UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM IN SUPPORT OF DEFENDANT CHAD ELIE'S MOTION TO DISMISS COUNTS 1, 2, 3, AND 4 OF THE SUPERSEDING INDICTMENT

MALLON & MCCOOL, LLC
1776 K Street, N.W., Ste 200
Washington, DC 20006

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William R. Cowden
Steven J. McCool
MALLON & MCCOOL, LLC
1776 K Street, N.W., Ste 200
Washington, DC 20006
(202) 393-2088 (phone)
(202) 293-3499 (fax)
wcowden@mallonandmccool.com

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I. INTRODUCTION

Chad Elie stands indicted along with ten other individuals in a nine count Superseding Indictment ("Indictment"). The Indictment contains five charges: (1) conspiracy to violate the Unlawful Internet Gambling Enforcement Act ("UIGEA") under 18 U.S.C. § 371 (Count One); (2) violation of UIGEA, under 31 U.S.C. § 5363 and 18 U.S.C. § 2 (Counts Two-Four); (3) operation of an illegal gambling business under 18 U.S.C. §§ 1955 and 2 (Counts Five-Seven); (4) conspiracy to commit bank and wire fraud under 18 U.S.C. § 1349 (Count Eight); and (5) money laundering conspiracy under 18 U.S.C. § 1956(h) (Count Nine).

The charges relate to Internet poker and involve the operations of three different online poker companies: PokerStars, Full Tilt, and Absolute Poker. Each of these companies maintained a website through which poker players could play against each other at virtual poker tables. The poker games hosted by these companies were not house-banked games in which

players competed against a casino or bookmaker. Rather, the poker games at issue were peer-to-peer games. The poker companies did not participate in the games, and had no risk or stake in the outcome of the games. Instead, the companies provided virtual facilities for the games, and collected, in exchange, a fee, called the "rake." Ind. ¶ 3. Although all of the poker companies were based outside of the United States, and, in fact, had no corporate presence in the United States at all times relevant to the Indictment, the government alleges that their Internet operations violated federal gambling laws because the sites permitted United States customers to participate in real-money poker games over the Internet. Ind. ¶¶ 4-6, 15.

The eleven defendants charged in the case fall into four categories: individuals employed with/operating Internet poker sites (Scheinberg, Bitar, Tom, Beckley, Burtnick, and Tate), intermediaries between poker companies and payment processors (Lang and Franzen), payment processors (Rubin and Elie), and a banker (Campos). Mr. Elie is alleged to have been a "third party payment processor[]." Ind. ¶ 2. The payment processors are alleged to have arranged with banks to process payments for the poker companies and poker players. Ind. ¶¶ 9-12.

II. ARGUMENT

Mr. Elie moves to dismiss the conspiracy and substantive UIGEA counts on four grounds. First, under the UIGEA statute, a financial transaction provider such as Mr. Elie is expressly exempt from criminal prosecution. Second, the poker companies do not meet UIGEA's statutory definition of a "person engaged in the business of betting or wagering," so therefore the UIGEA counts (Counts One through Four) are on their face legally insufficient. Finally, applying UIGEA to the facts that the government alleges in this case would violate well-settled principles of due process.

A. UIGEA Exempts Financial Transaction Providers Like Mr. Elie From Criminal Prosecution.

UIGEA prohibits "person[s] engaged in the business of betting or wagering" from knowingly accepting certain types of payments in connection with unlawful Internet gambling, as defined by federal and state law. UIGEA itself does not criminalize Internet gambling; instead, it criminalizes the receipt of funds *by certain defined persons* in connection with Internet gambling that is already unlawful under other federal or state laws. *See* 31 U.S.C. §§ 5361(b) (2010), 5362(10) (2010), 5363 (2010).

The UIGEA counts charge that the defendants were persons "engaged in the business of betting or wagering" who knowingly accepted payments in connection with unlawful Internet gambling, or persons who conspired with, or aided and abetted, such persons. Ind. ¶¶ 32, 33, 36, 38. The Indictment alleges that the poker companies offered United States residents the ability to access and use their websites to play poker. Ind. ¶ 15. Specifically, the Indictment charges that the provision of online poker services to New York residents (and the residents of other, unnamed states) was unlawful.

