UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-v-	:	S3 10 Cr. 336 (LAK)
CHAD ELIE and JOHN CAMPOS,	:	
Defendants.	:	ECF Case

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE UIGEA AND IGBA COUNTS OF THE INDICTMENT

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I. Introduction

In both its response to defendants' argument for dismissal of the UIGEA charges and of the IGBA charges, the government runs from the language of the statute, which, in each case, requires dismissal of the charges against defendants.

Defendants demonstrate in their opening briefs that the express language of Section 5362(2) of UIGEA exempts financial transaction providers like Mr. Campos and Mr. Elie from prosecution under UIGEA. *See* Campos Memorandum In Support of Motion to Dismiss[1] 5-12; Elie UIGEA Br. 3-10. Defendants also have demonstrated that under long-standing judicial interpretations of the phrase "business of betting or wagering," the poker companies in this case, which hosted online poker play by others in exchange for a fee, are not in the "business of betting or wagering" under UIGEA. Finally, the term "subject to chance" as used in UIGEA is hopelessly vague as applied to online poker, such that defendants' rights to due process and fair notice are violated by this prosecution.

Boxed into a corner, the government seeks to avoid dismissal of the UIGEA counts by distorting the statute and mischaracterizing defendants' straightforward arguments. But, as explained at length herein, these tactics are unavailing.

Nor has the government rebutted defendants' arguments in favor of dismissing the IGBA counts. The government's opposition to these arguments is based on a core assumption: that Internet poker is prohibited under IGBA. But while the government's brief is long on colorful history—from Mississippi riverboats to country music tunes—it is short on what matters: the

[1] Campos's Memorandum in Support of his Motion to Dismiss the Indictment is referred to herein as "Campos Br." Elie's Memorandum in Support of his Motion to Dismiss Counts One Through Four is referred to as "Elie UIGEA Br." Elie's Memorandum in Support of his Motion to Dismiss Counts Five through Seven and Nine is referred to as "Elie IGBA Br." The Government's Response to Defendants' Pre-Trial Motions is referred to as "Gov't Br."

text that Congress used when it enacted IGBA. Here, as always, that language is determinative. What it shows is that Internet poker is not covered by the terms of the statute.

II. The UIGEA Counts Against Mr. Campos and Mr. Elie Should Be Dismissed.

A. Defendants Are Exempt From Prosecution Under UIGEA As Financial Transaction Providers.

Only a person "engaged in the business of betting or wagering" can commit the crime Congress defined in UIGEA, 31 U.S.C. § 5363. Section 5362(2) provides that financial transaction providers are not engaged in the "business of betting or wagering." By eliminating financial transaction providers from the universe of persons who can be persons "engaged in the business of betting or wagering," UIGEA exempts persons who meet the definition of "financial transaction providers" from criminal liability. 31 U.S.C. §§ 5362(2) and (4). The government does not contest that Mr. Campos and Mr. Elie qualify as "financial transaction providers."

Nonetheless, the government seeks to avoid dismissal of the conspiracy and substantive charges under UIGEA against Mr. Campos and Mr. Elie by obfuscating this plain language of the statute and by mischaracterizing defendants' argument. Congress's intent to immunize financial transaction providers from criminal liability in this provision is clear—but the government largely ignores this provision in its brief.[2] The government also conveniently ignores the opinion by the Third Circuit, the only court that has considered the meaning of this provision to date: "[T]he criminal prohibition contained in § 5363 of the Act applies only to gambling-related businesses, *not any financial intermediary . . . whose services are used in connection with an unlawful bet*." *Interactive Media Entertainment and Gaming Association v.*

[2] The government's argument based on the "principle that statutory exceptions are to be construed narrowly," *see* Gov't Br. 44-45 (quoting a civil case), has no application in a criminal case, to which the well-established rule of lenity applies, requiring courts to adopt the more defendant-friendly reading of the statute. *See, e.g., United States v. Santos*, 553 U.S. 508, 513-15, 128 S. Ct. 2020, 2025-26 (2008).

Attorney General, 580 F.3d 113, 114 n.1 (3d Cir. 2009) (emphasis added); *see* Campos Br. 7; Elie UIGEA Br. 7.

Seizing on the defendants' discussion of the bifurcated nature of UIGEA (providing for criminal liability for persons engaged in the business of betting or wagering and a civil regulatory scheme for certain financial transaction providers), the government argues contrary to logic and to the plain language of UIGEA that:

> UIGEA does provide that '[t]he business of betting or wagering' does not include the activity of a financial transaction provider . . . . [b]ut it does not then subject all excluded entities to regulation, undermining defendants' argument that Congress' intent was to divide potential entities between criminal and regulatory regimes.

Gov't Br. 40. The government's argument makes no sense. The fact that Congress expressly chose to subject some, but not all, of the entities exempted from criminal liability to regulation does not nullify the express exemption from criminal liability for financial transaction providers. It simply means that some exempt entities are subject to regulations enacted pursuant to UIGEA, and some are not. Rather than address the plain meaning of the statutory exemption, the government devotes considerable attention to complaining that the regulations enacted by Treasury and the Federal Reserve pursuant to the authority granted in UIGEA are too "limited" to carry out what it views as the goals underlying UIGEA. Gov't Br. 37, 40-42, 44. But this is irrelevant. The obligations (or lack thereof) imposed on a financial transaction provider by regulations implemented *years after* UIGEA was passed has absolutely no bearing on whether Congress excluded financial transaction providers from criminal liability when it passed UIGEA.

The sole limitation on exemption from criminal liability for financial transaction providers is set forth in § 5367, entitled "Circumventions prohibited." Misguidedly, the government argues that the existence of this provision "undermin[es] the defendants'

presentation of the statute as bifurcated" between a criminal and a regulatory regime because it shows that financial transaction providers can in certain instances be subject to criminal liability. Gov't Br. 40-41. To the contrary, § 5367 eviscerates the government's argument that financial transaction providers are not generally exempted from the reach of the criminal prohibition codified at § 5363. Section 5367 is clear evidence that Congress considered and specifically enumerated the *limited* circumstances under which a financial transaction provider should lose the protection of § 5362(2) and face criminal liability. It provides that "[n]otwithstanding section 5362(2), a financial transaction provider. . . may be liable under this subchapter if such person has actual knowledge and control of bets and wagers, and" also "operates, manages, supervises, or directs," or "owns or controls, or is owned or controlled by, any person who operates, manages, supervises, or directs" an unlawful Internet gambling website. § 5367. It follows that *unless* a financial transaction provider meets the specified criteria of § 5367, it may *not* be held criminally liable under UIGEA. The Indictment does not allege that § 5367 applies in this case, nor does the government argue that it applies.

