UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X
:
UNITED STATES OF AMERICA,
:
v. : CASE NO.: 10-cr-0336 (LAK)
:
CHAD ELIE, *et al*.,
:
Defendants.
---X

MEMORANDUM IN SUPPORT OF DEFENDANT CHAD ELIE'S MOTION
TO DISMISS COUNTS 5, 6, 7 AND 9 OF THE SUPERSEDING INDICTMENT

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UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA,	:	
-against-	:	CASE NO.: 10-cr-0336 (LAK)
CHAD ELIE, *et al.*	:	
Defendants.	:	

I. INTRODUCTION

This case concerns the government's flawed attempt to expand the Illegal Gambling Business Act ("IGBA"), 18 U.S.C. § 1955 (2010), to cover foreign businesses that offered customers the opportunity to play poker against one another, for money, over the Internet. IGBA makes it a federal offense to conduct a "gambling business which . . . is a violation of the law of a State or political subdivision in which it is conducted," provided that the business satisfies certain jurisdictional prerequisites. *See* 18 U.S.C. § 1955(b)(1). While IGBA includes a definition of gambling, that definition never mentions poker, or any game similar to poker. *Id.* § 1955(b)(2). Furthermore, nothing in the text or history of IGBA suggests that Congress intended for it to apply expansively to the conduct of overseas businesses whose activity is entirely legal where it is undertaken.

Nevertheless, the government argues that IGBA has been violated because the defendants' conduct allegedly violates New York Penal Law §§ 225.00, 225.05. Like IGBA itself, however, New York's ambiguous gambling proscriptions do not reach the conduct alleged in this case because they do not apply to foreign online poker businesses. To read either IGBA or the New York Penal Law as outlawing businesses like those at issue here would require this Court to interpret the statutes so broadly that they would violate the rule of lenity and become

void for vagueness.

Accordingly, Counts Five, Six and Seven of the Indictment, which charge that Chad Elie violated or abetted violation of 18 U.S.C. § 1955, must be dismissed. Count Nine of the Indictment, which asserts money laundering violations predicated on the same illegal gambling offenses, must likewise be dismissed.

II. BACKGROUND AND STATUTORY FRAMEWORK

Counts Five, Six and Seven of the Indictment purport to charge Mr. Elie with operation of (or aiding and abetting the operation of) three separate "illegal gambling businesses," in violation of 18 U.S.C. §§ 1955 and 2. The various counts relate to the operations of three different online poker businesses, PokerStars (Count Five), Full Tilt Poker (Count Six), and Absolute Poker (Count Seven). The Indictment terms these three entities collectively "the Poker Companies." Count Nine alleges a money laundering violation stemming from the illegal gambling business allegations. Ind. ¶¶ 53-54.

According to the Indictment, each of the Poker Companies was "an illegal gambling business, namely a business that engaged in and facilitated online poker, in violation of New York State Penal Law Sections 225.00 and 225.05 and the law of other states in which the business operated[.]" Ind. ¶¶ 42, 44 and 46. Mr. Elie is not alleged to have financed, managed, supervised, directed or owned any of the Poker Companies. Rather, he is alleged to have "opened bank accounts in the United States, including through deceptive means, through which

each of the Poker Companies received payments from United States based gamblers." Ind. ¶ 12.[1]

IGBA provides, in relevant part, that "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1955(a). Under the statute, an "illegal gambling business" is "a gambling business which—

> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

Id. § 1955(b)(1). Thus, in order to violate IGBA, a business must, first and foremost, be a "gambling business." In addition, the gambling business must *itself* be a violation of "the law of a State or political subdivision in which it is conducted."

As defined in IGBA, "'gambling' includes but is not limited to *pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein*." § 1955(b)(2) (italics added).

IGBA also does not mention foreign businesses, and—unlike other federal statutes that have been used to target interstate gambling—does not prohibit the transmission of gambling-related information in interstate or foreign commerce. *Cf.* 18 U.S.C. § 1084(a) (2010) (the Wire

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[1] Of course, before Mr. Elie could be found guilty of aiding and abetting a violation of IGBA, a violation of IGBA must exist. *See United States v. Perry*, 643 F. 2d 38, 46 (2d Cir.), *cert. denied,* 454 U.S. 835 (1981).

Wager Act applies to "transmission in interstate or foreign commerce of bets or wagers"); 31 U.S.C. § 5361(a)(4) (2010) (the Unlawful Internet Gambling Enforcement Act was enacted in order to proscribe gambling that "crosses State or national borders").

III. ARGUMENT

The IGBA charges should be dismissed for five reasons. First, IGBA does not criminalize the provision of online poker because a poker is not "gambling" and poker businesses therefore are not "gambling businesses" under IGBA. Second, IGBA targets domestic gambling operations and not the kind of foreign conduct that the defendants engaged in here—which was legal in the nations where it occurred. Third, IGBA requires the government to show a predicate state law gambling offense, but the Indictment's allegations regarding the defendants' New York State law violations are insufficient. Fourth, reading either IGBA or the New York Penal Law to encompass defendants' conduct would render the statutes unconstitutionally vague. Finally, dismissal of the IGBA charges is warranted because this case is a textbook situation in which the rule of lenity applies to the favor of defendants, and under a defendant-friendly reading, IGBA and the New York Penal Law cannot be read to encompass the conduct alleged.

If this Court dismisses the IGBA charges, then it must also dismiss the money laundering charges, which are predicated on violations of IGBA. *See* Ind. ¶¶ 53–54.