With regard to Mr. Elie, the Indictment charges as follows:

> [The Poker Company] defendants [] relied on highly compensated third party payment processors (the "Poker Processors") who . . . included CHAD ELIE . . . who, at various times relevant to this Indictment, processed and helped disguise payments to each of the three Poker Companies.

Ind. ¶ 2. As the Indictment alleges, Mr. Elie was a payment processor who processed payments in connection with Internet poker through third party payment processor accounts at "United States banks and financial institutions[.]" Ind. ¶ 3. Although UIGEA imposes criminal sanctions on persons "engaged in the business of betting or wagering," the statute's definition of the "business of betting or wagering" expressly excludes "financial transaction providers," a class of

persons that includes payment processors like Mr. Elie. For financial transaction providers, the statute eschews criminal liability, instead imposing civil regulatory obligations. Because the plain text and the structure of the statute establish that Mr. Elie is exempt from criminal liability, the UIGEA Counts against him should be dismissed.

Enacted in 2006, the UIGEA statute is a subchapter consisting of seven sections: Title 31 United States Code §§ 5361 through 5367. The subchapter includes a provision setting forth criminal liability, a provision for promulgation of noncriminal regulation of "financial transaction providers," and a detailed section defining terms used in UIGEA.

UIGEA's criminal prohibition, § 5363, provides that "[n]o person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling" payment by certain types of financial transactions. The definition section of the statute, § 5362, expressly states that "financial transaction providers" are *not* "engaged in the business of betting or wagering." The term "financial transaction provider," in turn, is defined in § 5362(4) as:

> 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.

Mr. Elie meets this definition because his alleged third party payment processing activities involved a "national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service[.]"

Instead of imposing criminal liability on financial transaction providers, UIGEA subjects them to a civil regulatory regime. In Section 5364 of the statute, Congress provided that the Secretary of the Treasury and the Board of Governors of the Federal Reserve, in consultation

with the Attorney General, shall prescribe regulations "requiring each designated payment system,[1] and all participants therein, to identify and block or otherwise prevent or prohibit restricted transactions[2] through the establishment of policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions." Pursuant to these provisions the relevant regulatory agencies adopted elaborate regulations requiring financial transaction providers and payment systems to adopt policies and procedures designed to prevent restricted transactions. 31 C.F.R. §§ 132.1- 132.7 (2010).[3] Section 5364 also delegates "exclusive[]" enforcement authority over the regulatory regime to the "Federal functional regulators" and the Federal Trade Commission.

The regulatory scheme, published at 12 C.F.R. Part 233 and commonly known as Regulation GG, applies to financial transaction providers, but not to persons engaged in the business of betting or wagering. Regulation GG demonstrates Congress's intent to treat financial transaction providers differently from gaming operators under UIGEA. The regulatory scheme also enforces the fact that as a third party payment processor, Mr. Elie is exempted from criminal liability. The agencies involved in enacting the UIGEA regulations specifically added to the

[1] A "designated payment system" is defined in UIGEA as "any system utilized by a financial transaction provider that the Secretary and the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, jointly determine, by regulation or order, could be utilized in connection with, or to facilitate, any restricted transaction." § 5362(3).

[2] The statute defines "restricted transaction" to mean "any transaction or transmittal involving any credit, funds, instrument, or proceeds described in any paragraph of section 5363 which the recipient [i.e. the person engaged in the business of betting or wagering] is prohibited from accepting under section 5363." § 5362(7).

[3] While UIGEA was enacted in October, 2006, financial transaction providers, like Mr. Elie's payment processing company and banks that hosted it, were not required to comply with the final regulations until June 1, 2010. 74 Fed. Reg. 62,687 (Dec. 1, 2009) (extending compliance date to June 1, 2010).

Final Rule "a new definition for the term 'third party processor' . . . in response to comments that suggested the final rule should clarify the responsibilities of processors under the Act." 73 Fed. Reg. 69,387 (Nov. 18, 2008): According to the regulators:

> The new definition clarifies that a processor with a direct customer relationship with the originator of a debit transfer transaction of the receiver of a credit transaction, and which acts as an intermediary between the originator (or receiver) and the depository institution is a "third party processor" and covered by the regulation. . . The term 'third party processor' has also been added to the definition of 'participant in a designated payment system[.]"