In the face of defendants' dispositive argument that UIGEA exempts them from criminal liability, the government invents a new exception that would impose criminal liability for financial transaction providers that act in bad faith, i.e., with knowledge that they are accepting restricted transactions. *See* Gov't Br. 41, 43. No such exception exists. First, neither § 5362(2) nor the definition of financial transaction provider in § 5362(4) contains any requirement that the financial transaction provider act in "good faith," as the government would define it. Gov't Br. 42. Second, this newly-minted exception would fly in the face of § 5367, which sets forth the *only* circumstances under which a financial transaction provider is subject to criminal liability, and requires not only "actual knowledge *and* control of bets and wagers," but also that the

additional elements of § 5367(1) or (2) be met. § 5367 (emphasis added). Regardless of whether —as the government urges—there were policy considerations in favor of subjecting financial transaction providers to more expansive criminal liability or providing for broader exceptions to § 5362(2), Congress obviously decided otherwise. Third, the government is mistaken that the regulatory regime is founded on a presumption of good faith and lack of knowledge of gambling-related transactions. To the contrary, the final regulations adopted by the agencies address situations in which a participant in a designated financial system, a third party processor, or a money transmitting business (each an example of a financial transaction provider) has actual knowledge that its customer has engaged in restricted transactions. *See* 12 C.F.R. § 233.6 (c)(1)(iii), (c)(2), (e)(1)(iii), (e)(2), and (f)(4).

B. Because They Fall Within An Express Statutory Exemption From Criminal Liability Under UIGEA, Defendants Cannot Be Prosecuted As Aiders And Abettors Or Co-Conspirators.

In light of UIGEA's express exemption for financial transaction providers, this Court should reject the government's attempt to defeat the plain meaning of the statute by prosecuting defendants under principles of aiding and abetting and co-conspirator liability.

The government argues that because conspiracy and aiding and abetting liability apply to most criminal statutes, including other gambling statutes, such liability should apply here as well. Gov't Br. 37-40. In making this argument, the government sets up a straw man. Defendants do not argue that these accessorial criminal liability provisions do not apply to UIGEA at all; rather, they argue that they do not apply to the narrowly circumscribed category of potential defendants who were explicitly exempted from criminal liability under § 5362(2).

In an argument geared more towards knocking down its straw man than addressing defendants' points, the government argues that the aiding and abetting and conspiracy statutes

apply "unless Congress expressly provides otherwise," and argues that in UIGEA, "Congress included no language specifically exempting UIGEA from the general applicability of" those statutes. Govt. Br. 37-38, 42-43. This is flatly inconsistent with the well-established principle set forth in the cases cited by defendants in their opening briefs—that courts should determine whether the statute indicates an "affirmative legislative policy" to exempt a class of persons from criminal liability. Campos Br. 9-11; Elie UIGEA Br. 8-9. If the court finds evidence of such a policy in the language and structure of the statute, it should then find that allowing accomplice liability for that class of persons would be inappropriate. It is simply not the law that the statute must "expressly" state that accomplice liability is foreclosed.

Thus, in *Gebardi v. United States*, 287 U.S. 112, 53 S. Ct. 35 (1932), the Supreme Court held that the Mann Act's failure to criminalize a woman's agreement to be transported across state lines for immoral purposes indicated an "affirmative legislative policy to leave her acquiescence unpunished" and held that "[i]t would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers." 287 U.S. at 123, 53 S. Ct. at 38. Likewise, in *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987), the Second Circuit reversed an aiding and abetting conviction under the Continuing Criminal Enterprise Statute, 21 U.S.C. § 848, which by design targeted only the ringleaders of narcotics operations. Because Congress chose to assign guilt only to the ringleaders, the Second Circuit found an intent "to leave the others unpunished" and would not undermine that intent by allowing aiding and abetting liability for non-ringleaders. *Id.* at 381-82. Similarly, in *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991), the court held that when Congress manifests "an affirmative legislative policy to leave unpunished a well-defined group of persons who were necessary parties to acts constituting a violation of the substantive

law," conspiracy liability is inappropriate. *Id*. at 836 (affirming dismissal of conspiracy charge against foreign official recipient of a bribe under Foreign Corrupt Practices Act). See *also* *Abuelhawa v. United States*, 129 S. Ct. 2102, 2106 (2009) (drug buyers cannot be held criminally liable for "facilitating" the acts of drug sellers because "where a statute treats one side of a bilateral transaction more leniently" courts will not "upend the calibration of punishment set by the legislature").

Here, irrefutable evidence of an "affirmative legislative policy" not to criminalize the actions of financial transaction providers is found in the plain language of § 5362(2). This is precisely the type of case in which courts have held that "Congress specifically carve[d] out an exemption that precludes aiding and abetting liability." *United States v. Yakou*, 428 F.3d 241, 251-52 (D.C. Cir. 2005) (quoting *United States v. Angwin*, 271 F.3d 786, 802 (9th Cir. 2001)). Indeed, in *Yakou*, the D.C. Circuit affirmed the dismissal of an indictment for aiding and abetting violations of the International Traffic in Arms Regulations under circumstances analogous to those here. The court held that because Congress had chosen to limit liability to U.S. persons, the indictment charging a non-U.S. person with aiding and abetting a U.S. person must be dismissed, even though there was no express exemption from aiding and abetting liability:

> Congress and the State Department did not go to such lengths to exclude non-U.S. persons located outside the United States from direct extraterritorial liability under the Brokering Amendment only to permit these same persons to be charged under an aiding-and-abetting statute for the identical conduct that they have determined should not result in their punishment as principals.

