Food Holdings, Ltd. v. Bank of Am. Corp.* (*In re Parmalat Sec. Litig.*), 477 F. Supp. 2d 602, 611-612 (S.D.N.Y. 2007).

[18] In *Parmalat*, the Southern District of New York rejected Defendants' contention that plaintiffs were required to identify the speaker of an alleged fraudulent misrepresentation in order to meet the Rule 9(b) standard. Instead, the court held that such specifics were not necessary when the purposes of Rule 9(b) were already satisfied. *Id.*

allege intent on the part of RICO defendants to deprive the banks of property rights nor that the defendants deprived the banks of funds through wire communications.

The Defendants transacted business through the wires—including through the ACH system—debiting accounts of U.S. players using fraudulent means. Plaintiffs specifically allege in their Complaint and through incorporation of the DOJ Pleadings that the RICO Defendants directed and conspired with third party processors to make fraudulent representations to financial institutions and to U.S. customers. The scheme, which was executed in part through use of the wires in interstate and foreign commerce, successfully resulted in the Defendants obtaining funds from the custody or control of the banks, by, *inter alia*,:

1. using fabricated names and sham front companies (including "Arrow Checks" "TLC Global" and "Eastern Expressions") to open merchant accounts with Visa and MasterCard merchant banks for the purpose of deceiving merchant and issuing banks into processing the very online gambling transactions that those banks endeavored to block. ¶¶ 73-80.

2. purposefully miscoding transactions so as to trick Visa and MasterCard issuing banks into approving transactions that would otherwise (if proper coding were used to identify the transactions as related to online gambling) be rejected outright. In this fashion, RICO defendants debited funds from U.S. customer Visa and MasterCard accounts that would, absent the deceit, be unavailable to defendants. *Id.*

3. opening U.S. bank accounts through third parties under fictitious names and pretenses in order to gain access to the Automated Clearing House system, ("ACH") administered by the Federal Reserve and available only to accountholders at U.S. banks. *Id.* at ¶¶81-86.

Defendants were successful in their scheme many times over. Thousands of transactions were processed through the wires, pursuant to the schemes described above, a sampling of which Plaintiffs provide to the Court in their Complaint, at ¶ 103.

The bank fraud statute imposes liability on one who knowingly executes, or attempts to execute, a scheme or artifice to either defraud a financial institution *or* obtain the assets or funds

under the custody or control of a financial institution through fraudulent behavior. 18 U.S.C.S. § 1344. Plaintiffs have adequately pleaded that Defendants did both. Compl.¶¶ 73-86

Furthermore, Plaintiffs are not required to demonstrate that the Defendants' conduct resulted in a loss to the banks and Defendants cite no case law to that effect. See MTD at 30. In fact, Defendants cite to *U.S. v. Stavroulakis*, which states that the defendant need not actually victimize the bank, but merely attempt to execute a scheme with the intent to victimize the bank. Ifrah Br. at 30; 952 F.2d 686, 694 (2nd Cir. 1992), (citations omitted.) "[A]ctual or potential loss to the bank is not an element of the crime of bank fraud but merely a description of the required criminal intent", which is to be deduced by looking at "the entire circumstances of defendant's conduct." *U.S. v. Barrett*, 178 F.3d 643, 648 (2d Cir. 1999). Here, Defendants' scheme was to mislead banks into processing transactions that they specifically intended to bar for risk reasons (*See, e.g.*, Comp. ¶ 73-80)—and the Defendants succeeded in getting those transactions processed. *See, e.g.*, ¶ 103.

In *Stavroulakis*, intent to commit bank fraud was demonstrated by "common sense" (*Stavroulakis*, 952 F.2d at 694-95, accusing the defendant of a scheme to traffic in stolen blank checks was sufficient to accuse the defendant of "engaging in a course of intentionally deceptive conduct directed at the drawee bank.") Here, as in *Stavroulakis*, common sense dictates that Plaintiffs' more than adequate allegations as to Defendants' scheme to commit wire and bank fraud and money laundering are sufficient to allege intentional deceptive conduct directed at the drawee bank, the actual target of many of Defendants' lies.

b) Money Laundering

Plaintiffs rely on the extensive allegations of bank and wire fraud and money laundering offenses contained in the DOJ Pleadings, which are incorporated into Plaintiffs' Complaint and which are adequate to plead money laundering.

III. CONCLUSION

This Court has personal jurisdiction over the Entity Defendants and Individual Defendants because, *inter alia*, they purposefully availed themselves of the benefits of New York's laws and markets, projected themselves into New York by providing New Yorkers with an interactive "real-money" online poker casino and engaged in real-money gambling with those New Yorkers over the Internet. Plaintiffs' and class members' conversion claim should stand because their superior right to the funds is conceded and because Plaintiffs adequately pleaded demand. Finally, Plaintiffs' RICO claim is adequately pleaded; Plaintiffs sufficiently allege the predicate acts with requisite particularity and the Enterprise is properly pleaded under now-controlling law. For the reasons enumerated above, Defendants' Motions to Dismiss should be denied.

Dated: September 16, 2011

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP

By: /s/ Thomas H. Burt

Lawrence P. Kolker
Thomas H. Burt
Edmund Aronowitz
Lydia A. Keaney
Beth A. Landes
270 Madison Avenue
New York, New York 10016
Telephone: 212-545-4600
Facsimile: 212-545-4653

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