Id.[4]

The statutory definition of "bet or wager" contained in § 5362(1) provides still further evidence that financial transaction providers are exempt from criminal liability under UIGEA. As discussed, § 5363 proscribes persons "engaged in the business of betting or wagering" from accepting certain forms of payment in connection with unlawful Internet gambling. Section 5362(1)(E)(vii) excludes from the definition of "bet or wager" "any deposit or other transaction with an insured depository institution." The Indictment acknowledges that the banks that hosted Mr. Elie's payment processing company and the electronic funds transfers involved in processing payment transactions were insured depository institutions subject to the authority of the FDIC. Ind. ¶¶ 3, 31.[5]

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[4] Thus, pursuant to Regulation GG's definitions, "*Participant in a designated payment system*" now includes "an operator of a designated payment system, a financial transaction provider that is a member of, or has contracted for financial transaction services with, or is otherwise participating in, a designated payment system, or a third-party processor. This term does not include a customer of the financial transaction provider, unless the customer is also a financial transaction provider otherwise participating in the designated payment system on its own behalf. 12 C.F.R. Part 233.2(w) (2011) (underscore added).

[5] Notwithstanding the clear exemption in § 5362(2), there are certain very limited circumstances under which a "financial transaction provider" could be criminally liable under UIGEA. Section 5367, entitled "[c]ircumventions prohibited," addresses a situation in which an unlawful Internet

In sum, as stated by the Third Circuit in *Interactive Media Entertainment and Gaming Association ("iMEGA") v. Attorney General:*

> The phrase "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). Thus, *the criminal prohibition contained in § 5363 of the Act applies only to gambling-related businesses, not any financial intermediary* or Internet-service provider *whose services are used in connection with an unlawful bet*.

580 F.3d 113, 114 n.1 (3d Cir. 2009) (emphasis added). Because only a "person engaged in the business of betting or wagering" is subject to criminal liability under § 5363, and because financial transaction providers like Mr. Elie are by definition not so engaged, Mr. Elie cannot be prosecuted under UIGEA.

Mr. Elie is not only exempt from direct liability, but also, by implication, exempt from aiding and abetting or conspiracy liability. To permit the government to charge Mr. Elie as an aider-and-abettor or conspirator would undermine Congress's decision to exempt financial

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gambling business attempts to circumvent the criminal prohibition in § 5363 by acting as its own financial transaction provider. Section 5367 provides:

> Notwithstanding section 5362(2), a financial transaction provider, or any interactive computer service or telecommunications service, may be liable under this subchapter if such person has actual knowledge and control of bets and wagers, and-
>
> (1) operates, manages, supervises, or directs an Internet website at which unlawful bets or wagers may be placed, received, or otherwise made, or at which unlawful bets or wagers are offered to be placed, received, or otherwise made; or
>
> (2) owns or controls, or is owned or controlled by, any person who operates, manages, supervises, or directs an Internet website at which unlawful bets or wagers may be placed, received, or otherwise made, or at which unlawful bets or wagers are offered to be placed, received, or otherwise made.

Thus, financial transaction providers are exempt from criminal prosecution unless they meet the specific criteria set forth in § 5367. Here, there is no allegation (nor could there be) that Mr. Elie met those criteria.

transaction providers from criminal enforcement. Controlling precedent establishes that Congress's decision protects Mr. Elie not only from prosecution as a principal, but as an accomplice as well.

Where Congress has expressly treated one participant in a transaction differently than others, there is a well-settled exception to the general applicability of aiding and abetting liability under 18 U.S.C. § 2 and conspiracy liability under 18 U.S.C. § 371. In *Gebardi v. United States*, 287 U.S. 11, 53 S. Ct. 35 (1932), the Supreme Court reversed the Mann Act conspiracy conviction of a woman who agreed to be transported across state lines for immoral purposes. The Court held that the statute's failure to criminalize the woman's agreement demonstrated "an affirmative legislative policy to leave her acquiescence unpunished." 287 U.S. at 123, 53 S. Ct. at 38. The Court reasoned 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." *Id*.