A. The Poker Companies Are Not "Gambling Businesses" Because Poker Is Not "Gambling" Under IGBA.

The Poker Companies' businesses do not qualify as "illegal gambling businesses" under IGBA because they are not "gambling businesses" under the statute. Although Congress did not

define "gambling business" in IGBA, it follows from the statute's definition of "gambling" that a "gambling business" is a business that profits from gambling. The Supreme Court has described IGBA's definition of "gambling" as "a carefully crafted piece of legislation." *Iannelli v. United States*, 420 U.S. 770, 789, 95 S. Ct. 1284, 1296 (1975). IGBA's definition of gambling comprises a list of nine activities regarded by Congress as gambling. The definition does not include poker and does not contain a general rule or catch-all language that explains how one would determine whether games other than the nine enumerated games constitute "gambling" under the statute.

Because it provides the only guidance on the question, the statute's illustrative list of gambling games establishes a framework to determine whether a particular game constitutes "gambling" under IGBA. This Circuit adopts the "common sense approach to interpreting a general provision in the light of a list of specific illustrative provisions," so that the general term is construed to "include only things similar to the specific items in the list." *Molloy v. Metropolitan Transp. Auth.*, 94 F.3d 808, 812 (2d Cir. 1996); *see also City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 401 (2d Cir. 2008) ("[W]here general words are accompanied by a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated.") (internal citations and quotation marks omitted); *cf. S.D. Warren Co. v. Maine Bd. of Envtl Protection*, 547 U.S. 370, 378, 126 S. Ct. 1843, 1849 (2006) ("[A] word is known by the company it keeps."). Under this rule, poker falls within the statutory definition of "gambling" only if it is similar in kind to the nine enumerated games. It is not. The enumerated games share two key features: (1) they are all

lottery or house-banked games in which the house bets against its customers; and (2) they are all games of chance in which the bettor has no control over the outcome. These material distinctions are clear from an examination of the rules and dynamics of IGBA's listed games.[2]

Online poker is qualitatively different from all of the enumerated games. First, poker is not house-banked—the house does not participate in the game at all, but instead merely collects a fee, or "rake," for hosting the game. Ind. ¶ 3.[3] Second, online poker is a game in which the bettors have at least some control over the outcome. The players compete against each other on a level playing field, using an array of talents and skill to prevail over their opponents. These two features differentiate poker from all nine of the enumerated games.

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[2] For purposes of this Motion, Mr. Elie adopts the discussion of the enumerated games of chance as set forth in part IV.B, pages 17-18 of Mr. Campos's Motion to Dismiss the IGBA counts.

[3] The distinction between banked games and non-banked games like poker is already well-established in federal gambling law. The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (enacted in 1988), for example, defines three classes of gaming, each subject to different levels of regulation. The least regulated are "class I" games, which include "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Poker falls within the definition of "class II gaming," which includes bingo and card games, but specifically does not include "any banking card games, including baccarat, chemin de fer, or blackjack (21)." *Id.* § 2703(7). Those banking card games fall instead within the definition of "class III gaming," which also includes slot machines, craps tables, and any other game not defined as class I or class II gaming. *Id.* § 2703(8). Although the Indian Regulatory Gaming Act does not control this case, it is relevant that, when defining classes of gaming, Congress placed poker in a different class altogether from traditional casino gambling. If Congress intended to treat poker like slot machines and banked games under IGBA, it could have included poker as one of the statute's enumerated games or list it on a schedule (as it does, for example, under the Controlled Substances Act). Notably, IRGA distinguishes among games for treatment under that federal law. As discussed in this memorandum, if Congress' failure to list poker was not intentional, because Congress did not see peer-to-peer poker as warranting federal prosecution, then applying IGBA to such activity raises serious constitutional concerns.

Given these significant differences, this Court should not read IGBA's definition of "gambling" to encompass poker. To give the language of (b)(2) substantive effect, while still attributing meaning to the phrase "includes but is not limited to," the definition must be interpreted as a non-exclusive list of types of "gambling" that share certain important, defining, and limiting characteristics. The contrary result would render Congress's definition effectively irrelevant. *See United States v. Menasche*, 348 U.S. 528, 538-39, 75 S. Ct. 513, 520 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal citations and quotation marks omitted). If the government can prosecute poker as "gambling" under the IGBA, despite the fact that poker is so materially different from every one of the games enumerated in the statutory definition, then the listed games provide no meaning—and impose no discernible limit on government enforcement, see *infra* Section III.D—for individuals trying to engage in lawful conduct. In short, because poker is substantially different from the games listed in IGBA, it is not "gambling" under the statute.[4]

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[4] Previous prosecutions brought under IGBA that involve poker are not to the contrary; in many cases the gambling businesses offered house-banked games of chance, too, or video poker machines, which are entirely different from true peer-to-peer poker games. *See, e.g., United States v. Cook*, 922 F.2d 1026 (2d Cir. 1991) (involving slot machines, blackjack, roulette and craps in addition to poker); *United States v. Giovanetti*, 919 F.2d 1223, 1225 (7th Cir. 1990) (sports betting, blackjack, craps and poker); *United States v. Conley*, 859 F. Supp. 909 (W.D. Pa. 1994) (video poker machines); *United States v. Grey*, 56 F.3d 1219 (10th Cir. 1995) (video poker machines). In any event, no court has addressed the argument that poker is categorically different from the "gambling" businesses enumerated in the statute. *Cf. United States v. Rieger*, 942 F.2d 230 (3d Cir. 1991); *United States v. Tarter*, 522 F.2d 520 (6th Cir. 1975); *United States v. Zannino*, 895 F.2d 1 (1st Cir. 1991).

B. IGBA Does Not Apply To Foreign Businesses Like The Poker Companies.

1. IGBA's Plain Text, Supreme Court Precedent Construing That Text, And IGBA's Legislative History Establish That The Poker Companies Did Not "Conduct" Their Businesses In New York.