428 F.3d at 253-54.

Nor does the government's argument find support in *United States v. Falu*, 776 F.2d 46, 49 (2d Cir. 1985), the case on which it primarily relies. Gov't Br. 38-39. *Falu* simply did not speak to the situation where a statute expressly exempts a certain group from prosecution. The

defendant in that case, charged with aiding and abetting a drug sale within 1,000 feet of a school in violation of 21 U.S.C. § 845a(a), argued that the schoolyard statute did not apply to aiders and abettors because it did not say that it did. Finding no support for this argument in either the language of the statute or the legislative history, the Second Circuit held that "by its terms, the schoolyard statute admits no exceptions to the general rule that aiders and abettors are punishable as principals." 776 F.2d at 49. Unlike UIGEA, however, the schoolyard statute provided for *no* exceptions from liability for any class of persons, either as a principal or as an aider and abettor.[3]

In sum, the government's effort to distinguish this case from the *Gebardi* line of cases fails. The government articulates the principle underlying these cases as follows: "where a criminal transaction requires two parties for completion, and where the statute in question criminalizes the actions of only *one* of those parties, this legislative judgment cannot be circumvented through the application of conspiracy and/or aiding and abetting liability." Gov't Br. 42. Yet just a few paragraphs later, the government concedes that the transactions targeted by UIGEA "require[ ]two parties for completion"—financial transaction providers and Internet gambling companies. *See* Gov't Br. 44 (UIGEA "created a crime addressed to internet gambling companies who in fact *require* aiders and abettors and conspirators connected to the U.S. financial system in order to do the very thing—access the system for money—that the new crime forbids") (emphasis in original), 43 ("Internet gambling companies simply could not access the U.S. financial system without people like Elie or Campos, many of whom may well have been employees of a 'financial transaction provider.'"). UIGEA's findings likewise demonstrate that Congress was well aware of the essential role of financial transaction providers

[3] Making the completely irrelevant point that courts have found that individuals can be prosecuted for aiding and abetting or conspiracy to violate the IGBA and the Wire Act, Gov't Br. 39-40, the government ignores the critical distinction that, unlike UIGEA, neither of those statutes contains an explicit exemption for a category of persons who cannot be held liable as a principal.

in Internet gambling. *See* 31 U.S.C. 5361(1) ("Internet gambling is primarily funded through the personal use of payment system instruments, credit cards, and wire transfers."). Thus, Congress recognized that people "engaged in the business of betting or wagering" would inevitably have to use financial transaction providers to reach customers in the United States. And yet UIGEA clearly "criminalizes the actions of only *one* of those parties"—the person "engaged in the business of betting or wagering," and explicitly does not criminalize the actions of the financial transaction provider. § 5362(2). In other words, even under the government's own description of the *Gebardi* line of cases, it is apparent that Congress's removal of financial transaction providers from the scope of criminal liability precludes application of § 2 and § 371 in this case.

Indeed, the evidence in UIGEA of Congress's differential treatment of the parties to the transactions targeted by the statute is even more compelling than in the cited cases, in which courts found that the exemption for one party was implied by the structure and purpose of the statute. *Gebardi*, 287 U.S. at 121-23, 53 S. Ct. at 37-38; *Castle*, 925 F.2d at 833-36; *Amen*, 831 F.2d at 381-82; *Yakou*, 428 F.3d at 252-54. Here, the exemption for financial transaction providers is expressly set forth in § 5362(2). Congress "did not go to such lengths to exclude" financial transaction providers from criminal liability "only to permit those same persons to be charged under an aiding-and-abetting [or conspiracy] statute for the identical conduct that they have determined should not result in their punishment as principals." *Yakou*, 418 F.3d at 253-54.

C. Companies That Host Online Peer-to-Peer Poker Play Are Not Engaged In The "Business Of Betting Or Wagering."

Beyond the financial transaction provider exemption discussed above, the UIGEA counts should also be dismissed because the poker companies with whom Mr. Campos and Mr. Elie allegedly conspired are not engaged in the "business of betting or wagering" as that term is defined by UIGEA. UIGEA's definition of "business of betting or wagering" says nothing about

which businesses affirmatively fall within its scope. Instead, the definition is phrased in negative terms: it sets forth three kinds of businesses that are *not* included: financial transaction providers, interactive computer services, and telecommunications providers. § 5362(2).

UIGEA does, however, define the term "bet or wager" to mean "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome." § 5362(1)(A). The government acknowledges that the poker companies did not themselves "bet or wager" anything by offering forums for poker players to compete against each other. Gov't Br. 31. But, nonetheless, it argues that individuals can engage in the "business of betting or wagering" by "simply *facilitating* the betting and wagering of others on the Internet, even if they do not engage in betting and wagering themselves." *Id.* at 33 (emphasis in original). The government offers no case law or other authority to support its contention that the mere facilitation of bets or wagers constitutes being "engaged in the business of betting or wagering."

The government's interpretation is not only unsupported by precedent, it is also at odds with the text of the statute and with courts' interpretations of the same language in a different statute. As noted, the term "bet or wager" is defined in UIGEA as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance . . ." § 5362(1). In turn, the phrase "business of betting or wagering" narrows the universe of people to whom the statute applies from those who "bet or wager" (a broad category that can include any person) to those who do so as a business.

The Wire Act Statute, 18 U.S.C. § 1084, uses the identical phrase adopted in UIGEA: "business of betting or wagering."[4] This phrase in the Wire Act has been limited by courts to refer to those who bet against their customers, and do so as a business. *See United States v. Tomeo*, 459 F.2d 445, 447 (10th Cir. 1972) ("The statute deals with bookmakers—persons 'engaged in the business of betting or wagering.' Bookies take bets, they receive them, they handle them"); *United States v. Anderson*, 542 F.2d 428, 436 (7th Cir. 1976) (quoting *Tomeo*); *United States v. Sutera*, 933 F.2d 641, 649 (8th Cir. 1991) ("Running a gambling business is a fundamental aspect of" a Wire Act violation.). It is a settled principle of statutory construction that when two statutes use identical language, that language should be given identical meaning. *See Ratzlaf v. United States*, 510 U.S. 135, 143, S. Ct. 655, 660 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

Under the cases interpreting the identical language in the Wire Act, it is clear that the poker companies would not qualify as being engaged in the business of betting or wagering. *See* Campos Br. 14-15; Elie UIGEA Br. 12-13. The government's attempt to distinguish these authorities on the ground that the Wire Act is limited to sports betting, while UIGEA has a broader scope, is ill-considered. Gov't Br. 36. That more betting activities are encompassed in UIGEA does not change the meaning of the phrase "business of betting or wagering."