The Supreme Court recently reaffirmed the rule of *Gebardi* in *Abuelhawa v. United States,* 129 S. Ct. 2102 (2009), holding that drug buyers do not "facilitate" the actions of drug sellers because "where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature." 129 S. Ct. at 2106.

The Second Circuit applied *Gebardi* in *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987). In that case, the court considered whether a defendant could be prosecuted for aiding and abetting a violator of the continuing criminal enterprise statute, 21 U.S.C. § 848 (2010). Noting that the statute had been passed in order "to target the ringleaders of large-scale narcotics operations," the court recognized that applying aider-and-abettor liability to people other than the

ringleaders would be inconsistent with Congress's intent. *Amen*, 831 F.2d at 381. Citing *Gebardi*, the court reasoned that "[w]hen Congress assigns guilt to only one type of participant in a transaction, it intends to leave the others unpunished for the offense." *Id*. Thus, although the continuing criminal enterprise statute contained no express exemption from aiding-and-abetting liability for subordinates in such an enterprise, the court refused to find the defendant liable.

In a similar vein, the Fifth Circuit in *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991) applied *Gebardi* in affirming the dismissal of a conspiracy charge for conspiracy to violate the Foreign Corrupt Practices Act against a foreign official who received a bribe. The court noted that it would have been obvious to Congress when it enacted the FCPA that every transaction prohibited by the act would involve not only an offer of a bribe, but also an agreement on the part of a foreign official to receive the bribe. *Id*. at 835. But the statute did not set forth any penalties for foreign officials, and the court held that this silence manifested an intent to exempt the foreign recipients from prosecution as conspirators. *Id*.

This case squares with *Gebardi, Abuelhawa, Amen,* and *Castle*. Indeed, in this case the principle applies with even greater force. In enacting UIGEA, Congress carefully calibrated the legislative response to the different participants in the "restricted transactions" UIGEA is intended to curtail. As in *Castle*, Congress knew that financial transaction providers would typically participate in UIGEA-regulated transactions – indeed, the entire enforcement scheme contemplates that gambling businesses will contract with financial transaction providers to reach their customers. *See* 31 U.S.C. § 5361 (2010) (Congressional findings and purpose: "(1) Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers."); 31 U.S.C. § 5363 (prohibiting persons engaged in the business of betting or wagering from accepting various financial instruments in connection with the

participation of another person in unlawful Internet gambling). Nevertheless, Congress affirmatively excluded financial transaction providers from UIGEA's criminal liability provision, and instead enacted a separate regulatory scheme to govern their actions.

Given this careful delineation of criminal liability only for persons "engaged in the business of betting or wagering," and not for "financial transaction providers," servicing those in that business, the aiding-and-abetting and conspiracy charges must fail. It would be "unseemly and unwise for the courts and the Executive Branch to bring in through the back door a criminal liability so plainly and facially eschewed in the statute creating the offense." *United States v. Shear*, 962 F.2d 488, 496 (5th Cir. 1992) (rejecting notion that employee could aid and abet employer's criminal OSHA violation where Congress had carefully balanced the respective standards for employers and employees). The government cannot sidestep the plain exemption for financial transaction providers by charging Mr. Elie with aiding and abetting or conspiracy offenses.

Nor does the fact that the Indictment names Mr. Elie, and not his company, save the government's case. Financial transaction providers, like all entities, can only act through their agents. An individual acting in a representative capacity for an entity "assumes the rights, duties and privileges of the artificial entity or association of which [he is an] agent[] or officer[] and [he is] bound by its obligations." *See United States v. White*, 322 U.S. 694, 699, 64 S. Ct. 1248, 1251 (1944). Imposing criminal liability on a third party payment processor's agents while exempting the processor itself from criminal liability would be nonsensical and, like applying conspiracy or aiding-and-abetting liability in this instance, would "bring in through the back door" the liability "so plainly and facially eschewed in the statute." *Shear*, 962 F.2d at 496.

In sum, the UIGEA counts – Counts One through Four – must be dismissed as to Mr. Elie because his activities as a financial transaction provider and his acts on his company's behalf are exempt from criminal liability.

B. The UIGEA Counts Fail To Allege Any Person Legally Sufficient To Constitute A Person "Engaged In The Business Of Betting Or Wagering."

