Virtual Online Poker Cardrooms:
What Does It Mean to Be "*Engaged in the Business of Betting and Wagering*" Under US Federal Law?

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INTRODUCTION

Peer to peer iPoker as conducted on the worldwide internet has received much attention given the ever-increasing popularity of the game across the globe. Questions over the legality of such virtual online poker cardrooms has also been widely-debated. Typically, those legal debates have focused upon the amount of skill in poker and whether it predominates over elements of chance in the game, thus taking poker out of the realm of gambling under the vast majority of legal schemes. The skill versus chance assessment is indeed a formidable argument in favor of poker as a game of skill. It has been persuasively and successfully argued in several jurisdictions worldwide. And, of course, it is near and dear to poker players everywhere who vigorously and passionately argue that poker is a game of skill.

Obviously, skill is the proverbial "sexiest" argument for poker; and is no doubt the most persuasive. But from the standpoint of those site operators who host such online poker cardrooms – those virtual tables where players meet to test their skills against one another -- it is only one of many in poker's potent legal arsenal. This article takes a close look at another: are such virtual cardrooms "*engaged in the business of betting and wagering*" under US Federal Law.

This article extensively examines a key statutory element under US Federal law and ultimately concludes that virtual online poker cardroom operators are <u>not</u> "engaged in the business of betting or wagering" under the Wire Act, 18 U.S.C. §1084. This article further explores the fundamental connection between the Wire Act and the Unlawful Internet Gambling Enforcement Act of 2006 (the "UIGEA") on this score: namely, that the UIGEA incorporates the Wire Act's key definition of being "engaged in the business of betting or wagering." As a result, the statutes' key elements are the same.

Designed to curb the activities of bookmakers and others who accept bets, the Interstate Wire Act, 18 U.S.C. §1084 (the "Wire Act"), only applies to those who are "engaged in the business of betting or wagering." An individual who uses wire communications to transmit bets in interstate commerce but who is not engaged in the business of betting or wagering has not violated the Wire Act. Similarly, the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§5361 et seq. (the "UIGEA"), solely applies to those who are "engaged in the business of betting or wagering."

The drafters of the UIGEA, who could have chosen any existing term or created a new one, instead incorporated the Wire Act's definitional framework with respect to the term: "engaged in the business of betting or wagering." Among other things, the UIGEA drafters chose to incorporate word for word a Wire Act term, thereby creating a fundamental connection between these two statutes and invoking decades of jurisprudence interpreting what it means to be "engaged in the business of betting or wagering." Equally important is the corollary determination of what is means NOT to be so engaged.

Virtual poker rooms are not "engaged in the business of betting or wagering" because they do not accept wagers or set any odds for their customers. Being engaged in the business of betting or wagering requires the existence between two parties of an element of risk or chance depending on the outcome of a game or contest. The existence of such risk flows from the acceptance of wagers or setting of odds. For example, an element of chance exists between a bookmaker and his client because the bookmaker's compensation depends directly on the odds that the bookmaker has set in accepting his client's wager. A virtual poker room is unlike bookmakers and online casino gaming operators whose

compensation depends on the outcome of a game or contest, i.e., the operator or bookmaker wins only if his client loses. Between a virtual poker room and its customers, no such risk exists. A virtual poker room does not accept bets from its customers, it merely hosts online card play where players can wager against one another directly. Given that the virtual poker room operator is a service-provider only, and not interested in the outcome of any particular ring game, tournament, or contest between players, it is not "engaged in the business of betting or wagering" and thus has not violated either the Wire Act or, as more completely set forth below, the UIGEA which deliberately utilizes the same exact statutory language as the Wire Act in this regard.

I. VIRTUAL POKER ROOMS

Virtual poker rooms are online versions of brick-and-mortar poker card rooms. Virtual poker card rooms do not participate in the games as a player, they merely provide a service to those who wish to test their skills against others for fun, prizes or money. Many virtual poker rooms are licensed and regulated. Thos most reliable and well-recognized operators are regulated in first-tier jurisdictions.

Online card play – such as poker – is materially different from online casino gaming.[1] In online card play, the players wager directly against one another and the site operator hosts the game. However, in online casino gaming the players bet against the commercial operator of the site. This distinction is important because in online casino gaming the players and the casino operator both risk something of value on the outcome of the game: i.e., if the player wins, the house loses and vice versa. Therefore, in online casino gaming both the players and the casino operator are betting on the outcome of the game. However, in peer to peer poker online card play, the players alone – and not the site operator host – risk something of value based on their play. A poker site operator simply is not betting or otherwise gambling on any other outcome. The poker cardroom host has no interest in who wins and who loses.

The archetypical sports betting context pits the bettor/wagerer against the bookmaker. Much like brick and mortar gambling at a casino, online casino gaming pits the bettor against the site operator who is effectively an online casino – i.e., "the house." Additionally, a bookmaker constantly redistributes the risk that he personally assumes by accepting bets from as well as against his various sports betting customers. Thus, sports betting is also distinct from online card play because in sports betting the bookmaker is not in a neutral position toward his customer – they essentially wager with one another on the outcome of a particular sporting event. It is this very activity that the Wire Act sought to prohibit.

By contrast, a virtual poker room's compensation does not depend on the outcome of the card games it hosts. Because a virtual poker room merely hosts online card play and is not a bettor (i.e., nothing of value whatsoever is waged by the operator), it is completely indifferent as to whether any individual player wins or loses to another player. Thus, the virtual poker room's operational and business model exists in stark contrast to online casino gaming and bookmaking, where the casino operator and bookmaker stand personally to gain or lose depending on whether their players win.

[1] Online casino games are house-banked games such as roulette, blackjack, or slots.

II. FEDERAL GAMBLING STATUTES

Besides the UIGEA, there are many federal statutes regulating gambling or wagering. The primary federal gambling statues include: (a) Money laundering, 18 U.S.C. §1956; (b) Professional and Amateur Sports Protection Act, 28 U.S.C. §§3701-3704; (c) Organized Crime Control Act (the "OCCA"), 18 U.S.C. §1955; (d) Travel Act, 18 U.S.C. §1952; (e) Interstate Transportation of Wagering Paraphernalia, 18 U.S.C. §1953; (f) Lottery Statutes, 18 U.S.C. §§1301-1307; (g) Gaming devices (Johnson Act), 15 U.S.C. §§1171-1178; (h) Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§1961-1968; (i) the Communications Act of 1934, 47 U.S.C. §§151 et seq.; and (j) the Interstate Wire Act, 18 U.S.C. §1084.

Statutes That Do Not Use the Term "Business of Betting or Wagering"

Among federal gambling statutes, none uses the term "engaged in the business of betting or wagering" except for the UIGEA and the Wire Act. The following is a sample of analogous terms used by federal gambling statutes to describe the individuals they target:

1. OCCA, 18 U.S.C. §1955: uses the term "illegal gambling business;"

2. Travel Act, 18 U.S.C. §1952: uses the term "any business enterprise involving gambling;"

3. Lottery Statutes, 18 U.S.C. §1301: uses the term "being engaged in the business of procuring . . . such a ticket, chance, share, or interest in a lottery . . . ."