The government's reading of the statute, which would have this Court hold that any business that *facilitates* wagering is "engaged in the business of betting or wagering," would not only jettison the settled meaning of the phrase, but would also create the problem of deciding

[4] Indeed, the Wire Act is the only other statute in the entire U.S. Code to use this language. The Wire Act and UIGEA are particularly linked because the bill the government identifies as the precursor to UIGEA, House Resolution 4777, was in fact drafted as an amendment to the Wire Act. This provides context for Congress's use of the term "business of betting or wagering" in UIGEA and reinforces defendants' argument that the meaning of the term in the Wire Act bears directly on the meaning of the term in UIGEA.

where to draw the line in defining what constitutes "facilitating" gambling, in the absence of any statutory direction. In the context of a criminal statute, this would raise substantial constitutional concerns. *See, e.g., Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618 (1939) ("No one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes."). The government's sweeping construction of the UIGEA statute could criminalize as facilitation the business activities of entities clearly outside the intended scope of UIGEA: for example, software vendors that supply poker companies with products and services; web-hosting companies whose servers are used by Internet gambling companies; operators of websites that linked to the poker companies' websites or any other site that accepted bets or wagers; or individuals associated with businesses or websites that provide poker lessons or information about the rules of poker or any other game that is bet upon. The government's view that "simply facilitating the betting and wagering of others" is enough to run afoul of UIGEA is flawed.

The government argues that because Congress "took pains" to exempt three kinds of businesses—financial transaction providers, interactive computer services, and telecommunications services—from liability it must have meant to deny any "safe harbor" to poker companies, or indeed to any other type of entity. Gov't Br. at 32. But defendants do not argue that the statute envisions a "safe harbor" for poker companies—they argue only that UIGEA's requirement that the business be "engaged in the business of betting or wagering" does not include businesses that do not themselves bet or wager.

The government next contends that because 31 U.S.C. § 5367 subjects even the three excluded categories of entities to criminal liability if they have "actual knowledge and control of bets and wagers," and operate, manage, supervise, or direct an Internet site "at which unlawful bets or wagers may be placed, received, or otherwise made," that direct participation in betting is

not required for liability. But this contention ignores the requirement in § 5367 that the business must have "*control* of bets or wagers." § 5367 (emphasis added). This language means that the exempt entity must do more than *facilitate* gambling to incur liability—it must *control* the gambling. The poker companies do not "control" the betting that occurs on their websites, since they have no control over any player's decision to bet. Thus, to the extent that this provision sheds any light on the meaning of the phrase "engaged in the business of betting or wagering," it undermines the government's position that facilitation alone suffices.

The government also contends that UIGEA was designed specifically to include online poker. It notes that HR 4777, a precursor to UIGEA that proposed to amend the Wire Act, included the phrase "predominantly subject to chance" in its definition of "bet or wager." The government implies that testimony from Department of Justice officials expressing concern that this definition would not cover poker was dispositive in persuading Congress to change the definition to say only "subject to chance." This argument is not persuasive. First, there is no evidence that the Department of Justice's opinions had any sway with Congress. The testimony cited by the government was taken on April 5, 2006 before the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security. On July 11, 2006, the House actually passed HR 4411, a related bill that still included the "predominantly subject to chance" language. Second, this provision deals only with the quantum of chance covered by the statute. It has literally nothing to do with whether a "business of betting or wagering" requires that the business itself make bets or wagers. Both HR 4777 and HR 4411 preserved the "business of betting or wagering" language from the Wire Act (each used the phrase "gambling business," which then was defined to be "a business of betting or wagering").

Finally, the government argues that the statute must encompass poker because its findings incorporate by reference the National Gambling Impact Study Commission's ("NGISC") 1999 report, which refers to poker. This is unpersuasive for several reasons. First, that report did not endeavor to define the term "engaged in the business of betting or wagering," and so the fact that the Commission's report refers to poker does not shed light on the meaning of the term. Second, the findings of UIGEA simply reference the NGISC's recommendations, not the full report. The Commission's recommendations *never* mention poker, *see* NGISC Report Recommendations, June 18, 1999, http://govinfo.library.unt.edu/ngisc/reports/ngisc-frr.pdf (last visited Nov. 11, 2011). Third, the report was prepared in 1999, and all of the research was completed in 1998, *see* NGISC Research, http://govinfo.library.unt.edu/ngisc /research/research.html (last visited Nov. 11, 2011), but online poker did not reach the United States until 1998, so there was no data on online poker at the time the report was prepared. *See* History of Online Poker, March 2008, http://www.pokerplayer.co.uk/news/features/4602/ poker_timeline.html (last visited November 18, 2011). Finally, the government's attempt to rely on the report's "numerous references" (Gov't Br. 34) to poker is simply disingenuous. The report makes only a single, fleeting reference to online poker, noting that "once registered, the gambler has a full range of games from which to choose. Most Internet gambling sites offer casino-style gambling, such as blackjack, poker, slot machines, and roulette." Report at 5-3. Each of the ten other pages cited by the government refer to *video poker*, not poker. Video poker is a house-banked game of chance, and bears no resemblance to the peer-to-peer games of skill offered by the poker companies in this case. *See United States v. 294 Various Gambling Devices*, 708 F. Supp. 1236, 1243 (W.D. Pa. 1989) ("Indeed all the skill elements associated with

the ordinary game of draw poker are conspicuously absent in the video version. In video poker there is no raising, no bluffing, no money management skills.").

D. UIGEA Is Unconstitutionally Vague As Applied To Internet Poker.

The UIGEA counts should also be dismissed because the statute does not provide a person of reasonable intelligence any guidelines to determine whether it includes online poker. The government points to state statutes and state court decisions proscribing poker as evidence that a person should be able to decipher that UIGEA also proscribes poker, but it ignores the fact that UIGEA contains an independent federal law requirement that the bet or wager in question be placed upon a "game subject to chance." § 5362(1)(A). The government would read this statutory term out of the statute, rendering it mere surplusage. *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449 (2001). The state law provisions the government cites relate to whether poker qualifies as "unlawful internet gambling," which UIGEA defines to incorporate state laws regarding gambling, but they do not relate to whether online poker qualifies as a "game subject to chance," a separate requirement embedded in the definition of "bet or wager." *See* §§ 5362(1)(A) and 10(A). In order to violate UIGEA, then, the betting or wagering involved must violate another state or federal law, and it must also relate to a "game subject to chance." UIGEA, however, provides no basis for determining whether poker is a "game subject to chance."