As discussed above, the UIGEA counts allege that the eleven defendants – consisting of poker companies, brokers, third party payment processors and a bank official – were "engaged in the business of betting or wagering" or conspired with, or aided and abetted such persons. Ind., ¶¶ 33, 36, 38 and 40. Although the UIGEA counts in the Indictment allege that the poker companies were "engaged in the business of betting or wagering," this rote recitation of the statutory requirements fails. The Indictment alleges no actual facts from which it could be inferred that the poker companies or any other defendant engaged in the business of betting or wagering. Accordingly, all of the UIGEA counts must be dismissed.

The term "bet or wager" is defined in § 5362(1) as "the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or 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." In light of this definition, the most natural construction of the phrase "business of betting or wagering" – a phrase that is not positively defined in the statute -- is a business that has a stake in the outcome of a contest of others, sporting event, or game subject to chance.

The poker companies did not have any stake in the outcome of the online poker matches hosted on their sites. As the indictment acknowledges, the matches were between customers. The poker companies' revenue consisted exclusively of the "rake" – the amount charged to the online poker players as a fee for participating in the games. Ind. ¶ 3. The "rake" is set in

advance based on the game being played and is collected in full regardless of the outcome of the games. The Indictment does not allege that the poker companies obtained revenues through any other mechanism. Because the Indictment fails to allege that the poker companies had any stake in the outcome of the poker matches played on their sites, it fails to allege that they were engaged in the "business of betting or wagering."

This construction of § 5363 is supported by clear case law construing the phrase "business of betting or wagering" in the Wire Act, another federal statute addressing gambling activity that predates UIGEA. 18 U.S.C. § 1084 (2010). The Wire Act, like section 5363 of UIGEA, is a criminal prohibition that only applies to parties "engaged in the business of betting or wagering." 18 U.S.C. § 1084(a) (2010). Construction of this phrase in the context of the Wire Act is highly relevant to its meaning in UIGEA; "where Congress uses the same language in two statutes having similar purpose . . . 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, 125 S. Ct. 1536, 1541 (2005).

Courts considering the phrase "business of betting or wagering" in the Wire Act have concluded that it means "a professional gambling or bookmaking business." *Pic-A-State PA., Inc v. Pennsylvania*, 1993 WL 325539, *3 (M.D. Pa. Jul. 23, 1993*), rev'd on other grounds*, 42 F.3d 175 (3d Cir. 1994). In *Pic-A-State*, the court held that retail outlets which sold out-of-state lottery tickets in exchange for a fee per ticket were not in the "business of betting or wagering" because they "set no odds, accept[ed] no wagers and distribut[ed] no risks." *Id*. As stated in *Pic-A-State,* "[c]ourts considering the phrase 'business of betting or wagering' appear to have universally concluded that it involves a professional gambling or bookmaking business." *Id. See also United States v. Alpirn*, 307 F. Supp. 452, 454-55 (S.D.N.Y. 1969) ("turf advisor" who

provided clients with predictions about horse races was not engaged in the business of betting or wagering because he was not himself making or accepting bets, did not share in losses, and thus his arrangement with his clients was not a betting or wagering contract as that term is normally understood).

Because the poker companies in this case neither staked nor risked anything of value on the outcome of the contests between players, but instead merely provided a hosting service for a fee, they were not "engaged in the business of betting or wagering." Accordingly, even assuming that the "financial transaction provider" exemption from UIGEA liability does not exempt Mr. Elie from prosecution, the UIGEA counts fail to satisfy a requisite element of Section 5363, and must be dismissed.

C. Due Process Principles Of Fair Notice And Lenity Preclude Application Of UIGEA To The Conduct At Issue.

In the event the Court does not dismiss the UIGEA charges against Mr. Elie on the ground that the conduct attributed to him is not proscribed by the statute, the Court should dismiss the charges on the ground that UIGEA is unconstitutionally vague as applied to online poker.