The terms used by these statutes – the OCCA, the Travel Act, the Lottery Statutes – are distinct from the Wire Act and UIGEA term "engaged in the business of betting or wagering." This is presumably because, at least as to the statutes passed after the Wire Act, Congress did not wish to incorporate the Wire Act's definition and its corresponding jurisprudence. Therefore, these federal statutes have their own particular ways of describing those they seek to regulate.

Statutes That Use the Term "Business of Betting or Wagering"

An obvious connection between the UIGEA and the Wire Act exists because these are the only two federal gambling statutes to use the exact same definitional language to describe their respective statutory and regulatory targets: those "engaged in the business of betting or wagering." 18 U.S.C. § 1084 (the Wire Act); 31 U.S.C. §5363 (the UIGEA).

The Wire Act

Enacted in 1961, the Wire Act was passed along with a statute prohibiting travel in interstate commerce in order to promote any business enterprise involving gambling. 18 U.S.C. § 1952. Section 1084(a) of the Wire Act provides: "[w]hoever *being engaged in the business of betting or wagering* knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit

as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both." (emphasis added).

The Wire Act Targets Bookmakers and Others Who are Engaged in the Business of Betting or Wagering

The legislative history of the Wire Act demonstrates that Congress' intent was to stem modern bookmaking activities. The House Report on the bill illuminates Congress' concerns: "Testimony before your Committee on the Judiciary revealed that modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communication facilities. For example, at present the immediate receipt of information as to results of a horse race permits a bettor to place a wager on a successive race. Likewise, bookmakers are dependent upon telephone service for the placing of bets and for layoff betting on all sporting events. The availability of wire communications facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that a sporting event begins." H.R.Rep.No.967, 87th Cong., 1st Sess. (1961), reprinted in (1961) U.S. Code Cong. & Ad.News 2631, 2631-32.

A predicate to liability under Section 1084(a) is a showing that the defendant was "engaged in the business of betting or wagering." Kelly v. Illinois Bell Telephone Company, 210 F. Supp. 456, 466 (N.D. Ill. 1962); United States v. Alpirn, 307 F. Supp. 452, 454 (S.D.N.Y. 1969); United States v. Baborian, 528 F. Supp. 324, 327 (R.I. 1981) (stating that "the sine-qua non of conviction under [Section 1084(a)] is proof that the defendant was in the 'business' of betting or wagering."). A person who uses a wire communication facility to place wagers, but is not otherwise engaged in the business of betting or wagering, has not violated Section 1084(a). *See*, *e.g.*, United States v. Anderson, 542 F.2d 428, 436 (7th Cir. 1976); Baborian, 528 F. Supp. at 331. In comparison to the wealth of opinions discussing the Wire Act generally, there is a dearth of case law analyzing what constitutes being "engaged in the business of betting or wagering," perhaps because most have understood the phrase to describe bookmaking and activities of a similar nature. One District Court, while analyzing whether a defendant was in the business of betting or wagering, stated that when "such a business exists is not easy to determine. There are no sharp contours in a general term such as 'business,' and the present state of the law is indeed amorphous." Baborian, 528 F. Supp. at 327. However, courts which have considered "the phrase 'business of betting or wagering' appear to have universally concluded that it involves a professional gambling or bookmaking business." Pic-A-State PA., Inc. v. Pennsylvania, 1993 U.S. Dist. LEXIS 12790, *11 (M.D. Pa. 1993), *rev'd on other grounds*, 42 F.3d 175 (3d Cir. 1994).

In Baborian, the Court carefully analyzed the contours of what it means to be "engaged in the business of betting or wagering." Baborian involved two defendants: Baborian who was a "lavish gambler" and bet often on sports, and Lauro who was Baborian's bookmaker. Baborian only placed bets with Lauro and did so only for himself. Baborian, 528 F. Supp. at 326-327. The Court examined the Wire Act's legislative history and concluded that "Congress intended the business of gambling to mean bookmaking, i.e., the taking and laying off of bets, and not mere betting." Id. at 328. In the context of its discussion regarding bookmaking, the Court further stated that being engaged in the business of betting or wagering "requires the sale of a product or service for a fee involving third parties, i.e., customers and clients, or the performance of a 'function which is an integral part of such business.'" Id. at 329. The Court's definition of being in the business of betting or wagering, taken on its own, is so

vague as to aptly describe almost any business. Viewed in context of the Court's opinion, however, the definition is the Court's attempt to describe the bookmaking business. Factors the Court considered in determining whether Baborian was in the business of betting included whether he furnished the bookmaker with line information on a regular basis, whether such information was critical to the bookmaker's operation, and whether there was a financial arrangement between the two. Id. at 331. In addition to noting the absence of these factors in Baborian's case, the Court stated that Baborian was a customer, not a part of Lauro's business. Id. Finding that Section 1084 "does not sweep within its prohibition a mere bettor," the Court held that Baborian did not violate Section 1084 because he was not in the business of betting or wagering. Id. As to Lauro, the bookmaker, the Court concluded that there was "no question that defendant Lauro accepted wagers from Baborian as a bookmaker . . . and therefore was in the business of betting or wagering." Id.

Some Circuit Court jury instructions define the "business of betting or wagering" as constituting the business of a bookmaker or someone betting or wagering with his customers. For example, the Fifth Circuit's instructions on this element of Section 1084 provide that the jury must find that

> the defendant was in the business of betting or wagering. By this I mean the *defendant was prepared on a regular basis to accept bets placed by others-that is, that the defendant was a "bookie"*. . . To prove that the defendant is in the betting business, the government must show beyond a reasonable doubt that the defendant engaged in a regular course of conduct or series of transactions involving *time, attention, and labor devoted to betting or wagering for profit*. The government must show more than casual, isolated, or sporadic transactions . . . The government need not show that the defendant has made any prescribed number of bets or that the defendant has actually earned a profit.

Fifth Circuit Pattern Criminal Jury Instruction §2.55 (emphasis added). Similarly, the Eleventh Circuit's instructions on this element provide that

> [t]o be "engaged in the business of betting or wagering" it is not necessary that making bets or wagers, or dealing in wagering information, constitutes a person's primary source of income, nor must it be shown that such person has made any specific number of bets; or that such person has made a specific dollar volume of bets, or has actually earned a profit. What must be shown beyond a reasonable doubt is that the Defendant engaged in a regular course of conduct or series of transactions involving *time, attention and labor devoted to betting or wagering for profit*, rather than casual, isolated or sporadic transactions.

Eleventh Circuit Pattern Criminal Jury Instruction §44 (emphasis added).