As discussed in defendants' opening briefs, "subject to chance" is susceptible of multiple meanings. *See* Campos Br. 25-26. Neither the statute nor the agency regulations specify how much chance must be present for a game to be "subject to chance." The government does not attempt to select one meaning for this phrase; rather, it argues that the phrase either has no meaning at all, or, without explanation, that no matter what the phrase means "there is no doubt

that poker falls within its scope." Gov't Br. 45-46. It has obviously not escaped the government's attention that the question of the degree of skill involved in poker is a subject of much debate. *See* Gov't Br. 18, 26-27, 29 n. 25. Former FBI Director Louis Freeh, in recent testimony submitted to Congress, argued that Congress should amend UIGEA in order to clearly define what is prohibited so that the statute will "demarcate the difference between illegal internet gambling on games of chance and legal internet gambling on games of skill like online poker." *See, e.g.*, Louis Freeh, Testimony from Former FBI Director Louis Freeh submitted to Subcommittee Hearing: Internet Gaming: Is there a safe bet?, http://fairplayusa.com/blog/testimony-former-fbi-director-louis-free-submitted-subcommittee-hearing-internet-gaming-there (last visited Nov. 14, 2011). Nor do the state statutes or cases cited by the government support its argument, because none of the statutes or cases contain or interpret that phrase.

UIGEA forbids an act so vague and ambiguous that persons of common intelligence must guess at its meaning and may differ as to its application to online poker. *See United States v. Williams*, 553 U.S. 285, 306, 128 S. Ct. 1830, 1846 (2008) ("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."). This violates due process. Accordingly, for this reason too, the UIGEA charges should be dismissed.

III. The IGBA Counts Should Be Dismissed.

A. The IGBA Counts Should Be Dismissed Because The Federal Definition Of "Gambling" Does Not Include Poker.

The IGBA counts should be dismissed because poker is not "gambling" within the meaning of IGBA. The government's opposition seeks to avoid dismissal of these counts in two ways. First, it argues—contrary to the plain text of the statute—that there is no federal definition

of "gambling." Second, it argues that even if this definition exists—which it plainly does—it should be understood to clearly encompass poker. Neither argument is persuasive.

The government claims that IGBA's prohibition was designed to be "co-extensive with state law determinations as to what type of gambling is unlawful." Gov't Br. 16-17. This argument is at odds with the plain text of IGBA and with the obvious intent of the statute. IGBA expressly includes a definition of "gambling," which never mentions state law, and which differs from every state's statutory definition of "gambling." *See* 18 U.S.C. § 1955(b)(2). "[T]he principle is well established that, unless Congress plainly manifests an 'intent to incorporate diverse state laws into a federal statute, the meaning of [a] federal statute should *not* be dependent on state law.'" *Spina v. Dep't of Homeland Security*, 470 F.3d 116, 126 (2d Cir. 2006) (quoting *United States v. Turley*, 352 U.S. 407, 411, 77 S.Ct. 397, 399 (1957). That principle applies with force here. Examining its structure, IGBA criminalizes the *subset* of "gambling business[es]" that, among other things, are "a violation of the law of a State or political subdivision in which [they are] conducted." 18 U.S.C. § 1955(b)(1). The initial inquiry is whether the business in question is a "gambling" business; if it falls within the "gambling" definition, the *next* inquiry is whether that business is "a violation of the law of a State." By conflating these two requirements, the government strips the definition of "gambling" of all effect, and thus violates the "cardinal principle of statutory construction," which the government itself invokes, "that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." Gov't Br. at 32 (citing *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449 (2001)); *see also United States v. Kaczowski*, 114 F. Supp. 2d 143, 152 (W.D.N.Y. 2000) (recognizing the independent

force of IGBA's federal law definition of gambling: rejecting bookmaker's motion to dismiss IGBA charges and pointing out that "'gambling' is defined [in IGBA] to include bookmaking").

The government's view of IGBA as depending solely on state law definitions of gambling not only ignores the statute's text, but also results in bizarre and undesirable consequences. On the government's view, if a state hypothetically deemed speculation in the stock market, or playing bridge, chess, or carnival games for prizes to be "gambling," such activity—which bears no resemblance to the games in IGBA's definition—would thereby be converted into an IGBA predicate. That is obviously wrong. Similarly, without the federal definition of "gambling," it would be unclear whether IGBA applies to an activity that a state legislature outlaws without deeming it a "gambling" offense. For example, if a state outlawed a classic casino game like baccarat, but did not call it "gambling" per se, it would be unclear whether IGBA applied under the government's reading. Thus, IGBA's *federal* definition of "gambling" is crucial to the proper functioning of the statute.

The government next argues the federal definition of "gambling" encompasses online poker. The government concedes, as it must, that there is no judicial precedent construing the federal definition this way. Gov't Br. 12 ("[N]o court has ever even considered the statutory construction argument the defendants are making . . . ."). In the absence of such precedent, in order to demonstrate that poker *is* covered, the government offers a series of arguments, none of which survives scrutiny.

First, the government cites an "unbroken" chain of precedent in which federal courts supposedly have "applied" IGBA to poker businesses. However, in *none* of those cases did the court hold that IGBA's definition of gambling encompassed poker. Rather, the cases either resolved disputes over the meaning of other aspects of the statutory text or the meaning of state

law. *See United States v. Rieger*, 942 F.2d 230, 234-35 (3d Cir. 1991) (construing the continuous operation and five-participant requirements); *United States v. Trupiano*, 11 F.3d 769, 774 (3d Cir. 1975) (same); *United States v. Grey*, 56 F.3d 1219 (10th Cir. 1995) (same); *United States v. Zanino*, 895 F.2d 1 (1st Cir. 1991) (construing the meaning of "conduct"); *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006) (rejecting argument that New York gambling statute did not encompass video poker); *United States v. Hill*, 167 F.3d 1055 (6th Cir. 1999) (holding that Tennessee's gambling statute prohibited the use of video poker and slot machines); *United States v. Cook*, 922 F.2d 1026, 1034 (2d Cir. 1991) (holding that Indian Gaming Regulatory Act did not repeal IGBA with respect to conduct on Indian reservations); *United States v. Giovannetti*, 919 F.2d 1223 (7th Cir. 1990) (raising challenges to improper opinion evidence and jury instructions). It is elementary that a precedent is not authority for an issue not considered by the court. *See, e.g., Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 898-99 (2d Cir. 2011) ("As Judge Friendly put it in colorful terms: 'A judge's power to bind is *limited to the issue that is before him*; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'") (quoting *United States v. Rubin*, 609 F.2d 51, 69 (2d Cir.1979) (Friendly, J., concurring)). Accordingly, none of the cases cited by the government support its contention that "gambling" as used in IGBA encompasses poker.

