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Plaintiffs Fold on Their Full Tilt Poker Actions Following Court's Rejection of Class Certification and Proposed Settlement

By Elizabeth Schutte

The plaintiffs in three actions against entities and individuals involved in the Full Tilt Poker Internet gambling operation dismissed their claims without prejudice in the U.S. District Court for the Southern District of New York. Their voluntary dismissal came a few weeks after U.S. Magistrate Judge Kevin N. Fox refused to certify a class and rejected their proposed global settlement with the Full Tilt defendants. Relying on the standards set forth in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), Judge Fox found that the plaintiffs did not satisfy Rule 23 and that their proposed settlement failed to provide due process to those putative class members claiming damages. The district court refused to permit an injunctive relief settlement – one which denies class members the right to opt out – when money damages were also at stake.

Internet Gambling and "Black Friday"

Full Tilt, PokerStars, and Absolute Poker/Ultimate Bet (collectively, the "Poker Companies") were the largest online gambling sites operating in the United States following Congress's enactment of the Unlawful Internet Gambling Enforcement Act of 2006 (the "UIGEA"). The UIGEA made it a federal crime for gambling businesses to "knowingly accept" most forms of payment "in connection with the participation of another person in unlawful Internet gambling."[1] Many online poker businesses subsequently aborted their U.S. operations, allowing the Poker Companies to step in and dominate the market,[2] which continued until the U.S. Attorney's Office for the Southern District of New York shut down their websites, seized their assets, and issued arrest warrants for their founders on April 15, 2011, known as "Black Friday" within the online gambling community.

The Department of Justice (the "DOJ") brought civil and criminal actions against the Poker Companies and their founders, and other entities and individuals involved in the operation, alleging that the defendants used fraudulent methods to circumvent the UIGEA and deceive U.S. banks and financial institutions into processing billions of dollars in payments for the Poker Companies.[3] The DOJ alleged, for example, that the Poker Companies, which were each located offshore, utilized third-party payment processors to open accounts at U.S. banks and disguise money received from U.S. gamblers as "payments to hundreds of nonexistent online merchants and other non-gambling businesses."[4] On April 20, 2011, the DOJ entered into agreements with PokerStars and Full Tilt allowing them to use their respective domain names for the limited purposes of reopening online poker games to players outside of the U.S., and to facilitate the withdrawal of U.S. players' funds from accounts held with PokerStars or Full Tilt.[5]

Three putative class actions were later filed in the district court by and on behalf of online poker players who could not access the funds in their Full Tilt accounts.

The Three Putative Class Actions Against Full Tilt

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[1] 31 U.S.C. § 5363.
[2] Dan Cypra, *iMEGA: Signs Were There for Online Poker Seizures*, Poker News Daily, Apr. 25, 2011, http://www.pokernewsdaily.com/imega-signs-were-there-for-online-poker-seizures-18918/.
[3] Verified Compl., *United States v. PokerStars*, Civ. No. 11-2564 (S.D.N.Y. Apr. 14, 2011), ECF No. 8; Superseding Indictment, *United States v. Scheinberg*, Cr. No. 10-336 (LAK) (S.D.N.Y. Mar. 10, 2011), ECF No. 20.
[4] Verified Compl., *supra* note 3, ¶¶ 2-3.
[5] *See, e.g.*, Notice of Agreement Between the United States Attorney's Office & Vantage Limited d/b/a Full Tilt Poker Regarding Use of Domain Name Fulltiltpoker.com, *United States v. PokerStars*, Civ. No. 11-2564 (LBS) (S.D.N.Y. Apr. 20, 2011), ECF No. 11.

The first putative class action, *Segal v. Bitar*, was filed on June 30, 2011, by U.S. residents seeking recovery of approximately $150 million that they claimed was frozen in Full Tilt player accounts.[6] The *Segal* complaint asserted a conversion claim and a claim under the Racketeering Influenced and Corrupt Organizations Act ("RICO") against both corporate and individual defendants. The *Segal* plaintiffs sought injunctive relief, a return of U.S. player funds, and damages under RICO.