Both the Fifth and Eleventh Circuits' instructions show that the business of betting or wagering entails an enterprise which devotes at least some energy to betting or wagering for profit. As demonstrated herein, poker site operators do not themselves devote labor or time to betting – that is the purview of the poker players themselves as they decide against whom to play, when to fold, how much to bet, or when to bluff, etc. Instead, a virtual poker room devotes its labor to providing the best virtual poker card room service available. A virtual poker room itself does not bet or wager with anyone; unlike bookmakers, a virtual poker room has no interest or stake in which players win or lose. Thus,

these Circuit Court jury instructions also support the conclusion that the Wire Act targets bookmakers and those who accept bets but not businesses such as a virtual poker room.

As is apparent from Baborian, the legislative history of the Wire Act, and Circuit Court jury instructions, Section 1084 targets bookmakers and others who accept wagers. A virtual poker room is distinct from the bookmaker in Baborian because a virtual poker room merely acts as a host and there is no element of risk between a virtual poker room and its customers. Unlike a bookmaker, a virtual poker room is not an entity that the Wire Act intended to target.

A Virtual Poker Room is Not in the Business of Betting or Wagering Because it Does not Bet or Wager and it Does not Distribute Risks

A Virtual Poker Room Does not Bet or Wager with its Customers Because There is no Element of Chance or Risk in Their Relationship

The hallmark of betting or wagering is the existence of an element of risk or chance between the parties to a contract. United States v. Bergland, 209 F. Supp. 547 (E.D.Wis. 1962), *rev'd on other grounds*, 318 F.2d 159 (7th Cir. 1963). In particular, for gambling to exist the risk or chance at issue must be associated with the outcome of a game or contest, and cannot be the ever-present risk that one party simply will not perform his obligations under the contract. Bergland, 209 F. Supp. at 549. For example, if "one wishes to purchase securities through a stockbroker, there may be a 'chance' that the broker may err in transmitting the order to the floor of a stock exchange, but no one could reasonably contend that this is 'gambling.'" Id.

In Bergland, the Defendants would travel to Arkansas and learn the results of horse races at a track there. When the winner was announced, one Defendant would communicate the results by radio to a Codefendant outside the track. That Codefendant would then communicate the results by telephone to another Codefendant in Milwaukee who would then "past post" bookmakers who were unaware that the winner had already been announced. Id. at 548. The Defendants were charged with violating Section 1084(a). The Court found that while the Defendants' conduct may have been fraudulent, it did not constitute gambling. Id. at 549. Here, the "alleged bets or wagers placed with unsuspecting bookmakers involved that [*sic*] is known in common parlance as 'a sure thing.' The defendants were certain to win, and the bookmakers were certain to lose." Id. The supposed "gamble" was upon the result of a horse race which had already concluded, thus there was no chance or risk involved between the Defendants and the unsuspecting bookmakers. Because no element of risk existed, the Defendants were not gambling. Id.

Like the relationship between the Defendants and bookmakers in Bergland, there is no element of risk or chance between a virtual poker room and its customers based on their card play. A virtual poker room and its customers agree that the poker room will provide a hosting service which allows individuals to play poker against one another. When players use the poker room's website, they bet directly against one another. A virtual poker room is not a bettor. A virtual poker room's compensation is based on service fee commonly known as the "rake" and does not depend on who wins or who loses the game. Thus, a virtual poker room truly is indifferent as to whether any individual player wins or

loses. Since there is no element of chance whatsoever as present between a virtual poker room and its customers, the room's hosting of poker games does not constitute gambling or betting.

A Virtual Poker Room is Not Engaged in the Business of Betting or Wagering Because it Does Not Set Odds, Accept Wagers or Distribute Risks

Those who provide a service but do not accept wagers are not in the business of betting or wagering under the Wire Act. Courts have recognized that the "business of betting or wagering" requires the setting of odds, the acceptance of wagers, or the distribution of risks. Pic-A-State, 1993 U.S. Dist. LEXIS 12790, *12; *See also*, Alpirn, 307 F. Supp. at 454 (holding that "turf advisor" was not in business of betting or wagering because no betting or wagering contract existed between him and clients); Kelly, 210 F. Supp. at 466 (holding that sports news periodical was not in business of betting or wagering because it did not accept bets).

Pic-A-State was a service-oriented Pennsylvania corporation which conducted its business through approximately 165 retail locations, including Zack's Frozen Yogurt. Pic-A-State, 1993 U.S. Dist. LEXIS 12790, *4. A person wishing to buy a ticket for a legally authorized lottery in another state could go to a retail location, such as Zack's, and place a ticket order. The retail outlet agent would transmit the order to purchasing agents in the state where the lottery would be held. Those purchasing agents would buy the tickets directly from the lottery agents of that state. The customer was not given the actual lottery ticket, which remained in the state where the lottery was held. Pic-A-State charged $1.00 for each ticket order placed. Id. at *4-5. The Court held that Pic-A-State was not in the business of betting or wagering because it "set no odds, accept[ed] no wagers and distribute[d] no risks." Id. at *12. Thus, Pic-A-State did not violate Section 1084. Id. at *12-13. A virtual poker room's and Pic-A-State's operational models are similar: both provide a service which allows clients to enter into bets or wagers with third parties. Both a virtual poker room and Pic-A-State charge a flat fee for their services. Neither virtual poker rooms nor Pic-A-State set odds or distribute risks for their clients. Like Pic-A-State, a virtual poker room does not share in its customers' winnings or losses. Thus, like Pic-A-State, a virtual poker room is not in the business of betting or wagering.

Alpirn provides another example of a defendant who was not engaged in the business of betting or wagering. Alpirn, 307 F. Supp. at 454. In Alpirn, as in Pic-A-State, the Defendant provided a service but did not accept wagers or any risk relating to the outcome of a game or contest. The Defendant was a "turf advisor" who provided clients with predictions as to likely winners of horse races. If the selected horse won, the Defendant requested that the client pay him the equivalent of a five dollar bet on the horse. If the horse lost, the client would owe him nothing. Id. at 453. The Defendant admitted to being involved in a "turf advisory" business, but argued that he was not "engaged in the business of betting or wagering." Id. at 454. The Court agreed, focusing on the fact that Congress limited Section 1084's application to those engaged in the business of betting or wagering and finding that the Defendant was not so engaged. Id. The Court stressed that the Defendant's clients were not contractually bound to wager at all, that his clients merely agreed to "share their winnings with him – if in fact they wagered and were fortunate to win." Id. at 455. The Court also rejected the Government's argument that the Defendant was a "joint venturer" with his clients because, unlike a true joint venturer, he "did not share in the losses from the alleged venture." Id. Given that there was no "betting or wagering contract" between the Defendant and his clients, the Court held the Defendant was not in the business of betting or

wagering and did not violate Section 1084. Id. at 454. Like the turf advisor in Alpirn, a virtual poker room is involved in a business but is not "engaged in the business of betting or wagering." As did the Defendant in Alpirn, a virtual poker room provides a service to its customers: hosting online poker games where some players wager against one another. There is never a contract to wager created between a virtual poker room and its customers. A virtual poker room makes a flat fee by providing its hosting service. A virtual poker room does not share in its customers' winnings or losses and thus does not share in any risk assumed by its customers. Thus, just as the turf advisor in Alpirn did not violate Section 1084, virtual poker rooms have not violated Section 1084 because they are not in the business of betting or wagering.