IGBA can only be applied to the Poker Companies' activities if they are gambling businesses whose operations are illegal under "the law of a State or political subdivision in which [they are] *conducted*." 18 U.S.C. § 1955(b)(1). They are not. Although the Indictment charges that the Poker Companies were "business[es] that engaged in and facilitated online poker, in violation of New York State Penal Law," it fails to allege that they were businesses "conducted" in New York as required by IGBA. Furthermore, the Indictment fails to allege any act that occurred in New York that is sufficient to meet the requirement that the business was "conducted" in New York as that word has been interpreted in other IGBA cases. The Poker Companies instead "conducted" their businesses abroad in a manner that IGBA has never been interpreted to reach.

To begin with, the government acknowledges that at all times relevant to the Indictment, the Poker Companies were located overseas. Ind. ¶¶ 4, 5, 6, 14, 15. Indeed, the government concedes that the Poker Companies "keep their computer servers, management and support staff offshore." Karaka Decl. ¶ 7.[5] The *sole* point of contact that the Indictment alleges the defendant Poker Companies had with the United States was the activity of its customers, who used their

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[5] The Karaka declaration was filed publicly with this Court in the related civil forfeiture case, 11-cv-02564-LBS, as an exhibit to the government's First Amended Complaint. *See* Doc. No. 49-3, filed on September 20, 2011.

own computers to deposit funds and withdraw funds from their offshore poker accounts, and also to play poker on the companies' websites, which also were hosted offshore. *See Ind.* ¶ 34(b).

Under Supreme Court precedent, this is insufficient to establish that the Poker Companies businesses were "conducted" in New York. In *Sanabria v. United States*, 437 U.S. 54, 70–71, n.26, 98 S. Ct. 2170, 2182 (1978), the Supreme Court examined IGBA subsection (a), which applies to anyone who "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business." The Court found that the term "conducts" refers to "any degree of participation in an illegal gambling business, *except participation as a mere bettor*." *Id.* at 70–71, n.26 (emphasis added). The word "conducted" in subsection (b)(1) likewise does not extend to mere betting. *See, e.g., Nat'l Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 501, 118 S. Ct. 927, 939 (1998) ("[S]imilar language contained within the same section of a statute must be accorded a consistent meaning."). The mere presence of poker "bettors" [6] in New York is thus insufficient to establish, for purposes of an IGBA prosecution, that the Poker Companies' businesses were conducted in New York.

This fact is underscored by the reality that no court has *ever* held that a business may be criminally liable under IGBA without some actual physical presence and conduct in the state

[6] While it is true that individual moves in poker are called "bets," the vocabulary is misleading. The "bet" is not a wager on a chance event nor is it a "bet" as defined in UIGEA. Unlike poker "bets," true wagers do not alter the outcome of the event. A bet on the Super Bowl does not change the score; bets at a blackjack table are generally made before the cards are dealt and have no impact on the play of the game; bets on roulette wheels are placed before the ball is dropped. Bets at a poker table are different. What is called a "bet" in poker is really like a "bid" in Bridge or a "move" in any other game: it is a gambit designed to provoke a desired reaction from an opponent.

whose law was allegedly violated. Where courts have found that a foreign "gambling business" violated IGBA, the gambling business has always had employees or a physical office in the relevant state. For example, in *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006), the court noted that New York based defendants were essentially operating a local branch of the Costa Rican business in New York. *Id*. at 340. Similarly, in *United States v. Kaczowski*, 114 F. Supp. 2d 143, 151 (W.D.N.Y. 2000), the court rejected the defendants' motion to dismiss because the indictment alleged that defendants maintained facilities in New York where they regularly received and relayed bets for players to the off-shore enterprise. *See also United States v. $734,578.82 in U.S. Currency*, 286 F.3d 641, 659–60 (3d Cir. 2002) (holding that the defendant property was subject to forfeiture in New Jersey because of conduct there). On the other hand, when a business has no physical presence in the United States, the government has typically not proceeded under IGBA, but instead under the Wire Act, 18 U.S.C. § 1804, which outlaws transmissions of sports wagering information into the country. *See United States v. Cohen*, 260 F.3d 68, 71 (2d Cir. 2001); *United States v. Corrar*, 512 F. Supp. 2d 1280, 1282 (N.D. Ga. 2007).[7]

IGBA's plain text demonstrates that the statute does not apply to purely foreign businesses in yet another way. The statute refers to "the law of a State or political subdivision," in which the "business . . . is conducted." This language refers to U.S. states and political

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[7] The government has not alleged that the defendants in this case violated the Wire Act, because that statute, like IGBA, does not apply to online poker games. *See In re MasterCard Int'l Inc.*, 313 F.3d 257, 262-63 (5th Cir. 2002) (holding that the Wire Act applies only to sports betting).

subdivisions, not to foreign countries. Had Congress intended foreign entities to fall within the statute, it would have said so. *See, e.g.*, 18 U.S.C. § 8310 (listing separately "States or political subdivisions of States, national governments of foreign countries, local governments of foreign countries"); 16 U.S.C. § 1151 (listing separately "the Federal Government, or any State or political subdivision thereof, or of any foreign government"); 18 U.S.C. § 1030 (same).

In addition to contravening the plain meaning of the word "conduct" as construed by the Supreme Court itself, the government's attempt to broaden the scope of IGBA to reach businesses conducted abroad is also refuted by the statute's legislative history. The statute was enacted as part of the Organized Crime Control Act in order to curtail "syndicated gambling, the lifeline of organized crime." *United States v. Sacco*, 491 F.2d 995, 998 (9th Cir. 1974). That history suggests that IGBA was intended to target illicit gambling businesses operating within a particular state, and not overseas, licensed online poker providers.

Furthermore, as Congress noted in its findings when it passed the Unlawful Internet Gambling Enforcement Act ("UIGEA"), an entirely new statute was necessary because "traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders." 31 U.S.C. § 5361(a)(4). This phrasing surely referred to IGBA, and it provides further support for the argument that Congress did not intend IGBA to reach the foreign provision of Internet poker—the conduct alleged to be criminal under IGBA here. Accordingly, the IGBA charges should be dismissed.