Second, the government argues that IGBA's definition should be understood to encompass poker because poker has been commonly understood to be a form of gambling. In support of this proposition, the government invokes various references in media and examples of state laws and court cases that treat poker as gambling. *See* Gov't Br. 14. But that is not how statutory interpretation works. Where, as here, "a statute includes an explicit definition [a court] must follow that definition." *Burgess v. United States*, 530 U.S. 914, 942, 120 S. Ct.

2597, 2615 (2000). As the Supreme Court has emphasized, "[i]t is axiomatic that the statutory definition of the term excludes unstated meanings of that term." *Meese v. Keene*, 481 U.S. 465, 484-85, 107 S. Ct. 1862, 1873 (1987); *see Colautti v. Franklin*, 439 U.S. 379, 392 n.10, 99 S. Ct. 675, 684 (1979) ("As a rule, 'a definition which declares what a term 'means' . . . excludes any meaning that is not stated.'") (citation omitted); *see also* 2A N. Singer, *Sutherland on Statutes and Statutory Construction* § 47.07 (5th ed. 1992). This Court should therefore apply the definition of "gambling" that Congress expressly used, not the government's preferred intuitions about the statute.

In any event, even if one were to consult journalists, country music stars,[5] or certain state courts and legislatures to decide if poker should be regarded as "gambling," that argument actually cuts against the government's position. If poker truly were universally considered to be a form of gambling, as the government suggests, then why would Congress, when enumerating the games that constitute "gambling" for the purposes of IGBA, leave such an obvious example off the list (even as it included esoteric games such as bolita)? If anything, Congress' decision *not* to list poker suggests a desire *not* to include it.

Ultimately, the government's assertion that it is sufficient that poker has historically been regarded as "gambling" is in reality another attempt to bypass the definition that Congress actually enacted. A wide variety of activities have been considered "gambling" through history—including speculation in capital markets or, more recently, the mortgage and real estate market—but Congress plainly targeted only a subset of them in IGBA. Congress could have spoken more broadly: it could have specified that "gambling" should take its historical meaning, it could have left the term undefined, or it could have listed poker—a game that was well-known at the time. But Congress did not speak so broadly or so specifically to include poker as it could

[5] It was Kenny Rogers, however, not Willie Nelson who sang "The Gambler."

have. Rather, Congress provided examples of games that share particular traits—such as the fact that players cannot influence the outcome of the games through skill, and the fact that the games are house-banked—that poker does not share. "If Congress . . . meant the statute to be all-encompassing, it is hard to see why it would have needed to include the examples at all." *Begay v. United States*, 553 U.S. 137, 142, 128 S. Ct., 1581, 1585 (2008).

Third, aside from pop culture, state law, and its contested view of history, the government also cites one federal statute as supportive of its position. According to the government's brief, the Indian Gambling Regulatory Act of 1988 ("IGRA") identified "poker as a type of gambling." Gov't Br. 15. As a preliminary matter, the meaning given to a term in a subsequent enactment is hardly informative of the meaning of that term in the *prior* enactment. But, the government's invocation of the IGRA suffers from a more fundamental problem: the IGRA does not say what the government says it does. Indeed, the text of the section cited by the government refers neither to "gambling" nor "poker." Rather, the section cited includes definitions of different classes of "gaming," one of which includes certain types of "card games." 25 U.S.C.A. § 2703(7)(A)(ii). Indeed, the word "poker" appears nowhere in the U.S. Code.

Fourth, the government argues that the construction placed upon the term "gambling" by defendants is unworkable and at odds with Congress' intent. According to the government, adopting the defendants' interpretation of the statute—*i.e.*, holding that the illustrative list places any *limit* on the scope of "gambling" to games like those enumerated—would result in the need for a complex *ad hoc* analysis of whether the particular conduct criminalized by the state statute also should be criminalized by the federal statute. Gov't Br. 16. It is not unusual, however—and certainly not "unworkable"—for a court to engage in a legal analysis to determine whether a particular form of unlisted conduct is sufficiently similar to a statute's listed examples to fall

within the scope of prohibited criminal conduct. For example, in *Begay v. United States*, the Supreme Court addressed the purpose and meaning that should be attributed to a list of examples contained within a statute that was meant to illustrate its application. 553 U.S. 137, 128 S. Ct. 1581. In that case, the Court considered whether a drunk driving felony under state law is a "violent felony" within the meaning of the Armed Career Criminal Act. By the terms of the statute, a "violent felony" is any crime punishable by a prison term exceeding one year that "is burglary, arson, or extortion, involves use of explosives, or otherwise involved conduct that presents a serious potential risk of physical injury to another." *Id.* at 140, 128 S. Ct. at 1583 (citing 18 U.S.C. § 924(e)(2)(B)).

Although drunk driving doubtless presents a serious potential risk of injury to another and is punishable by a term exceeding a year, the Supreme Court found that it was not encompassed by the statute because "[i]t is simply too unlike the provision's listed examples for us to believe that Congress intended the provision to cover it." *Id*. at 142, 128 S. Ct. at 1584. The Court reasoned:

> In our view, the provision's listed examples . . . illustrate the kinds of crimes that fall within the statute's scope. Their presence indicates that the statute covers only *similar* crimes, rather than *every* crime that "presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). If Congress . . . meant the statute to be all-encompassing, it is hard to see why it would have needed to include the examples at all. Without them, [the clause] would cover *all* crimes that present a "serious potential risk of physical injury.

Id. at 142, 128 S. Ct. at 1584-85 (emphasis in original). Thus, contrary to the government's assertion, there is nothing "extraordinarily complex" about applying a statutory definition that is given by reference to a list of similar activities.

Fifth, the government, embarking on the very task it claims in the previous breath is "unworkable," proceeds to argue that poker is similar to the listed games. Those arguments are

not persuasive. As an initial matter, the government notes that poker is "regularly treated as gambling under state law," but even if this were true, it would not be a relevant factor in deciding whether the federal definition of "gambling" includes poker. To resort to state law to understand the federal definition of "gambling" is no different than saying that the federal term has no independent meaning, which, for the reasons explained above, cannot be true. Next, the government claims that poker is similar to the other games because it involves "betting on indeterminate outcomes" and because "people can lose large sums on a bet." But, poker also shares these features with other activities, such as stock-picking, which—though sometimes colloquially called "gambling"—are generally recognized to be perfectly legal.