A newspaper which publishes sports information but does not accept bets or wagers is also not engaged in the business of betting or wagering. In Kelly, the newspaper *Illinois Sports News* sought to enjoin telephone and telegraph companies from terminating their services based on the Department of Justice's claims that the newspaper violated the Wire Act. Kelly, 210 F. Supp. at 462-463. The newspaper had been published since 1947 and was circulated throughout the Midwest and in Florida. The newspaper published information about horse racing and other sports. Id. at 457-458. The newspaper could contain, for example, information regarding handicappers' forecasts of wagering at the track (i.e., the "line") and the handicappers' own estimate of the order in which the horses will finish. No one at the newspaper accepted bets or wagers either by telephone or telegraph or otherwise. Id. at 458-459. Much of the information in the newspaper was similar or identical to that contained in newspapers of general circulation. Id. at 460. The newspaper argued that it did not violate Section 1084(a) because it was not in the business of betting or wagering. Id. at 466. The Court agreed, finding that no one at the newspaper "engage[d] in the receipt of bets or wagers" and that that was no "evidence before the Court that those to whom [the newspaper staff] transmit information by use of any wire facility are so engaged." Id. Thus, the Court concluded that the newspaper was not in the business of betting or wagering. Id. Like the newspaper in Kelly, a virtual poker room provides its customers with a service, but does not accept wagers from them. Thus, a virtual poker room is not engaged in the business of betting or wagering. Further, there is no evidence that a virtual poker room's customers are so engaged as the sub-group of its customers who wager for money are merely bettors, like the defendant bettor in Baborian.

In contrast to Alpirn and the foregoing cases, United States v. Scavo, 593 F.2d 837 (8th Cir. 1979) involved a defendant who did help distribute risks between bettors. Scavo furnished line information on a regular basis to another individual who "operated a substantial bookmaking business." Scavo, 593 F.2d at 839. In addition, evidence showed that the bookmaker relied on this information, that Scavo was aware of the bookmaking operation, and that a financial arrangement existed between the two men. Id. at 842. Appealing his conviction under Section 1084(a), Scavo argued that one who merely provides line information is not "engaged in the business of betting or wagering." Id. at 840. The Court rejected Scavo's "blanket assertion that suppliers of line information are outside the scope of §1084(a)" and went on to determine whether Scavo was in the business of betting or wagering. Id. at 841-842. Because the evidence showed "more than an occasional exchange of line information" and that Scavo was an "important part" of the bookmaking operation, the Court concluded that Scavo was engaged in the business of betting or wagering under Section 1084(a). Id. at 842. Scavo's furnishing of line information – and his remuneration therefore – meant that he had a direct interest in helping the bookmaker win and the bettors lose. Further, by supplying line information which he knew the

bookmaker relied on, Scavo helped to distribute the risk between the bookmaker and his betting customers. But unlike Scavo, a virtual poker room operator does not have a stake in the outcome of a game of chance, nor does it play any part in distributing risks which poker players may face. Thus, a virtual poker room's conduct, in contrast to Scavo's, does not constitute engaging in the business of betting or wagering.

Finally, the defendant in United States v. Ross, 1999 U.S. Dist. Lexis 22351 (S.D.N.Y. 1999) was charged with violating Section 1084 in the sports betting context. Ross was manager of an off-shore online sports betting business known as Island Casino. Ross, 1999 U.S. Dist. Lexis 22351, *1-2. Ross communicated with various New York undercover agents regarding placing bets on sporting events and Island Casino accepted bets placed by those agents. Id. at *2-3. Ross was charged with violating Section 1084. In response, Ross moved to dismiss the indictment, arguing that Section 1084(a) did not apply because his conduct fell within the exemption of Section 1084(b). In particular, Ross argued that the undercover agents' offers to bet were merely "information assisting in the placing of bets" – therefore subject to Section 1084(b) – and not bets themselves. Id. at *7-8. The Court disagreed, citing other opinions where bookmakers who accepted bets placed by telephone were prosecuted under Section 1084(a) for transmission of bets, "not information assisting the placement of bets." Id. at *10-11. The Court also cited Alpirn in support of its holding that betting or wagering involved "situations where the defendant was himself making or accepting bets directly." Id. at *15. The Court held that Section 1084(b) did not apply here because Ross' acceptance of bets on sporting events via telephone supported the charge of transmission of a bet in interstate commerce, and did not constitute mere transmission of information assisting the placement of bets. Id. at *21. The Court then denied Ross' motion to dismiss the indictment as to the charge that he violated Section 1084. Id. at *22. As discussed above, a virtual poker room is fundamentally different from bookmakers and those who distribute risks, such as Ross, because a virtual poker room does not wager with its customers.

Given that a virtual poker room does not accept bets and wagers, nor does it set odds or distribute risks, it is not engaged in the business of betting or wagering. Virtual poker rooms provide a service to individuals who wish to wager among themselves. A virtual poker room's hosting of this service does not violate Section 1084(a) as such poker rooms do not fall within the statutory category of persons who are engaged in the business of betting or wagering – as interpreted by decisional law above.

Online Casino Gaming Site Operators May be Engaged in the Business of Betting or Wagering Because They Wager With Their Customers.

It is important to bear in mind the operational differences between online card play and online casino gaming when determining who is in the business of betting or wagering under the Wire Act. Some courts have apparently concluded that online casino gaming operators may be in the business of betting or wagering under the Wire Act. *See, e.g.*, New York v. World Interactive Gaming Corp., 185 Misc. 2d 852, 862-863 (N.Y. Sup.Ct. 1999) (holding that Defendants' virtual casino offering games such as virtual slots, blackjack or roulette violated the Wire Act); United States v. Lombardo, 2007 U.S. Dist. LEXIS 91696, *25-26 (D. Utah 2007) (denying Defendants' motion to dismiss Wire Act counts where Defendants allegedly assisted unlawful online casino gaming operators). However, neither the World Interactive nor Lombardo opinion included an analysis of whether the defendants were "engaged in the business of betting or wagering." The World Interactive and Lombardo Courts were focused on other

Wire Act-related issues, and apparently assumed that the defendants in each case were engaged in the business of betting or wagering. *See*, Lombardo, 2007 U.S. Dist. LEXIS 91696, *10; World Interactive, 185 Misc. 2d at 861-863. Peer-to-peer online poker was not discussed in either case.

Both World Interactive and Lombardo involved house-banked online casino games. As explained above, online casino gaming is fundamentally different from online card play. The site operator of online casino games actually bets against the players, unlike online poker where the host or site operator is in a neutral posture toward the players. Precedents such as World Interactive and Lombardo are inapposite in the context of online poker play because the card game hosts do not accept wagers and are not in the category of persons engaged in the business of betting or wagering.

The Unlawful Internet Gambling Enforcement Act of 2006

Introduction to the UIGEA – What Does it Do?