2. Even If IGBA Is Ambiguous As To Its Extra-Territorial Reach, Three Settled Canons Of Statutory Interpretation Demand That It Not Be Extended To Criminalize The Defendants' Foreign Conduct.

To the extent that IGBA contains any ambiguity with regard to whether it targets offshore businesses, three canons of construction require the conclusion that it does not. The first canon is the presumption against extraterritoriality. The second is the precept that statutes must be read to avoid conflict with the United States' international obligations. Lastly, as discussed in Section E, the rule of lenity bars Mr. Elie's IGBA prosecution.

a. The Presumption Against Extraterritoriality Precludes Application of the IGBA to Offshore Businesses.

It is hornbook law that a statute will not be read to criminalize purely offshore activity absent a clear congressional intent to the contrary—particularly where the conduct in question is legal in the place where it occurs. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S. Ct. 575, 577 (1949). "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869, 2878 (2010).

As argued above (*supra* Section III.B.1), IGBA's plain text and legislative history conclusively establish that the statute does *not* criminalize the sort of purely foreign conduct engaged in by the Defendants here. But even if this Court chose not to accept the argument that the plain text forecloses its application in this case, the statute is at most ambiguous on the matter, as it never once suggests that it may be applied extraterritorially. This silence is notable especially in contrast with other federal gambling statutes, such as the Wire Act and UIGEA, which Congress wrote to apply explicitly against foreign conduct. *See* 18 U.S.C. § 1084(a) (providing that the Wire Act applies to "transmission in interstate or *foreign* commerce of bets or

wagers") (emphasis added); 31 U.S.C. § 5361(a)(4) (noting that UIGEA was enacted in order to proscribe gambling that "crosses State *or national borders*.") (emphasis added). Indeed, to the extent IGBA does mention territoriality at all, the statute describes businesses that are unlawful in the "state or political subdivision in which [they are] conducted," a phrase suggesting *domestic* application. It is thus unsurprising that no court has ever held IGBA to apply to businesses, like those here, which have no U.S. operations.

In the absence of a clear indication that IGBA was intended to criminalize foreign conduct—which was legal in the nations where it occurred—this Court should decline to apply IGBA against the defendants.

b. Reading IGBA to Apply Extraterritorially Would Undermine the United States' International Obligations.

Applying IGBA to prohibit foreign conduct despite its silence on the issue would also run afoul of the *Charming Betsy* canon of construction, which provides that statutes should be construed whenever possible to conform to the United States' international obligations. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804) (Marshall, C.J.) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains[.]"); *see also MacLeod v. United States*, 229 U.S. 416, 434, 33 S. Ct. 955, 961 (1913) ("The statute should be construed in the light of the purpose of the government to act within the limitation of the principles of international law, ... and it should not be assumed that Congress proposed to violate the obligations of this country to other nations[.]"); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 260-61 (1796) (Iredell, J.) (stating principle that statutes should not be interpreted to violate international legal obligations); Restatement (Third) of the

Foreign Relations Law of the United States § 114. Applying IGBA to international businesses like those allegedly operated by the Poker Companies would be inconsistent with the United States' international obligations as recognized by a recent World Trade Organization (WTO) decision holding that the United States cannot restrict the cross-border provision of gambling services that are permitted within its borders.

The United States is a party to the WTO General Agreement on Trade in Services (GATS). Article XVI of GATS provides that its members cannot take any measure that will prohibit or affect the cross-border supply of services to, from or between WTO members. *See* General Agreement on Trade in Services, GATS, Part III, Art. XVI:1-2(a), (c).

In 2004, Antigua requested that the WTO Dispute Settlement Body (DSB) hear its complaint that U.S. state and federal laws affecting the cross-border supply of gambling and betting services contravened the United States' obligations under GATS. *See generally* Panel Report, *United States-Gambling*, WT/DS285/R, at p. 1 (Nov. 10, 2004). The dispute challenged the application of, among other statutes, the IGBA. The DSB found that in enforcing these statutes, the United States had acted inconsistently with Article XVI of GATS, and that its violations were not justifiable. *See US-Gambling*, WT/DS285/AB/R, at p. 272, ¶ 7.2, p. 273, ¶ 7.2(e). The WTO's Appellate Body upheld the decision, holding that the IGBA violated Article XVI, Sections 2(a) and (c) of GATS. *See US-Gambling*, WT/DS285/AB/R, at p. 123, ¶ 373(c). These decisions became final in 2005, and under them it is clear that extraterritorial application of IGBA is not consistent with the United States' international obligations under GATS.

To be sure, the *Charming Betsy* canon applies only "where Congress's intent is

ambiguous." *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003). But as explained above, the text of the IGBA plainly does not proscribe foreign conduct—or is at worst ambiguous on the matter. The statute nowhere mentions foreign application,[8] and indeed only applies on its face to conduct that is a "violation of the law of a state or political subdivision *in which* it is conducted." Neither is there any indication in the legislative history that the statute was meant to criminalize conduct beyond a particular state's borders—a fact underscored by the reality that no federal court has ever applied IGBA against defendants whose actions never took place in a particular state.

The fact that IGBA is at worst ambiguous with respect to its foreign application as in this case, coupled with the WTO DSB's decision holding that the IGBA is inconsistent with GATS, behooves this Court to adopt a construction of the statute that harmonizes the terms of IGBA with the United States' international obligations.[9] Under such a construction, the statute cannot apply extraterritorially, and the IGBA counts must be dismissed.

To be clear, none of this is to suggest that Congress does not have the power to regulate

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[8] This silence is notably in contrast with other federal gambling statutes, such as the Wire Act and UIGEA, which Congress wrote to apply explicitly to activity that crosses this nation's border. *See* 18 U.S.C. § 1084(a) (Wire Act applies to "transmission in interstate or *foreign* commerce of bets or wagers") (emphasis added); 31 U.S.C. § 5361(a)(4) (UIGEA enacted in order to proscribe gambling that "crosses State *or national borders*.") (emphasis added).