The second action, *Jetha v. Filco Ltd.*, was filed on August 9, 2011, by Canadian citizens who similarly claimed that Full Tilt had not returned any funds from their player accounts.[7] The *Jetha* complaint alleged that Full Tilt's refusal to return funds violated their "contractual and other obligations." The *Jetha* plaintiffs asserted a breach of contract claim against the corporate defendants, and claims for breach of fiduciary duty, and aiding and abetting breach of fiduciary duty, against all of the defendants. The *Jetha* plaintiffs demanded damages, prejudgment interest, and punitive damages on the breach of fiduciary duty and aiding and abetting claims.

The third action, *Lawson v. Full Tilt Poker Ltd.*, was filed by a U.S. resident on August 30, 2011, similarly alleging that Full Tilt wrongfully froze $150 million in players' funds.[8] The *Lawson* complaint alleged a conversion and RICO claim, similar to *Segal*, but named only the corporate defendants and those individual defendants who were allegedly the founders of Full Tilt. The *Lawson* plaintiff sought injunctive relief and damages.

Subsequent Developments in the DOJ's Action Against Full Tilt

On September 21, 2011, the DOJ filed an amended complaint in its civil action against the Poker Companies and other defendants to include allegations that Full Tilt was a Ponzi scheme. The government alleged that Full Tilt "also defrauded its poker players by misrepresenting to players that funds deposited into their online player accounts were secure and segregated from operating funds, while at the same time using player funds to pay out hundreds of millions of dollars to Full Tilt Poker owners."[9] By March 31, 2011, Full Tilt allegedly owed $390 million to players worldwide, including the approximately $150 million owed to U.S. players, but had only $60 million on deposit in its bank accounts.[10] Meanwhile, from April 2007 to April 15, 2011, Full Tilt and its board of directors allegedly distributed $443,860,529.89 to themselves and other owners of the company.[11]

On July 31, 2012, the district court entered separate stipulations and orders of settlement regarding PokerStars and Full Tilt. Full Tilt agreed to forfeit its assets to the DOJ in exchange for dismissal of all claims against Full Tilt with prejudice.[12] Under the PokerStars order, the DOJ agreed to transfer Full Tilt's assets to PokerStars and dismiss all claims against it with prejudice, in exchange for PokerStars forfeiting $547 million to the DOJ and reimbursing the approximately $184 million that Full Tilt owed to non-U.S. players within 90 days of the asset transfer.[13] The DOJ would then use the $547 million forfeited by PokerStars to compensate Full Tilt's U.S. players. The district court also entered stipulations

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[6] *See* Class Action Compl. & Action Under 18 USCS § 1961 *et. seq.*, *Segal v. Bitar*, Civ. No. 11-4521 (S.D.N.Y. June 30, 2011), ECF No. 1.
[7] *See* Compl., *Jetha v. Filco Ltd.*, Civ. No. 11-5519 (S.D.N.Y. Aug. 9, 2011), ECF No. 1.
[8] *See* Compl., *Lawson v. Full Tilt Poker Ltd.*, Civ. No. 11-6087 (S.D.N.Y. Aug. 30, 2011), ECF No. 1.
[9] *See* Verified First Am. Compl. ¶ 5, *United States v. PokerStars*, Civ. No. 11-2564 (S.D.N.Y. Sept. 21, 2011), ECF No. 53.
[10] *Id.* ¶ 7.
[11] *Id.* ¶ 8.
[12] *See* Stipulation & Order of Settlement Regarding Full Tilt Poker, *United States v. PokerStars*, Civ. No. 11-2564 (S.D.N.Y. July 31, 2012), ECF No. 240.
[13] *See* Stipulation & Order of Settlement Regarding PokerStars, *United States v. PokerStars*, Civ. No. 11-2564 (S.D.N.Y. July 31, 2012), ECF No. 241.