"A plaintiff making an as-applied challenge must show that the statute in question provided insufficient notice that his or her behavior at issue was prohibited." *Dickerson v. Napolitano*, 604 F.3d 732, 745 (2d Cir. 2010). Or, in the alternative, "[e]ven if a person of ordinary intelligence has notice of what a statute prohibits, the statute nonetheless may be unconstitutionally vague if it authorizes or even encourages arbitrary and discriminatory enforcement. To survive a vagueness challenge, a statute must provide [ ] explicit standards for those who apply it." *Id*. at 747 (internal citations and quotation marks omitted); *see also Hill v. Colorado*, 530 U.S. 703, 732, 129 S. Ct. 2480, 2498 (2000); *City of Chicago v. Morales*, 527

U.S. 41, 56, 119 S. Ct. 1849, 1859 (1999). UIGEA is impermissibly vague as applied to Internet poker both because it fails to provide adequate notice to the public and because it vests an unacceptable degree of discretion in law enforcement personnel.[6]

1. UIGEA Is Void for Vagueness As Applied to Online Poker.

UIGEA us impermissibly vague as applied to online poker. Not only does the statute never mention poker, but it also fails to provide any meaningful guidance that would permit a person of reasonable intelligence to determine whether poker falls within the statute's scope. This open-endedness invites arbitrary enforcement agents that threaten basic notions of fair play and justice.

UIGEA applies to online poker only if online poker is "a game subject to chance," so that bets and wagers upon the outcome of the game fall within the statutory definition of "bet or wager." § 5362(1)(A). But the phrase "game subject to chance" is vague in several important respects.

First and most importantly, it is not clear what quantum of chance is required for a game to qualify as a "game subject to chance" – *i.e.*, whether chance must solely determine the outcome of the game as it does in traditional gambling games, or instead predominate over skill, or perhaps be present to a material degree, or merely have the potential to alter the outcome of the game in some circumstances. Virtually *every* game – and for that matter virtually all human activity -- involves some element of chance. The UIGEA, however, fails to provide instruction of how to distinguish those activities that are "subject to chance" from those that are not. The

[6] Although the Third Circuit has upheld UIGEA against a *facial* vagueness challenge, the plaintiff in that case was required to "demonstrate that the law is impermissibly vague in *all* of its applications." *Interactive Media Ent. & Gaming Ass'n v. Att'y Gen.("iMEGA")*, 580 F.3d 113, 116 (3d Cir. 2009) (internal quotation marks omitted). That stringent standard was not met, but it does not apply to an as-applied challenge, which is governed by the standard set forth in the text of this memorandum.

statute includes no definition of the phrase "game subject to chance," and there is no body of precedent to which individuals and courts may look for guidance. Indeed, the phrase "subject to chance" has no settled meaning at all. No other statute – federal or state – uses the phrase "subject to chance," nor is the phrase discussed in any detail in case law: a search of all federal and state opinions for "subject to chance" yields only twenty-one results, none of which interprets the phrase. Thus, even if members of the public consult with attorneys, individuals are left to guess as the statute's meaning. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

Neither do the administrative regulations implementing UIGEA shed any light on the proper interpretation of the phrase "subject to chance." Instead, they add to the confusion. During the rulemaking process for UIGEA, many comments were received raising the question of the statute's application to games of skill, and particularly to poker. *See* Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382, 69,386 (Nov. 18, 2008) (to be codified at 12 C.F.R. Part 233, 31 C.F.R. Part 132). Specifically, the comments asked the agencies to clarify whether Congress intended the law to apply to games of skill, whether a game was subject to chance when skill predominated over chance, whether "game subject to chance" referred only to traditional house-banked gambling games, like roulette and slots, and whether poker was a "game subject to chance." *Id*. The Federal Reserve and the Department of the Treasury – the two agencies charged with implementing UIGEA – refused to answer any of these questions. Instead, the agencies stated:

> The Agencies believe that the characterization of each of the activities discussed above depends on the specific facts and circumstances. As noted above, the Agencies believe

> that questions regarding what constitutes unlawful Internet gambling should be resolved pursuant to the applicable Federal and State gambling laws. While there may be some games or contests conducted over the Internet that are not 'games subject to chance' and, thus, not subject to the Act and the final rule, the Agencies believe that such issues are more appropriately resolved pursuant to the various underlying gambling laws than with a single regulatory definition.

Id. (Footnotes omitted).