[9] It is true that, in the context of GATS, Congress indicated that U.S. law should take precedence over international law in the event of a conflict. *See* 19 U.S.C. § 3512(a)(1) (providing that no provision of Uraguay Round Agreements (which includes GATS) has effect if it is inconsistent with another provision of U.S. law). That provision, however, is of no moment here because *there is no conflict* between U.S. and international law to begin with: IGBA simply does not extend to [circumscribe] the Poker Companies' extraterritorial conduct.

the relationship between foreign entities and U.S. citizens: UIGEA and the Wire Act are examples of statutes that do that. Instead, the point is that Congress did not exercise that power when it enacted IGBA, and the text, history, and structure of the statute, informed by the Supreme Court's binding precedents and established canons of statutory construction, establish this as a matter of law.

c. The Rule Of Lenity Also Dictates That IGBA Should Not Be Applied To Defendants' Overseas Conduct.

To read IGBA as criminalizing the defendants' foreign conduct when the statute makes no mention of such an application would violate another canon of construction: the rule of lenity. The contours of the doctrine of lenity are discussed in more detail in Part E, *infra*. Applied to this particular question, the statute should be read as requiring that at least some part of the alleged gambling business, as opposed to some of the business's customers, be located in the New York.

C. The Indictment Fails To Allege A Necessary Predicate Violation Of State Law.

The IGBA counts must be dismissed for an additional reason: the New York state gambling law cited in the Indictment does not purport to criminalize the Poker Companies' lawful foreign conduct. The government's allegation of a predicate New York state gambling law offense is deficient in two distinct ways. First, to sustain its charges under IGBA, the government must show that each defendant Poker Company business *is itself* a violation of state law, and not merely that some of the companies' activities violated state law, which the government cannot do. Second, the provisions of New York gambling law that the government

cites simply do not criminalize the lawful conduct of foreign businesses.

With respect to the government's first failure, the United States Court of Appeals for the Eighth Circuit has parsed the text of IGBA carefully, explaining that "[t]he statute defines an 'illegal gambling business' as one which 'is a violation' of state law. The word 'is' strongly suggests that the government must prove more than a violation of some state law by a gambling business. *The gambling business* itself must be illegal." *United States v. Bala*, 489 F.3d 334, 340 (8th Cir. 2007) (internal citations omitted). Thus, it is not enough for IGBA liability purposes that an otherwise legal foreign business engage in conduct that violates some New York statute—rather, the government must show that the New York legislature criminalized the existence of the gambling business, itself, in New York. But here, the government has not done so. Instead, the government alleges that the Poker Companies, which are licensed and based abroad, committed the misdemeanor of "promoting gambling in the second degree," defined as advancing or profiting from unlawful gambling. *See* N.Y. Penal Law § 225.05. That statute does not, on its face, criminalize the existence of any enterprise. It only prohibits one from advancing or profiting from gambling occurring in New York.

The New York statute does not criminalize the existence of legal, foreign businesses, like the Poker Companies, that operate over the Internet. Like IGBA, N.Y. Penal Law § 225.05 does not purport to apply to businesses located in the Isle of Man, Ireland, Costa Rica, and Antigua. Therefore, the presumption against extraterritoriality, the *Charming Betsy* canon, and the rule of lenity all apply with equal force to preclude its application in this case.

The structure of the New York Penal Law provides further evidence that the statute does

not target the conduct of lawful foreign businesses. Section 225.40 provides that "[a]ny offense defined in this article which consists of the commission of acts relating to a lottery is no less criminal because the lottery itself is drawn or conducted *without the state* and is not violative of the laws of the jurisdiction in which it was so drawn or conducted." (emphasis added). The term "lottery," in turn, is narrowly defined, and the government does not allege that poker constitutes a lottery. *See* N.Y. Penal Law § 225.00(10). When the legislature expressly disclaims a defense for one class of offenses, but not others, then the logical inference is that the defense applies to unnamed offenses. *See Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 513 122 S. Ct. 992, 998 (2002) ("*Expressio unius est exclusio alterus*.") (internal quotation marks omitted). When New York legislators intended to prohibit lawful foreign lottery businesses from advancing or profiting from activities in New York, they expressly did. Having never legislated with respect to lawful foreign-based Internet poker businesses is telling.

The purpose of the New York statute likewise supports Mr. Elie's reading. The law does not target New York players, *see* N.Y. Penal Law § 225.00(3)–(5) (defining players and clarifying that the laws relating to advancing and profiting from gambling do not apply to them), nor does it specifically prevent foreign operators from ever offering games to New Yorkers. Thus, if a player from New York travels to Las Vegas to partake of a poker game that is lawful in Nevada, the foreign poker room hosting the game does not violate New York Penal Law § 225.05 by profiting or advancing the game. Nor would it be unlawful for a Las Vegas casino to air an advertisement encouraging New Yorkers to come and play, even though that activity falls within the definition of advancing gambling. *See* N.Y. Penal Law § 225.00(4) (defining

"advance gambling activity" to include solicitation). This case is similar: if a player in New York joins, via the Internet, a game hosted legally abroad, the New York Penal Law does not prohibit the player's activity and does not purport to criminalize the out of state host's activity. Instead, the New York Penal Law constricts "advancing or profiting" from unlawful gambling in-state. New York Penal Law § 225.05 does not target the activities of lawful businesses conducted abroad and should not be so interpreted.

D. Reading IGBA Or The New York Penal Law To Apply To Foreign Internet Peer-To-Peer Poker Businesses Would Render The Statutes Void For Vagueness.

It is clear that the text of IGBA and the New York Penal Law do not support the government's theory of prosecution. To nevertheless read the statutes as applying to offshore poker businesses—notwithstanding their complete silence regarding poker and foreign businesses—would render both IGBA and the New York Penal Law void for vagueness.