and orders of settlement between the DOJ and two of Full Tilt's directors, Howard Lederer[14] and Christopher Ferguson.[15]

The Class Plaintiffs Move for Settlement Approval

On January 7, 2015, the named plaintiffs in *Segal*, *Jetha*, and *Lawson* moved the district court for preliminary approval of a settlement reached by the parties and preliminary certification of the settlement class.[16] The settlement agreement was among the named plaintiffs, the Full Tilt corporate defendants, and five individual defendants. Pursuant to the settlement agreement, the defendants agreed, without admitting liability, that for a period of four years, defendants Lederer and Ferguson would, *inter alia*, not own or operate a real-money online gaming enterprise unless they followed certain outlined precautions. Because the named plaintiffs sought only injunctive relief, notice to the settlement class members was not required under Fed. R. Civ. P. 23(b)(2). As to money damages, the named plaintiffs contended that "when considered in tandem with the Settlement in and subsequent disbursement resulting from the U.S. Department of Justice's settlement with Full Tilt Poker, the Settlement Class Members have been provided with the opportunity to receive relief in the amount of their account principals and protection from future misconduct by Defendants if they should re-enter the online gaming industry."

On May 26, 2015, Judge Fox declined to certify the settlement class and approve the settlement because of multiple Rule 23 deficiencies.[17]

A. The plaintiffs failed to satisfy Rule 23(a)

A plaintiff seeking class certification must show that:

(1) [T]he class is so numerous that joinder of all members is impracticable;[18] (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."[19]

In *Wal-Mart Stores, Inc.*, the Supreme Court explained that reciting common questions is not sufficient to meet Rule 23(a)(2)'s commonality requirement; the plaintiff must "demonstrate that the class members have 'suffered the same injury.'"[20] There must be a "common contention" that is capable of classwide resolution, such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke…."[21] The district court held that the plaintiffs recited, without more, only bare questions alleged to be common to the class. Not only were such bare questions insufficient under prevailing law to satisfy the commonality requirement, but many of the questions themselves were not common to the class.[22] For example, one of the questions, "whether Defendants

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[14] *See* Stipulation & Order of Settlement in Regard to Howard Lederer, *United States v. PokerStars*, Civ. No. 11-2564 (S.D.N.Y. Dec. 18, 2012), ECF No. 295.
[15] *See* Stipulation & Order of Settlement in Regard to Christopher Ferguson, *United States v. PokerStars*, Civ. No. 11-2564 (S.D.N.Y. Feb. 22, 2013), ECF No. 301.
[16] *See* Motion for Preliminary Approval of Class Action Settlement and Setting of Final Fairness Hearing, *Lawson v. Full Tilt Poker Ltd.*, Civ. No. 11-6087 (S.D.N.Y. Jan. 7, 2015), ECF No. 98.
[17] Memo. & Order, *Segal v. Bitar*, Civ. No. 11-4521 (S.D.N.Y. May 26, 2015), ECF No. 106.
[18] Judge Fox found that the plaintiffs satisfied the numerosity factor "in light of the nature of online gambling and the thousands of potential class members.…" Memo. & Order, *supra* note 17, at 17.
[19] Fed. R. Civ. P. 23(a).
[20] 131 S. Ct. at 2551.
[21] *Id.*
[22] The district court noted that the "[d]issimilarites within the proposed class are what have the potential to impede the generation of common answers." Memo. & Order, *supra* note 17, at 18-19 (quoting *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551).

converted the monies in the Player Accounts through the use of shell corporations," was not common to members of the *Jetha* action because they alleged neither conversion nor RICO claims in their complaint.