The agencies' interpretation, which suggests that the phrase "subject to chance" has no independent significance, but instead draws its meaning entirely from underlying state and federal law, cannot be correct. It would mean that a single phrase in a federal statute could mean something different in every prosecution. Instead, it is clear that the statute incorporates two independent and potentially conflicting formulations of games of chance. First, Section 5363(1), defines "bet or wager" in pertinent part, as the "staking or risking of something of value upon the outcome of…a game subject to chance." One must determine whether a game constitutes a "game subject to chance" as that term is used in UIGEA. Second, Section 5363 states that "no person engaged in the business of betting or wagering" can accept payments in connection with "unlawful Internet gambling." Section 5362(10) defines "unlawful Internet gambling" as placing or receiving a bet or wager using the Internet where "such bet or wager is unlawful under any Federal or State law." State gambling laws typically include some formulation defining prohibited gambling in terms of the role chance plays in the game. *See, e.g.*, N.Y. Penal Law §§ 225.00(1) and (2) (using the term "contest of chance" and defining it to mean one in which "the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein"). State law formulations may be more or less permissive than the "game subject to chance" formulation used in UIGEA. The individual trying to adhere to the law or the government agent trying to enforce the law must now consider whether the game in question passes muster under the state law formulation of game of chance in

addition to the federal formulation. With respect to poker, a game in which skill unquestionably plays some role, this two-level approach to the quantum of chance necessary to distinguish between lawful and unlawful conduct means that § 5363 "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited." *Hill*, 530 U.S. at 732, 129 S. Ct. at 2498.

Regardless of whether the agencies were correct in their reading of the statute, it is clear that the agencies failed to provide readers with any guidance as to the required degree of chance. Instead, their response highlights the fact that UIGEA is hopelessly vague on this point. The best the agencies could muster in response to legitimate comments and questions about what constitutes unlawful conduct prohibited by UIGEA was that it "depends on the specific facts and circumstances." 73 Fed. Reg. 69,382, 69,386. But which facts? And what circumstances? If the agencies themselves cannot say what Congress intended to include as a game of chance, then it simply is unfair to impose criminal liability on an individual for failing to divine the answer. *Cf. Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553, 1581 (M.D. Tenn. 1989) (holding that "[c]learly, if the regulating authority cannot determine the establishments which are subject to its authority, the establishments themselves cannot be expected to determine whether they need to be licensed or not."); *City of Knoxville v. Entertainment Resources*, LLC, 166 S.W.3d 650, 656 (Tenn. 2005) (holding that "the inability of the officers charged with enforcing the ordinance to define its key terms weighs heavily against the ordinance's constitutionality").

UIGEA and its regulations also are silent on whether games like poker should be evaluated by examining a single hypothetical hand (and if so, what kind of hand), or by considering results over the long run, or something else. Courts, law enforcement, and

individuals are left without any guidance as to how to evaluate whether poker is a "game subject to chance."

Significantly, since it was passed in 2006, UIGEA has been the subject of constant efforts, by lawmakers and advocates on both sides of the issue, to amend UIGEA to clarify the status of online poker under federal law. A number of legislators and current and former high-ranking law enforcement officials have spoken out on the ambiguity of UIGEA with respect to online poker and several bills intended to clarify UIGEA's scope are currently pending before Congress. *See, e.g.*, Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 1174, 112th Cong. (2011). For example, in May 2011, during testimony at a House Judiciary Committee Hearing, Attorney General Eric Holder said deciding whether poker was a game of skill or chance was "beyond my capabilities," but said that it was up to Congress to clarify the laws with regard to online poker.[7] Former FBI Director Louis Freeh, speaking at a news conference in the U.S. House of Representatives, recently noted that UIGEA has "great ambiguity" which "puts a burden on the banks and the financial institutions to police the Internet, which is a ridiculous proposition." *See* Tony Batt, *Former FBI Director Calls For Federal Internet Poker Regulation*, Gambling Compliance, Sept. 16, 2011, http://www.gamblingcompliance.com/node.47530. Because the term "bet or wager," which depends upon whether a game is "subject to chance," is integral to the application of the statute, its vagueness renders 31 U.S.C. § 5363 unconstitutionally vague as applied to online poker.