"As one of the most fundamental protections of the Due Process Clause, the void-for-vagueness doctrine requires that laws be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited and to provide explicit standards for those who apply them." *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir.2007) (internal citations and quotation marks omitted); *see also VIP of Berlin v. Town of Berlin*, 593 F.3d 179, 186-87 (2nd Cir. 2010) ("[A] law may be unconstitutionally vague as applied to the conduct of certain individuals is 'if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.'") (quoting *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480 (2000)). A law is thus unconstitutionally vague if it "fails to give 'a person

of ordinary intelligence fair notice that his contemplated conduct is forbidden.'" *United States v. Alameh*, 342 F.3d 167, 176 (2nd Cir. 2003) (quoting *United States v. Batchelder*, 442 U.S. 114, 123, 99 S. Ct. 2198 (1979) (citation and quotation marks omitted)). Moreover, the scope of the conduct should be apparent on the face of the statute, and not require that individuals seek the meaning of the statute by studying outside materials. *Sabetti v. DiPaolo*, 16 F.3d 16, 17 (1st Cir. 1994) (Breyer, C.J.), *cert. denied*, 513 U.S. 916 (1994). Most importantly, it is the legislature and not prosecutors, police, juries, or courts that are charged with defining criminal activity. *United States v. Bass*, 404 U.S. 336, 347-50, 92 S. Ct. 515, 522-24 (1971); *McBoyle v. United States*, 283 U.S. 25, 27, 51 S. Ct. 340, 341 (1931).

Judged by this standard, as applied in this case, IGBA fails to meet minimal constitutional standards of providing fair notice that online poker is prohibited.

First, as discussed in Section A, *supra*, IGBA does not mention poker even once. If the statute is interpreted to mean that online poker, despite sharing none of the characteristics common to the "gambling" games enumerated in § 1955(b)(2), does indeed fall within the scope of IGBA, then the statute offers no guidelines by which either law enforcement or a person of reasonable intelligence can assess whether a given game falls within the federal statute's scope. This vagueness creates a strong probability of arbitrary enforcement. While IGBA has been upheld against facial challenges, it would be unconstitutional to apply its definition of "gambling" to a game like poker—which, as discussed, is different in kind from the games enumerated in the statute.

Second, even if the Indictment is read to refer to the application of the specified

prohibitions of the New York Penal Law, the statute still fails to give a person of "ordinary intelligence" fair notice of whether Internet poker falls within that law's proscriptions.

The Indictment identifies New York Penal Law §§ 225.00 and 225.05 as the relevant state law provisions in this case. Section 225.05 provides that "[a] person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity." Section 225.00 defines "gambling" as "[a] person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome." A "contest of chance" is "any contest, game, gaming scheme or gaming device in which the outcome depends *in a material degree* upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." N.Y. Penal Law § 225.00(1) (emphasis added). On the other hand, wagering on games of skill—that is, games that do not constitute "contests of chance"—is permitted. *See People ex rel. Ellison v. Lanvin*, 71 N.E. 752 (N.Y. 1904) (finding "games of chess, checkers, billiards, and bowling . . . to be games of skill").

When applied to games containing a mixture of chance and skill, New York's amorphous test, which hinges on the interpretation of the open-ended term "material degree," produces inconsistent and unpredictable results. What constitutes a game of chance may be clear *at the statute's core*—roulette and craps are games of chance; chess is a game of skill. But New York courts have not applied this "material degree" test in a way that makes its meaning clear *at the margins*—in particular, on the issue of precisely what level of influence on the result is

"material."[10] For example, New York courts applying the "material degree" test have reached conflicting results regarding three-card monte, concluding both that the game constitutes a game of skill, *see People v. Mohammed*, 724 N.Y.S.2d 803, 806 (N.Y. City Crim. Ct. 2001); *People v. Hunt*, 616 N.Y.S.2d 168, 171 (N.Y. City Crim. Ct. 1994), and, on the other hand, a contest of chance, s*ee People v. Denson*, 745 N.Y.S.2d 852, 854-55 (N.Y. City Crim. Ct. 2002); *People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. City Crim. Ct. 1995) (same holding for a "shell game" that was functionally identical to three-card monte).[11] This proven track record of conflicting adjudications demonstrates both the notice problem and the potential for arbitrary enforcement

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[10] Indeed, New York courts do not even articulate the same test. *See People v. Li Ai Hua*, 885 N.Y.S.2d 380, 384 (N.Y. City Crim. Ct. 2009) ("The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?") (internal quotation marks and citation omitted); *People v. Rovero*, 190 Misc. 1050, 75 N.Y.S.2d 255 (1947) (same); *S&F Corp. v. Wasmer*, 195 Misc. 860, 91 N.Y.S.2d 132 (1949) (same); *People v. Shapiro*, 77 N.Y.S.2d 726 (1948) (a game of skill is a game where a player predominantly has control over circumstances of the game, and where the element of luck or chance is subordinate to proficiency); *People v. Hunt*, 162 Misc.2d 70, 616 N.Y.S.2d 168 (1994) (skill rather than chance as a material element); *People v. Mohammed*, 187 Misc.2d 729, 724 N.Y.S.2d 803 (2001) (same). Some commentators note that, read in light of the "legislative history, case law, common sense, and the views of many commentators, it ought to be clear that the 'dominating element' test . . . remains valid law in New York State." Bennett Liebman, *Chance v. Skill in New York's Law of Gambling: Has the Game Changed?* 13 Gaming L. Rev. 461, 467 (2009). Despite the lack of clear guidance either from New York's legislators, or its highest court as to the specific level of chance required for a game to constitute gambling, it is clear that a game must turn on more than a mere modicum of chance to be classified as a game of chance—which makes the test only more confusing. *See Hunt*, 616 N.Y.S.2d at 169.