The district court also held that the plaintiffs did not establish typicality under Rule 23(a)(3) because they did not assert the same claims, or seek the same relief for the same alleged wrongful conduct. Importantly, Judge Fox noted that the relief sought in the proposed settlement agreement was not relevant for purposes of his Rule 23 analysis; he instead considered each complaint's allegations. The *Jetha* plaintiffs asserted breach of contract, breach of fiduciary duty, and aiding and abetting causes of action that were not asserted in the *Segal* or *Lawson* actions. Conversely, the *Segal* plaintiffs brought a conversion claim and the *Lawson* plaintiffs asserted conversion and RICO claims, which were both absent from the *Jetha* complaint. In addition, the district court found that the plaintiffs in all three actions did not seek the same relief because the *Jetha* plaintiffs sought only damages, not injunctive or declaratory relief, and the *Segal* plaintiffs did not define the class or seek class certification in their complaint.

The district court further held that the named plaintiffs did not satisfy the adequacy of representation requirement under Rule 23(a)(4). The interests of the *Segal* plaintiffs, who sought to represent account holders residing in the United States, were not aligned with those of the proposed settlement class, which also included foreign Full Tilt account holders. The court questioned the *Segal* plaintiffs "change of allegiance" in determining to represent a different class, which, together with their failure to seek class certification in the complaint, cast doubt on the adequacy of the *Segal* plaintiffs and their counsel to represent the class.

In addition, the *Jetha* plaintiffs sought to represent a putative class of foreign Full Tilt account holders. These non-U.S. account holders were entitled to reimbursement of their account balances within 90 days after the DOJ transferred Full Tilt's assets to PokerStars. Thus, the *Jetha* plaintiffs had different interests from the named plaintiffs and purported class members in the *Segal* and *Lawson* actions who were not entitled to immediate payment and had to instead participate in the Full Tilt claims process. The *Jetha* plaintiffs also acquiesced to an agreement that did not provide for the relief sought in their complaint. The district court therefore found that the *Jetha* plaintiffs would not fairly and adequately protect the interests of the putative class members.

B. The plaintiffs failed to satisfy Rule 23(b)(2)'s requirement for preliminary class certification

Absent class members have a due process right to notice and an opportunity to opt out of class litigation when the action is predominantly for money damages. Following the *Wal-Mart Stores, Inc.* decision, "the right to notice and an opportunity to opt out under Rule 23 … applies not only when a class action is predominantly for money damages, but also when a claim for money damages is more than 'incidental.'"[23]

Judge Fox found that the *Jetha* plaintiffs failed to satisfy Rule 23(b)(2) because they had sought only damages as relief for their claims, yet settled for injunctive relief. The plaintiffs in *Segal* and *Lawson* also had sought damages for their RICO and conversion claims, in addition to injunctive and declaratory relief. All three actions alleged that they were brought pursuant to Rules 23(b)(1) and (b)(3), and not Rule 23(b)(2). The plaintiffs did not explain why the injunctive and declaratory relief sought in *Segal* and *Lawson* predominated over the claims for damages in those actions, or whether the plaintiffs' claims for damages were incidental. The district court found that "the putative class members in the three actions claiming damages cannot be deprived of due process just because the named plaintiffs negotiated a settlement agreement offering only injunctive relief."

Further, the district court stated that the injunctive relief sought in the proposed settlement agreement may be mooted by the injunctive provisions contained in the DOJ's stipulations and orders of

[23] Memo. & Order, *supra* note 17 (quoting *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 222 (2d Cir. 2012)).

settlement with Full Tilt, Lederer, and Ferguson. Under all three stipulations, the defendants agreed to not offer online poker or derive money from any Internet gambling business in the United States until a change in law makes it permissible to do so.

Conclusion

After denying class certification and the proposed settlement, the district court ordered the plaintiffs to amend their complaints to eliminate all class allegations. Instead of proceeding with their individual suits, the plaintiffs voluntarily dismissed their actions against Full Tilt and the remaining defendants. As the district court saw it, the proposed settlement was riddled with issues that would ultimately deny absent class members due process. The named plaintiffs' inability to represent the class adequately, as they lacked issues common with or typical of the class, combined with the non-opt-out element of the proposed settlement, doomed the class from a due process perspective. The decision is a reminder that in representative actions, due process is first and foremost.