The government then claims that poker fits within the federal definition because it shares traits with certain of the enumerated games like sports betting and pool-selling. However, the government's assertion that poker is like sports betting (and therefore like bookmaking and pool-selling) because "betting on the outcome of sporting events involves substantial (not slight) skill," Gov't Br. at 18 (internal quotation marks omitted), misses the point. Regardless of the *quantum* of skill potentially involved in sports betting, the *role* of skill in sports betting is qualitatively different from the role of skill in poker. Sports bettors are secondary actors who exercise skill to select from a menu of wagers, and then wager on the outcome of events beyond their control (whether with a bookmaker or through a wagering pool). But poker players are *primary* participants: that is, their actions—*e.g.*, by betting, bluffing, and folding—influence the outcome of the contest upon which their wagers depend. Indeed, the government concedes that the ability of a poker player to "influence bets made by other players" is "a peculiar feature of poker" that distinguishes it from the games listed in IGBA. Gov't Br. 18 n.12. In this regard,

playing poker is like playing golf, while bookmaking or pool-selling involve merely betting on another person's golf game (or another event beyond the bettor's control).

The government also analogizes the "rake" in poker to the revenue model in pool-selling, lotteries, and bookmaking. Gov't Br. at 19-20. Except for pool-selling, in which the house does not always participate, this argument is flatly wrong.[6] Lotteries are house-banked games because the house sets the odds and because the house keeps *all* of the stakes if nobody hits the lucky numbers. Bookmaking is a house-banked game for the same reason: the bookmaker sets the odds, and wins the bets that his customers lose. Thus, the lottery operator and the bookmaker have the same relationship with their customers that a casino has with a player at a roulette table. The government argues that bookmakers seek to balance the action on their books so that the outcome of the underlying contests do not affect them, and profit only by collecting transaction costs. Gov't Br. at 19-20. Although many bookmakers operate this way, the point is irrelevant both because it does not address the bookmaker's relationship with his customers, and because regardless of the bookmaker's intentions, the books inevitably do not achieve perfect balance, and so the bookmaker is invested in the outcome of nearly every event on which he takes bets.

Finally, the government's reading of the statute is not only inconsistent with its plain text, but also at odds with basic principles of due process. As defendants have demonstrated, any interpretation of the statute that includes poker must rely on counter-textual, subjective, and ultimately arbitrary determinations about what constitutes "gambling." Such determinations have

[6] With regard to pool-selling, the story is more complex. It is possible that the rules of a particular betting pool might enable the house to participate. For example, the house might collect the wagers in the event that everybody loses (for example, if nobody picks the winning horse in a race). The more common practice, especially in lawful, regulated pari-mutuel systems, is to refund the wagers, but there is nothing inherent to pool-selling that requires this policy. Regardless of the role of the house, the key reason why pool-selling is distinct from poker is that the players in pool-selling do not bet upon events within their control, and so pool-selling, like bookmaking and all of the other enumerated games, is a game of chance.

no place in a criminal prosecution, as they deprive free individuals of the requisite notice of prohibited conduct, and they serve only to enable arbitrary prosecutions. *See* Campos Br. 23-30; Elie IGBA Br. 25-31. The government ignores all of this, and contends that because a handful of cases have upheld IGBA convictions involving poker, the statute is not vague. But the government's cases have not considered or addressed the distinctions that defendants have raised in this motion. In light of that fact, those cases constitute poor authority for the proposition that poker is gambling.

In sum, Congress set forth a binding definition of "gambling" in IGBA that does not mention poker, and does not mention games similar to poker. This Court should reject the government's attempt to circumvent that definition.[7]

B. The IGBA Counts Should Be Dismissed Because The Poker Companies' Businesses Were Not "Conducted" In The United States.

The IGBA counts should be dismissed for a second reason: IGBA does not reach gambling businesses that are located and operate overseas. As noted in the opening briefs, this prosecution is literally unprecedented, as IGBA simply has never been applied to a business that has no physical presence in the United States. And for good reason: the statute is written expressly to exclude foreign conduct, applying only to a gambling business if it violates the law of a state "in which it is conducted." 18 U.S.C. § 1955(b)(1)(i). When Congress enacted other statutes, including UIGEA, that apply expressly to interstate and foreign commerce, it noted explicitly that existing law enforcement mechanisms—including IGBA—were not adequate to deal with Internet businesses that are not physically located in any state or U.S. territory. *See*

[7] Even if the Court does not accept the foregoing purely legal arguments that defendants' conduct was not criminal under the UIGEA and IGBA, a significant question threshold question will remain. Defendants maintain—and will seek to prove—that poker is not gambling within the meaning of those statutes for the further reason that it is predominantly a game of skill. That question would presumably be resolved in later proceedings.

Campos Br. 22-23; Elie IGBA Br. 18-19. To the extent there is any ambiguity on this matter, the presumption against extraterritorial application of the law, the rule of lenity, and the *Charming Betsy* canon all counsel in favor of restricting IGBA to the domestic businesses that it was enacted to target. Elie IGBA Br. 14-19.

The government is simply wrong in arguing that the Second Circuit—or any other court—has already applied IGBA extraterritorially. Gov't Br. at 20. It omits that in *United States v. Gotti*, 459 F.3d 296, 315-17 (2d Cir. 2006), the defendants had physically conducted their gambling business in New York, including by placing and operating illegal gambling machines at a number of locations in the state, physically collecting from and paying out to New York sports bettors, and keeping gambling records in their New York residences. It similarly omits that in *United States v. Kaczowski*, 114 F. Supp. 2d 143, 149 (W.D.N.Y. 2000), the bookmakers' gambling business was located in New York, and they used telephones in the state to collect wagers and deliver wagering information to offshore sports book. And indeed, each of the other cases the government cites involved similar facts; in each, the defendants actively conducted their physical gambling business within the United States.[8] Another court in this district recently reserved judgment on whether IGBA may be applied to extraterritorial conduct.

Despite the absence of any case law supporting its position, the government asks this Court to become the first ever to hold that IGBA applies in the absence of any presence in the United States. The government concedes that the Poker Companies maintained their operations offshore, and were licensed and regulated abroad. Nevertheless, it asserts that the Poker Companies "conducted" their business here because (i) customers in the United States used their

[8] *See United States v. $734,578.82 in U.S. Currency*, 286 F.3d 641, 660 (3d Cir. 2002) (IGBA applied "based upon conduct occurring in New Jersey"); *United States* v. *Truesdale*, 152 F.3d 443 (5th Cir. 1998) (defendant operated gambling business from his home office in Texas).

websites to play poker, (ii) third party payment processors helped the Poker Companies establish payment channels within the United States, and (iii) the Poker Companies advertised in the United States.[9] None of those arguments has merit.