[11] Ultimately, "the New York City Council sought to end the confusion surrounding the legal status of three card monte by unanimously approving legislation to outlaw the public operation of the game and its variants. The measure went into effect on August 4, 1999, as New York City Administrative Code § 10-161." *Denson*, 745 N.Y.S.2d at 52. New York City's response to three-card monte is precisely what the state legislature must do to poker if it wishes for that game to be treated as gambling. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348.

and inconsistent results inherent in New York's "material degree" test: two defendants promoting the exact same game could obtain entirely different answers to the question whether the criminal provision even applies to a promoter's alleged activity because the game constitutes a contest of chance.

Applying New York's amorphous standard to poker poses this same risk. Although defendants have been convicted of operating poker games in the past,[12] no New York court has ever considered in detail the role of skill or chance in poker. Courts in other jurisdictions considering the role of skill in poker have reached varying conclusions, proving that poker, like three-card monte, involves enough skill to cast significant doubt on the applicability of New York's amorphous gambling prohibition.[13] A strong and growing body of academic literature

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[12] *Luetchford v. Lord*, 11 N.Y.S. 597, 597 (N.Y. Gen. Term. 1890) *rev'd on other grounds*, 30 N.E. 859 (N.Y. 1892) (finding, without discussion, that poker was a game of chance); *People v. Cohen*, 289 N.Y.S. 397, 399 (N.Y. Magis. Ct. 1936) ("The throwing of dice or the playing of cards delivered face down depends solely and entirely upon chance or luck, the element of ability or skill being wholly lacking."); *In re Fischer*, 247 N.Y.S. 168, 178-179 (N.Y. App. Div. 1930); *People v. Dubinsky*, 31 N.Y.S. 2d 234, 236 (N.Y. Ct. Spec. Sess. 1941) (finding that a particular variant of stud poker is gambling); *Katz's Delicatessen, Inc. v. O'Connell*, 97 N.E.2d 906, 907 (N.Y. 1951) (poker treated as gambling without discussion). At the time the New York cases were decided, there were no statistical analyses of millions of poker hands, nor had academics dedicated nearly as much attention to the dynamics of poker games. Instead, these courts considered purely anecdotal evidence to arrive at their conclusions. More recent cases have established that New York courts are willing to take a harder look at the role of skill inherent in a game. *See, e.g.*, *Hua*, 885 N.Y.S.2d 380, 384 (N.Y. Crim. Ct. 2009) (dismissing prosecution because there was "no support given for the [government's] claim that mahjong is a game of chance").

[13] *Compare Chimento v. Town of Mt. Pleasant*, No. 2009-CP-10-001551, at 10 (S.C. Ct. C.P. 2009) (holding that the evidence was "overwhelming" that skill predominates over chance in Texas Hold 'Em poker); *Bell Gardens Bicycle Club v. Dept. of Justice*, 36 Cal. App. 4th 717, 744 (Ct. App. 1995) (poker "predominantly implicate[s] a player's skill"), *with Commonwealth v. Dent*, 992 A.2d 190, 197 (Pa. Super. Ct. 2010) (holding that Texas Hold 'Em constitutes a game of chance) *and Joker Club, LLC v. Hardin*, 643 S.E.2d 626, 630-631 (N.C. Ct. App. 2007) (same).

likewise establishes the overwhelming role of skill inherent in poker, which establishes that the status of poker is subject to far more controversy than games such as those at the core of the IGBA statute.[14]

Because the role of skill and chance is a question of fact, *see, e.g.*, *Wasmer*, 91 N.Y.S.2d at 136, this Motion is not the place to prove that poker is a game of skill and thus not gambling under such a test. What does matter now, however, is (1) that reasonable minds can differ, and have differed, on whether poker constitutes gambling under New York's "material degree" test, and (2) that the New York Penal Law fails to specify with any clarity how much skill, or how much chance, must exist before a court will conclude that its effect upon the outcome of a game is "material," and that this open-endedness invites unpredictable prosecutions and arbitrary adjudications. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v Williams*, 553 U.S. 285, 306, 128 S. Ct. 1830, 1846 (2008)**Error! Bookmark not defined.**.

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[14] *See, e.g.*, Liebman, Bennett, *Chance v. Skill in New York's Law of Gambling: Has the Game Changed?*, Gaming L. Rev. & Econ., V. 13 (Nov. 6, 2009); Paco Hope & Sean McCulloch, *Statistical Analysis of Texas Hold 'Em* 5, *available at* http://www.cigital.com/resources/gaming/poker/100M-Hand-AnalysisReport.pdf (2009) (considering over 100 million online poker hands and concluding that approximately 76 percent of hands are resolved without a showdown, and that half of the remaining hands were won by the player who did not hold the best cards because the player with the best cards had folded before the conclusion of the hand); Michael DeDonno & Douglas Detterman, *Poker is a Skill*, 12 Gaming L. Rev. 31 (2008) (concluding that players who were taught poker skills prevailed over those who were uneducated); Rachel Croson, Peter Fishman & Devin G. Pope, *Poker Superstars: Skill or Luck?*, 21 Chance, no.4, at 25, 28 (2008) (comparing the skill level in poker to golf); Steven D. Levitt & Thomas J. Miles, *The Role of Skill Versus Luck In Poker: Evidence From the World Series of Poker*, NBER Working Paper 17023, (May 2011), *available at* http://www.nber.org/papers/w17023 (comparing the skill level in poker to major league baseball and investment advising).