The UIGEA prohibits the handling of certain types of financial transactions related to "unlawful Internet gambling" and, like the Wire Act, expressly limits its application to those "engaged in the business of betting or wagering":

> No person ***engaged in the business of betting or wagering*** may knowingly accept, in connection with the participation of another person in unlawful Internet gambling-- (1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card); (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person; (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.

31 U.S.C. § 5363 (emphasis added).

In addition to targeting and regulating only those determined to be "engaged in the business of betting or wagering," the UIGEA also targets "financial transaction providers"[2] by requiring that they

[2] "The term "financial transaction provider" means a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system." 31 U.S.C. § 5362(4).

identify and block "restricted transactions."[3] 31 U.S.C. § 5364(c). The UIGEA provides for both civil remedies and stiff criminal penalties for violations of its terms. 31 U.S.C. §§ 5365, 5366.

Overview of the UIGEA's Legislative History

The UIGEA took a strange path to its passage on September 30, 2006. Because the UIGEA is the hastily passed result of earlier anti-gambling efforts in the 109th Congress its direct legislative history is virtually non-existent. Thus, in order to understand the creation of the UIGEA one must examine the failed bills that gave rise to some of the key elements contained within it.

Over the course of several Congressional sessions, there were various failed attempts to pass legislation prohibiting Internet gambling. One such attempt was H.R. 4411, the Internet Gambling Prohibition and Enforcement Act. Introduced by Representative James Leach in November 2005, H.R. 4411 initially focused on prohibiting financial transactions related to Internet gambling. 109 H. Rpt. 412, Part 2 (2006). Another gambling prohibition bill, H.R. 4777, was introduced in February 2006 by Representative Bob Goodlatte. H.R. 4777 sought to attack Internet gambling from a different angle by extensively modifying the Wire Act so that it would apply to all forms of Internet gambling, not just sports betting. 109 H. Rpt. 552, Part 1 (2006). These two bills proceeded on separate legislative tracks until July 10, 2006 when a proposed amendment to H.R. 4411 added H.R. 4777's Wire Act provisions. 152 Cong. Rec. H. 4958 (2006). One day later, on July 11, 2006, the House passed H.R. 4411. 152 Cong. Rec. H. 5005, 5008 (Rollcall Vote No. 363) (2006). After H.R. 4411's passage by the House, no major actions occurred on this bill and it never became law. H.R. 4777 met a similar fate: it was never passed by either the House or Senate.

Despite H.R. 4411's demise, its provisions prohibiting Internet gambling transactions lived on, later resurfacing in the 109th Congress as part of another bill: the SAFE Port Act, H.R. 4954. The SAFE Port Act had been introduced on March 14, 2006 by Representative Daniel Lungren. The SAFE Port Act originally focused on improving maritime and cargo security at United States ports. As introduced, the SAFE Port Act bore no traces of the Internet gambling prohibitions that would eventually be tacked onto it and become known as the UIGEA. *See, e.g.*, 109 H. Rpt. 447; Part 1. In fact, H.R. 4411's gambling transaction provisions did not appear in the text of the SAFE Port Act until September 29 in a Conference Report on the latter bill. 109 H. Rpt. 711 (2006). While Conference Report 109-711 did include H.R. 4411's gambling transaction provisions, it did not include the Wire Act modification that had been proposed on July 10. On September 30, one day after the Conference Report was filed and the very day before Congress went on recess, the SAFE Port Act – including the gambling transaction provisions borrowed from H.R. 4411 – was passed by the House and Senate a little after midnight. House Vote No. 516 (2006); Senate consideration: 152 Cong. Rec. S. 10810, 10810-10817 (2006).

[3] "The term "restricted transaction" means any transaction or transmittal involving any credit, funds, instrument, or proceeds described in any paragraph of section 5363 [31 USCS § 5363] which the recipient is prohibited from accepting under section 5363." 31 U.S.C. § 5362(7).

The Wire Act Defines what it Means to be "Engaged in the Business of Betting or Wagering" Under the UIGEA

The UIGEA's definition of the term "business of betting or wagering" is terse and says only what the term does not mean: "The term 'business of betting or wagering' does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service." 31 U.S.C. § 5362(2).

The Wire Act provides the framework for understanding what it means to be "engaged in the business of betting or wagering" under the UIGEA. First, Congress chose to use the exact same term in both statutes which are the only federal gambling statutes to use this term. Second, the UIGEA definition of being "engaged in the business of betting or wagering" is framed in the negative thus tacitly referencing the substance of the Wire Act's definition. In addition, Congress chose to extend the Wire Act into the UIGEA by deciding not to modernize the Wire Act. Finally, an examination of H.R. 4411 reveals that Congress itself saw a link between the Wire Act term (being "engaged in the business of betting or wagering") and the UIGEA.

The UIGEA Drafters Copied Language Verbatim From the Wire Act

It was not accidental that the UIGEA drafters adopted word for word the Wire Act term being "engaged in the business of betting or wagering." There are many other federal gambling statutes with different definitions of those whose conduct they seek to regulate. Congress could have chosen any of those existing definitions or created an entirely new definition unique to the UIGEA. But that did not happen. Instead, the UIGEA drafters chose to adopt verbatim a well-known Wire Act term with a long history.

It is axiomatic that when two statutes use the same term, this provides a strong indication that they should be interpreted *pari passu*. Northcross v. Board of Education, 412 U.S. 427, 428 (1973). In fact, a presumption exists where two statutes use the same term: "we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (citing Northcross v. Board of Ed., 412 U.S. 427, 428 (1973)).

The concept of *pari passu* is not unique to gaming regulation. The principal applies across the board in a wide variety of federal statutory contexts. For example, in Smith, the Supreme Court held that plaintiffs, police and public safety officers employed by the city of Jackson, Mississippi, could not bring a disparate impact claim under the Age Discrimination in Employment Act of 1967 (the "ADEA") because they had failed to identify the alleged specific employment practices which adversely impacted older workers. Smith, 544 U.S. at 242. In reaching this conclusion, the Court first analyzed whether the ADEA authorized disparate-impact claims. The Court applied the statutory similarity presumption to "language in the ADEA that was 'derived *in haec verba* from Title VII [of the Civil Rights Act of 1964].'" Id. at 234. The Supreme Court had already analyzed that identical language in another opinion, Griggs v. Duke Power Co., 401 U.S. 424 (1971), "which interpreted the identical text [from Title VII] at issue here." Id. at 236. Relying on Griggs' interpretation of the identical statutory

language, which "strongly suggest[ed] that a disparate-impact theory should be cognizable under the ADEA", the Smith Court found that it was error for the Circuit Court to hold that "the disparate-impact theory of liability is categorically unavailable under the ADEA." Id. at 240.

Like the two statutes in Smith, the Wire Act and the UIGEA use identical language: "engaged in the business of betting or wagering." 18 U.S.C. §1084 (the Wire Act); 31 U.S.C. § 5363 (the UIGEA). Further, the Wire Act and UIGEA have similar purposes: the regulation of gambling activity. As in Smith, it is appropriate here to presume that Congress intended this identical phrase to have the same precise meaning, scope, and effect within both statutes.