Most important, the government's arguments run counter to the Supreme Court's decision in *Morrison v. National Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010). In *Morrison*, the Supreme Court considered whether the fraud provisions of the Securities Exchange Act could be applied against a foreign corporate defendant who sold securities over a foreign exchange. The petitioner in *Morrison*, like the government here, argued that resort to the presumption against extraterritoriality was unnecessary because the defendant engaged in *domestic* conduct in the United States—namely, that the defendant made misleading public statements in the U.S. and also owned a U.S. subsidiary that engaged in the alleged fraud on U.S. soil.

The Supreme Court rejected these arguments, explaining that "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Morrison*, 130 S. Ct. at 2884 (emphasis in original). The Court held instead that the presence of domestic activity is enough to trigger application of a law only if it relates to the "focus" of Congress's concern in enacting the law. *Id*. In the case of the Exchange Act, the Court explained that Congress's "focus" was on "purchases and sales of securities in the United States," and thus the Act could only be applied to domestic transactions in securities. *Id*. The acts of a corporate defendant conducting fraud and making misrepresentations in the United States, or of a U.S. customer purchasing a security via a foreign exchange, are not enough. *Id*.; *see also Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620, 625-26 (S.D.N.Y. 2010), *reconsideration denied* (Aug. 11, 2010) (holding that under

[9] The government does not acknowledge this distinction, but the Poker Companies never advertised in the United States for their real-money sites. Rather, they advertised only for their concededly lawful play-money sites.

Morrison, § 10(b) does "not extend to foreign securities trades executed on foreign exchanges even if purchased or sold by American investors, and even if some aspects of the transaction occurred in the United States.").[10]

Morrison is instructive in this case: Congress's "focus" in passing IGBA was on illegal gambling businesses that, like the gambling enterprise in *Gotti*, are physically conducted within the United States by organized crime. *United States v. Sacco*, 491 F.2d 995, 998 (9th Cir. 1974) (IGBA enacted in order to curtail "syndicated gambling, the lifeline of organized crime.").[11] Congress, after all, chose to proscribe gambling businesses that are a violation of the law of a state "in which" they are "conducted"—not a state in which their customers reside, or in which third-party payment processors operate, or in which they advertise.[12] Moreover, IGBA is clear in that it targets illegal gambling *businesses*—a fact that further confirms that Congress was focused on where the *business itself* is conducted as opposed to where customers or business

[10] In the year since *Morrison* was handed down, the lower federal courts have relied on the decision to reject application of federal laws other than the Exchange Act against foreign defendants even where those defendants have engaged in substantial conduct within the United States. *See, e.g.*, *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 31, 33 (2d Cir. 2010) (dismissing RICO claim that involved numerous predicate offenses committed in the United States such as "mail and wire fraud, money laundering, Hobbs Act violations, Travel Act violations and bribery" because under *Morrison*, "simply alleging that some domestic conduct occurred cannot support a claim of domestic application."); *Cedeno v. Intech Group, Inc.*, 733 F. Supp. 2d 471, 472, 473 (S.D.N.Y. 2010) (noting that "although *Morrison* does not address the RICO statute, its reasoning is dispositive here" and thus dismissing civil RICO claims even though defendants engaged in the domestic conduct of moving "funds into and out of U.S.-based bank accounts.").

[11] In a footnote, Gov't Br. at 17 n.9, the government hopes to tie organized crime indirectly to this case by asserting that an unnamed third party sought to collect money with the assistance of an unnamed person with an unidentified link to an organized crime organization—an organization that itself is not asserted to have played any role. That claim is so vague that it is almost impossible to respond, but, regardless, the government's assertion is not part of the allegations of the Indictment and, as such, not an allegation properly given any weight in connection with this motion.

[12] As noted in *Morrison*, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States" (emphasis in original). *Id.* at 2884.

contacts happen to reside.[13] Thus, because the poker companies conducted their real-money online businesses lawfully in foreign nations and not in the United States in the manner envisioned by Congress, they should not be subject to prosecution under IGBA. To hold otherwise would unduly "interfere[] with" the settled regulatory regimes of the sovereign nations in which the poker companies reside and actually operate. *Morrison*, 130 S. Ct. at 2885.[14]

In sum, IGBA does not apply to businesses, like the poker companies, which have no physical presence in the United States, and the ancillary ties that the poker companies have to the United States are not sufficient to bring their conduct within the scope of the statute. For these reasons, as well as those stated in subpart A, *supra*, the IGBA counts should be dismissed.[15]

CONCLUSION

For the foregoing reasons, Mr. Campos and Mr. Elie respectfully request that the Court dismiss counts one through seven and nine of the Indictment against them, and grant any such further relief as the Court may deem just and proper.

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[13] The government also argues that the defendants misapply the Supreme Court's holding from *Sanabria* and *Becker*. Gov't Br. at 24-25. But it is actually the government that misunderstands the import of the case law as revealed through its flawed hot dog analogy, *id*. at 25. The defendants' argument is obviously not that no one at all conducts a hot dog business that sells hot dogs to New York residents. The argument is instead that a hot dog business located in and operated from a foreign country does not constitute a *business conducted in New York* simply because a New York resident happens to purchase a hot dog from it. The government's argument to the contrary is difficult to square with *Morrison* and its progeny, which hold that § 10(b) of the Exchange Act does not apply against a foreign company even if it sells its stock to U.S. customers. *See, e.g.*, *Cornwell v. Credit Suisse Group*, 729 F. Supp. 2d 620, 625-26 (S.D.N.Y. 2010), *reconsideration denied* (Aug. 11, 2010) (holding that under *Morrison*, § 10(b) does "not extend to foreign securities trades executed on foreign exchanges even if purchased or sold by American investors, and even if some aspects of the transaction occurred in the United States."); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 532 (S.D.N.Y. 2011) (same).

[14] The principles articulated in by the Supreme Court in *Morrison*—a civil case—have even more force in a criminal case which requires the application of the rule of lenity.

[15] Because the IGBA charges fail for the aforementioned reasons, the money laundering charge (Count 9) that is predicated on the IGBA violation should also be dismissed.

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Respectfully submitted,

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