Perhaps the most remarkable feature of this case is that the government is well aware that due process principles make application of the New York Penal Law to Mr. Elie's conduct problematic. In a recent IGBA prosecution in the District of Maryland, the government introduced an *expert's report* as part of its plea colloquy and written submission, ostensibly to support its argument that poker qualified as gambling under a similarly undefined Maryland gambling prohibition.[15]

The Maryland prosecution highlights two important points. First, even experts disagree about whether peer-to-peer poker is conduct prohibited under a federal statute's incorporation of a state's ambiguous gambling test. The common man is at a loss. Indeed, the Attorney General himself has commented that determining whether poker is a game of chance is "beyond [his] capabilities." *See* Nathan Vardi, "U.S. Attorney General Calls On-line Poker Crackdown Appropriate But Doesn't Know if Poker is a Game of Chance or Skill," *Forbes* (May 3, 2011), *available at:* <http://www.forbes.com/sites/nathanvardi/2011/05/03/u-s-attorney-general-calls-online-poker-crackdown-appropriate-but-doesnt-know-if-poker-is-a-game-of-chance-or-skill/>. Criminal prosecution in these circumstances is unconscionable because, as the Supreme Court has long recognized—our Constitution "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298 (1972). Second, when enforcing IGBA through incorporation of New York law, the need for state legislation that

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[15] *See* Benjamin Kedem, *On Luck versus Skill in Poker*, at 2-3 (Prepared for USAO/MD July 2010, case 10-cr-00751-CCB; Document 3-1).

clearly defines prohibited conduct is paramount. For "it is well and wisely settled that there can be no judge-made offenses against the United States and that every federal prosecution must be sustained by statutory authority." *Krulewitch v. United States*, 336 U.S. 440, 456-57, 69 S. Ct. 716, 724 (1949) (Jackson, J. concurring).

The potential for arbitrary enforcement and inconsistent results illustrated above is precisely the mischief that the void-for-vagueness doctrine seeks to remedy. For these reasons, this Court should hold that New York Penal Law 225.00 is unconstitutionally vague as applied to these poker defendants, and should dismiss Counts Five through Seven of the Indictment.[16]

E. At A Minimum, This Court Must Construe IGBA And New York Penal Law Favorably To The Defendants Under The Rule of Lenity.

Dismissal is further warranted because under the rule of lenity, neither IGBA nor the New York Penal Law can be construed to reach defendants' conduct in this case. The rule of lenity, which requires that criminal statutes be strictly construed against the government, "ensures fair warning by resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266, 1176 S. Ct. 1219, 1225 (1997). As the Supreme Court recently held:

> This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

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[16] Because the UIGEA Counts (Counts One through Four of the Indictment) likewise depend on a violation of New York law, they should be dismissed as well.

United States v. Santos, 553 U.S. 507, 514, 128 S. Ct. 2020, 2025 (2008) (Scalia, J., plurality opinion). The rule of lenity is especially appropriate when, as here, the alleged violations constitute predicate offenses for statutes, like the money laundering statute, that impose significant additional penalties. *Skilling v. United States*, 130 S. Ct. 2896, 2932 (2010). Thus, should this Court find that either IGBA or the New York Penal Law is susceptible to multiple interpretations, one of which is friendlier to defendants than the others, "the tie must go to the defendant." *Santos*, 553 U.S. at 514, 128 S. Ct. at 2025.

Both statutes are sufficiently malleable that the rule of lenity should apply. With regard to IGBA, the statute is ambiguous in three crucial respects. First, the statutory definition of "gambling" is merely a list of nine games, with no principle to bind them together or to inform whether a tenth offense should also fall within the definition. This Court should hold that, at a minimum, any additional game that falls within the definition must share the enumerated games' two key traits: it must be house-banked, and it must be a game in which players cannot influence the outcome of the dispositive event. Second, the statute is silent with regard to its application to foreign, lawful businesses. This Court should hold that the statute does not extend extraterritorially to businesses that have no ties to the United States other than customers. Third, the statute applies only when a gambling business "is a violation" of state law. This Court should interpret this section to require that not every violation of state law is sufficient to give rise to IGBA liability. Rather, only those violations which go to the existence of the business itself are sufficient to constitute a federal offense.

The New York Penal Law contains similar ambiguities. Section 225.00's definition of

"gambling," which includes a "contest of chance," should be read narrowly to encompass only games in which chance plays a predominant role. Furthermore, Section 225.05, which makes it a misdemeanor to promote gambling, is silent as to its extraterritorial application, so this Court should hold that it has none.

Under these defendant-friendly interpretations of the statute, the IGBA charges should be dismissed because neither statute reaches the conduct of the Poker Companies.

F. Because The IGBA Counts Warrant Dismissal, This Court Must Also Dismiss The Money Laundering Counts.

If this Court dismisses the IGBA counts, then it must dismiss the money laundering charge (Count 9) as well. In order to establish a violation of the federal money laundering statutes, the government must prove the existence of a predicate offense, or "specified unlawful activity." 18 U.S.C. §§ 1956, 1957. The government's money laundering allegations here are predicated on the theory that the Poker Companies engaged in the "specified unlawful activity" of operating an illegal gambling business in violation of the IGBA. Specifically, the Indictment alleges that (1) the defendants engaged in illicit transactions to further the "specified unlawful activity" of an illegal gambling business, Ind., ¶ 53, and (2) used property criminally derived from the "specified unlawful activity" of an illegal gambling business. Ind. ¶ 54. Because the government's illegal gambling charges fail for the aforementioned reasons, however, the government necessarily cannot prove its money laundering allegation—and that count should accordingly be dismissed. *See United States v. D'Alessio*, 822 F. Supp. 1134, 1146 (D.N.J. 1993) (dismissing money laundering charges because "[a]ccording to the indictment, the specified unlawful activity is the alleged mail fraud charged in counts one through three. Since counts one

through three have been dismissed, there is no basis upon which to support the money laundering charges in counts four and five, and therefore, they must be dismissed as well.").

IV. CONCLUSION

For the foregoing reasons, defendant Chad Elie respectfully requests that the Court dismiss the IGBA and money laundering charges.

Respectfully submitted,

__________/s/________________
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September 2011, the foregoing was served electronically on the counsel of record through the U.S. District Court for the Southern District of New York's Electronic Document Filing System (ECF) and the document is available on the ECF system.

__________/s/________________
William R. Cowden