The UIGEA's Definition of Being "Engaged in the Business of Betting or Wagering" is Framed in the Negative

Congress implicitly incorporated into the UIGEA the Wire Act's definition for the term "engaged in the business of betting or wagering." The UIGEA's definition of the term "business of betting or wagering" is brief: "The term 'business of betting or wagering' does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service." 31 U.S.C. § 5362(2). In addition, this definition is framed in the negative, *i.e.*, it tells us only what the "business of betting or wagering" is not and does not say what the term means in a positive sense. It is as if the UIGEA definition of the term provides only a carve-out by implicit reference to the Wire Act: it describes exceptions to the Wire Act definition of the same term. The UIGEA's lack of positive instruction regarding the meaning of the "business of betting or wagering" leads to the conclusion that Congress intended to reference and incorporate the Wire Act's definitional framework for this term.

The Department of Justice (the "DOJ") itself implicitly recognized that the phrase "business of betting or wagering" is not unique to the UIGEA. Testifying before Congress, a DOJ representative averred that "[u]nlike other statutes, the UIGEA is specific to Internet gambling. The statute defines the terms 'unlawful internet gambling' and 'bets or wagers.' However, those definitions are only applicable to that statute." *Rep. John Conyers Jr. Holds a Hearing on Online Gambling Law Enforcement*, 109th Cong., House Judiciary Committee (November 14, 2007) (statement of Catherine L. Hanaway, United States Attorney, Eastern District of Missouri). Notably, this DOJ spokesperson did not mention the phrase "business of betting or wagering" in her testimony about the UIGEA's defined terms. Perhaps her omission was due to the obvious fact that this exact term is used by both the Wire Act and the UIGEA or due to the evidence in the legislative history of Congress' conceptualization of this term as shared between the statutes.

Congress Chose Not to "Modernize the Wire Act" and Instead Extended the Wire Act Classic Definitional and Limiting Structure Into the UIGEA

As noted above, H.R. 4411 included a provision "modernizing" the Wire Act to ensure that it would cover all Internet gambling and provisions to prohibit online gambling transactions. While H.R. 4411's gambling transaction prohibitions became the heart of the UIGEA, the Wire Act modification was excluded from the UIGEA. Congress' decision to exclude H.R. 4411's Wire Act modification provides insight into the perspective of Congress and the DOJ regarding the relationship between the Wire Act and the UIGEA. With the passage of the SAFE Port Act/UIGEA, Congress and the DOJ had

the opportunity to modify the Wire Act and set it apart from the online gambling prohibition as to the "business of betting or wagering." However, Congress chose not to do so. Instead, Congress extended the term "business of betting or wagering" by inserting this key Wire Act term into the UIGEA and choosing not to modify the Wire Act at all. In so doing, Congress created an undeniable link between the two statutes as to the meaning of being "engaged in the business of betting or wagering."

The DOJ would likely argue that H.R. 4411's Wire Act modification was abandoned because it was unnecessary as the DOJ's position has been that all Internet gaming is already subject to the Wire Act. However, DOJ has also maintained a second and inconsistent position with respect to the applicability of the Wire Act, as Rep. Bob Goodlatte explained at a Congressional hearing: "[w]hile the Department of Justice continues to state publicly that the Wire Act covers Internet technologies and also covers all forms of gambling, it has also welcomed legislation to clarify these provisions. . . . In order to provide more tools to law enforcement, the House of Representatives passed H.R. 4411 last Congress by an overwhelming bipartisan vote of 317 to 93. This legislation was perhaps the strongest legislation prohibiting Internet gambling that has been considered on the House floor in the past few decades. It contained important provisions to update and clarify the Wire Act." *Rep. John Conyers Jr. Holds a Hearing on Online Gambling Law Enforcement*, 109th Congress, House Judiciary Committee (November 14, 2007). At an earlier hearing, a DOJ representative who testified before Congress to share the Department's views on Internet gambling explicitly stated that the DOJ supported modernization of the Wire Act: "the Department also recognizes that the advent of Internet gambling may have diminished the overall effectiveness of the Wire Communications Act, in part, because that statute may relate only to sports betting and not to the type of real-time interactive gambling (e.g., poker) that the Internet now makes possible. Therefore, the Department generally supports the idea of amending the federal gambling statutes by clarifying that the Wire Communications Act applies to interactive casino betting and that the Act covers all Internet use." *How the Provisions of the Internet Gaming Prohibition Act Will Impact Tribal Gaming Activities Conducted Under the Indian Gaming Regulatory Act*, 106th Congress, Senate Committee on Indian Affairs (June 9, 1999) (statement of Kevin DiGregory, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, Washington, D.C.).

A Louisiana District Court echoed the DOJ's concern regarding the applicability of the Wire Act to Internet gambling. In re MasterCard Int'l Inc., 132 F. Supp. 2d 468 (E.D. La. 2001). The Court, however, went one step further and definitively held that the Wire Act did not apply to online gambling. First, the MasterCard Court acknowledged recent Congressional attempts to modify the Wire Act in order to remove the ambiguity regarding whether it applies to Internet gambling: "[r]ecent legislative attempts have sought to amend the Wire Act to encompass 'contest[s] of chance or a future contingent event not under the control or influence of [the bettor]' while exempting from the reach of the statute data transmitted 'for use in the new reporting of any activity, event or contest upon which bets or wagers are based.' *See*, S.474, 105th Congress (1997). Similar legislation was introduced the 106th Congress in the form of the 'Internet Gambling Prohibition Act of 1999.' See, S. 692, 106th Congress (1999). That act sought to amend Title 18 to prohibit the use of the internet to place a bet or wager upon 'a contest of others, a sporting event, or a game of chance. . . .'" MasterCard, 132 F. Supp. 2d at 480. The Court concluded that "even a summary glance at the recent legislative history of internet gambling legislation *reinforces the Court's determination that internet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084*. . . . As to the legislative intent at the time the Wire Act was

enacted, the House Judiciary Committed [*sic*] Chairman explained that "this particular bill involves the transmission of wagers or bets and layoffs on horse racing and other sporting events." *See*, 107 Cong. Rec. 16533 (Aug. 21, 1961)." Id. at 480 – 481 (emphasis added). In addition, in deliberations over H.R. 4411, many members of Congress affirmed the conclusion of the MasterCard Court by agreeing that it is not clear that the Wire Act applies to online gambling.[4]

In light of the conclusion of the MasterCard Court and many members of Congress, and the position of the DOJ itself, it is no surprise that H.R. 4411 contained yet another Congressional attempt to modernize the Wire Act. Such modernization was warranted if the DOJ hoped to apply the Wire Act to online gambling. So why was that modernization attempt excluded from the UIGEA when other key provisions of H.R. 4411 were not? This outcome is only partially explained by the inconsistent positions taken by the DOJ: that the Wire Act needs modernizing in order to cover Internet gambling and that the Wire Act already applies to Internet gambling. One could argue that those inconsistent positions led to the initial inclusion of a Wire Act modification provision in H.R. 4411 but the ultimate exclusion of the same from the UIGEA.

However, the key question is why was the outcome exclusion – rather than inclusion – of the Wire Act modification? The explanation for this outcome lies in Congress' strategic decision tacitly to extend the Wire Act into the UIGEA instead of altering the Wire Act and potentially upsetting the decades of jurisprudence developed around it. Congress accomplished this extension by inserting the Wire Act term "the business of betting or wagering" into the UIGEA and by leaving the same term intact in the Wire Act. Passage of the SAFE Port Act/UIGEA afforded Congress (and the DOJ) a couple of options to distinguish the Wire Act from the UIGEA as to the "business of betting or wagering": it could have included H.R. 4411's Wire Act modernization provisions and used different defined terms in the modernized Wire Act and online gambling provisions, or it could have excluded the Wire Act modernization and used a distinct, non-Wire Act term in the UIGEA. For example, simply using the term "gambling" instead of "betting or wagering" would have yielded a dramatically different application of the UIGEA as gambling encompasses a wider category of conduct than betting or wagering. In any event, Congress and the DOJ did not take this opportunity to set the Wire Act and UIGEA apart. Instead, by incorporating a term unique to the Wire Act, Congress ultimately chose to maintain the connection between the Wire Act and the UIGEA which had earlier been contemplated by H.R. 4411. This combination of actions – the exclusion of the Wire Act modification and the adoption

[4] Following are a few examples among many statements by Congressmen regarding the need to "modernize" the Wire Act so it would apply to Internet gambling. Representative Mike Oxley stated that "H.R. 4411 clarifies that the 45-year-old Wire Act covers illegal Internet gambling." 152 Cong. Rec. H. 4978, 4984 (2006). Representative Charlie Dent agreed with Rep. Oxley's perspective on the Wire Act: "the Wire Act, which is codified at title 18 United States Code Section 1081, was enacted in 1961, well before the establishment of the Internet or other forms of similar electronic communication. H.R. 4411 clarifies in statute that Internet communications made in furtherance of gambling transactions indeed fall within the scope of the Wire Act and are thus prosecutable." Id. at 4989. Also discussing H.R. 4411, Representative Rick Boucher explained that "[t]he time to approve a ban on Internet gambling has now arrived. The basic policy that we are promoting in this bill was adopted in the 1960s when Congress passed the Wire Act. That law makes it illegal to carry out a gambling transaction through use of the telephone network. *We are modernizing the Wire Act to account for the arrival of the Internet as a communications medium by making it illegal to use the Internet for gambling transactions as well*. In view of the fact that people connect to the Internet by means other than telephone lines, and that a large amount of Internet traffic does not even touch the public switched telephone network, we think it is necessary to specify that prohibited traffic which crosses either the telephone network or the Internet is illegal under the Wire Act." Id. at 4996 (emphasis added).

of a Wire Act term in the UIGEA – reveals Congress' intent to use the Wire Act as the basis for the meaning of being "engaged in the business of betting or wagering" under the UIGEA. This middle-ground approach may have been politically easier to accomplish than amending the Wire Act and it effectively extended the Wire Act in the end by having the UIGEA regulate and otherwise apply only to the exact same group as targeted by the Wire Act: those within the "business of betting or wagering."

H.R. 4411 Shows Congressional Intent to Model the UIGEA Definition on the Wire Act

In addition to the exact mirroring of the language in the Wire Act and UIGEA and the UIGEA's anemic definition of the "business of betting or wagering," another link between the two statutes exists: H.R. 4411. A close look at Congress' use of the term "engaged in the business of betting or wagering" in H.R. 4411 reveals that Congress conceptualized this term as linking the UIGEA to the Wire Act because it treated this term equally in its Wire Act modification and gambling transaction prohibition:

As of May 26 – H.R. 4411 did not yet contain a Wire Act modification. Instead, the bill focused on prohibiting gambling-related transactions. At this point, the bill used the Wire Act term "engaged in the business of betting or wagering." In addition, the language regarding being "engaged in the business of betting or wagering" was a verbatim copy of what would ultimately be adopted in the SAFE Port Act as the UIGEA: H.R. 4411 stated that the "term '*business of betting or wagering*' does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service." 109 H. Rpt. 412; Part 2 (emphasis added). In addition, the provision prohibiting gambling transactions was already exactly as it would be in Section 5363 of the UIGEA come September.[5]

As of July 10 – An amendment to H.R. 4411 was proposed, including a new provision to modify the Wire Act. The bill was also changed to use the term "gambling business" – instead of "business of betting or wagering" – in both its Wire Act modification and in its prohibition on gambling transactions. However, despite this apparent move away from the Wire Act term, the bill still conspicuously referenced the Wire Act by retaining Section 1084's term "business of betting or wagering": H.R. 4411 provided that "[t]he term 'gambling business' means a business of betting or wagering." 152 Cong. Rec. H. 4958, 4959 (2006).

[5] "Section(s) 5363. Prohibition on acceptance of any financial instrument for unlawful Internet gambling
No person *engaged in the business of betting or wagering* may knowingly accept, in connection with the participation of another person in unlawful Internet gambling (1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card); (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person; (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person." 109 H. Rpt. 412; Part 2 (2006).

H.R. 4411's prohibition on gambling transactions was essentially unchanged – except for the substitution of "gambling business" for "business of betting or wagering" – from the May 26 version of the bill.[6]

H.R. 4411's Wire Act modification, the new addition to the bill, appeared as follows:

> Section 1084 of title 18, United States Code, is amended to read as follows:
> 1084. Use of a communication facility to transmit bets or wagers; criminal penalties (a) Except as otherwise provided in this section, whoever, being *engaged in a gambling business*, knowingly (1) uses a communication facility for the transmission in interstate or foreign commerce, within the special maritime and territorial jurisdiction of the United States, or to or from any place outside the jurisdiction of any nation with respect to any transmission to or from the United States, of (A) bets or wagers; (B) information assisting in the placing of bets or wagers; or (C) a communication, which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers;

152 Cong. Rec. H. 4958, 4959 (2006) (emphasis added).

The changes to the bill between May 26 and July 10 demonstrate that its Congressional drafters conceptualized the Wire Act modification and the gambling transaction prohibition as interrelated provisions. These two provisions received equal treatment once the Wire Act modification was added to the bill: both provisions were modified to use the term "gambling business." Not only did the Wire Act modification and the gambling transaction prohibition use the same term, but the two provisions ultimately referenced Section 1084 of the original Wire Act because H.R. 4411 provided that "gambling business" meant "business of betting or wagering."

After H.R. 4411's passage by the House on July 11, no major action occurred on this bill.

As of September 29 – Sections of H.R. 4411 reappeared as part of another bill. H.R. 4411's gambling transaction prohibition – but not its Wire Act modification – was tacked onto the SAFE Port Act. In its gambling transaction prohibition (i.e., the UIGEA), the SAFE Port Act adopted language

[6] "Chapter 53 of title 31, United States Code, is amended by adding at the end the following new subchapter: 'SUBCHAPTER IV_POLICIES AND PROCEDURES REQUIRED TO PREVENT PAYMENTS FOR UNLAWFUL GAMBLING' . . . 5362. Prohibition on acceptance of any financial instrument for unlawful gambling
No person *engaged in a gambling business* may knowingly accept, in connection with the participation of another person in unlawful gambling_(1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card); (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person; (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person." 152 Cong. Rec. H. 4958, 4961 (2006) (emphasis added).

from the May 26 version of H.R. 4411 such that the SAFE Port Act used the original Wire Act term "business of betting or wagering" instead of "gambling business."[7]

Thus, despite the exclusion of H.R. 4411's Wire Act modification from the SAFE Port Act, the drafters of the SAFE Port Act preserved the relationship between the UIGEA and the Wire Act which had been earlier established in H.R. 4411. They did so by choosing to revert to the classic Wire Act term "engaged in the business of betting or wagering" which had earlier been a part of H.R. 4411's Wire Act modification and its gambling transaction prohibition.

It also bears noting here while carefully reviewing this legislative history that all businesses that are found to be "engaged in the business of betting and wagering" are also considered "gambling businesses" from a federal regulatory perspective. However, the converse is not true. In other words not all "gambling businesses" are necessarily "engaged in the business of betting and wagering." A contrary view is not possible because it would render these separate and distinct statutory terms as synonymous and interchangeable which they are not.

At the end of the day, Congress could have easily chosen to make the UIGEA cover all "gambling businesses" as noted above. But it did not do so. Instead, Congress chose to regulate only those gambling businesses and persons which are found to be "engaged in the business of betting and wagering" from a classic Wire Act perspective as contemplated and discussed herein.

III. STATE LAW

Virtual Poker Rooms Resemble Betcha.com Which was not Engaged in Bookmaking or Gambling Under Washington Law

In 2009, a state appeals court held that the online betting exchange Betcha.com was not engaged in "gambling" or "bookmaking" under Washington law. Internet Community & Entertainment Corp. d/b/a Betcha.com v. Washington, 148 Wash.App. 795 (2009). Betcha.com's website provided a person-to-person betting platform where the "terms of service" expressly stated that bets were made between the user and fellow bettors, not Betcha.com. Further, the terms of service stated that bets were non-binding, i.e., bettors were never obligated to pay when they lost a bet. Betcha.com, 148 Wash.App. at 799. The website had a rating system which allowed users to leave feedback regarding other bettors' behavior, including whether someone had refused to pay a loss.

[7] "5363. Prohibition on acceptance of any financial instrument for unlawful Internet gambling
No person *engaged in the business of betting or wagering* may knowingly accept, in connection with the participation of another person in unlawful Internet gambling (1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card); (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person; (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or (4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person." 152 Cong. Rec. H. 8540, 8559 (2006) (emphasis added).

The trial court granted summary judgment in favor of the State, finding that Betcha.com had violated various provisions of Washington's gambling laws by engaging in "gambling" and "bookmaking" as defined by state law. Id. at 802. In Betcha.com, the Washington Court of Appeals reversed the trial court and remanded for entry of summary judgment in favor of Betcha.com. Id. at 811-812. On appeal, Betcha.com argued that because it did not engage in "bookmaking" and because the wagers placed on its website did not amount to "gambling," the statutory violations based on these definitions must fail. The Court of Appeals analyzed the definition of "bookmaking," finding that the "definition of bookmaking requires one to 'accept bets,' meaning to take a position in the bet." Id. at 810. Betcha.com earned its fees by deducting small amounts from both bettors' accounts once a bet was accepted. Given that Betcha.com did not take any interest in the outcome of the bets, the Court held that Betcha.com did not engage in bookmaking. Id. at 810. In addition, the Court of Appeals analyzed the definition of "gambling" and found that "there can be no understanding that a bettor *will* receive something of value where the website stresses that all bets are non-binding." Id. at 807. Since nothing was risked by bettors here, the essence of the common law and statutory definitions of "gambling" was not met, therefore neither the users nor Betcha.com were gambling. Id. at 809. Finally, the Court concluded that the absence of these two foundational elements meant that there was no "professional gambling" as defined by state law. Id. at 811.

Although Betcha.com did not involve federal gambling statutes, the parallels between Washington state's concept of "bookmaking" and the Wire Act's and UIGEA's concept of "being engaged in the business of betting or wagering" are evident. As explained by the Betcha.com Court, "bookmaking" under Washington law involves taking a position in a bet. Likewise, being "engaged in the business of betting or wagering" under federal law requires that some element of risk exist between the two parties to a contract. Like Betcha.com – which did not accept bets since it did not take an interest in the outcome of any bet – virtual poker rooms are not stakeholders in the outcome of bets between players. Virtual poker rooms merely provide a platform where players may make bets between themselves. Thus, just as Betcha.com was not bookmaking under Washington law, virtual poker rooms are not engaged in the business of betting or wagering under federal law.

IV. CONCLUSION

Designed to curb the activities of bookmakers and others who accept bets, the Wire Act only applies to those who are "engaged in the business of betting or wagering." A virtual poker room does not fall into this category because it does not accept wagers or set any odds for its customers.

Instead, a virtual poker room provides a service to those who wish to test their poker-playing skills against others. A virtual poker room is unlike bookmakers and online casino gaming operators whose compensation depends on the outcome of a game or contest, i.e., the operator or bookmaker wins only if his player customers lose. Given that a peer-to-peer virtual poker room is a service-provider only, and not interested in the outcome of any game or contest, it is not by statutory definition "engaged in the business of betting or wagering" and thus has not violated Section 1084(a).

Section 1084 of the Wire Act and the jurisprudence developed around it provide the context for understanding what it means to be "engaged in the business of betting or wagering" under the UIGEA. The Wire Act and UIGEA are the only federal gambling statutes to use this distinctive phrase. In the

UIGEA, Congress chose to define "business of betting or wagering" by saying only what it is not; this omission is a tacit reference to the substance of the Wire Act's definition of the same phrase. Further, when Congress uses the same language in two statutes with a similar purpose, as here, there is a presumption that Congress intended the language to have the same meaning in both statutes.

Of course, Congress and the DOJ advisors had an opportunity to differentiate the Wire Act and the UIGEA as to the "business of betting or wagering" but instead they chose to extend the Wire Act definition into the UIGEA. Finally, the legislative history of H.R. 4411 and the UIGEA itself demonstrate that Congress conceptualized this phrase as being shared between the Wire Act and the UIGEA. These strong connections between the Wire Act and the UIGEA reveal that Congress intended to give the same meaning to the "business of betting or wagering" in the UIGEA and under the Wire Act.

As a result, the same conclusion that is compelled under a proper analysis of the Wire Act equally applies when a review of the scope of the UIGEA is conducted; i.e., that a virtual poker room operator is not by definition "engaged in the business of betting and wagering" and by virtue of this fact such an operator is expressly outside the regulatory ambit and the various prohibitions – whatever they may be – of the UIGEA.