The notice problem to the public and to individuals like Mr. Elie is obvious. Because any game could conceivably be regarded as "subject to chance" under the vague terms of the statute,

[7] *See* Forbes, "U.S. Attorney General Calls On-line Poker Crackdown Appropriate But Doesn't Know if Poker is a Game of Chance or Skill," (Nathan Vardi 5/3/2011), at <http://tinyurl.com/holderpoker>.

and because that would be an absurd result, individuals like Mr. Elie are in no position to determine whether peer-to-peer poker activity, which is materially different from house-banked games, will be deemed lawful or not. This is precisely the sort of unbridled prosecutorial discretion that the void-for-vagueness doctrine seeks to curb. *See Chatin v. Coombe*, 186 F.3d 82, 89 (2d Cir. 1999) ("An enactment fails to provide sufficiently explicit standards for those who apply it when it 'impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis.'") (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09, 92 S. Ct. 2294, 2298-99 (1972)).

Because the term "game subject to chance," is integral to UIGEA's application in this case, its vagueness renders 31 U.S.C. § 5363 unconstitutionally vague as applied to online poker.[8] Therefore, the first four counts of the Indictment should be dismissed against Mr. Elie.

2. Under the Rule of Lenity, any Uncertainty Regarding the Scope of UIGEA Must be Resolved in Mr. Elie's Favor.

Under the rule of lenity, unless online poker is unambiguously covered by the terms of UIGEA, Mr. Elie's conduct should not be deemed unlawful. The Supreme Court has directed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct. 515, 522 (1971). "This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* at 348 (internal quotation marks omitted); *see also United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 1225 (1997) ("[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by resolving ambiguity in a criminal statute as to apply it

[8] The underlying New York Penal Law, which each of the "Illegal Gambling Business" counts appears to incorporate, is ambiguous as well, when applied to Internet Poker. The ambiguities are discussed in Mr. Elie's motion to dismiss Counts Five, Six and Seven.

only to conduct clearly covered."); *Bell v. United States*, 349 U.S. 81, 84, 75 S. Ct. 620, 622 (1955) ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.").

Applying the basic principle of lenity to this case, the prosecution of Mr. Elie for violation of UIGEA must fail. UIGEA contains no requisite clear statement that online poker is covered by its terms. Not only does UIGEA never mention the game of poker, but, as discussed, it does not define "game subject to chance" and thus it leaves the scope of the statutory prohibition open-ended. The rule of lenity requires this Court to adopt the most defendant-friendly interpretation of the ambiguous term "subject to chance." Such a reading would hold that the phrase "subject to chance" refers only to traditional house-banked gambling games like roulette and slot machines or, in the alternative, games in which the outcome is "conditional upon" chance, Collins English Dictionary – Complete & Unabridged (10th ed. 2009), *i.e.*, determined entirely or overwhelmingly by chance.

The defendant-friendly interpretation is faithful to the text and the purpose of the statute. It employs one of the plain meanings of the phrase "subject to," and it encompasses the core gambling games such as roulette, craps, slot machines, lotteries, and sports betting, all of which are games in which the player has no influence over the outcome of the event that determines the outcome of the game: the spin of the wheel, the roll of the dice, etc. *Cf. United States v. Santos*, 553 U.S. 507, 515, 128 S. Ct. 2020, 2026 (2008) (Scalia, J., plurality opinion) (applying the rule of lenity to adopt a defendant-friendly interpretation of the word "proceeds" in the money laundering statute when "[u]nder either of the word's ordinary definitions, all provisions of the federal money-laundering statute are coherent; no provisions are redundant; and the statute is not rendered utterly absurd."). Under this interpretation, poker does not fall within the scope of the

statute, as it is beyond dispute that poker is not a house-banked game, and it is similarly beyond dispute that poker involves a high degree of skill, and that the players have a high degree of control over the outcome of the game because they can induce their opponents to fold their hands by bluffing. Accordingly, Counts One through Four must be dismissed.

III. CONCLUSION

For the foregoing reasons, defendant Chad Elie respectfully requests that the Court dismiss the UIGEA charges against him.

Respectfully submitted,

_____/s/_____
William R. Cowden
Steven J. McCool
MALLON & MCCOOL, LLC
1776 K Street, N.W., Ste 200
Washington, DC 20006
(202) 393-2088 (phone)
(202) 293-3499 (fax)
wcowden@mallonandmccool.com

Attorneys for Chad Elie

CERTIFICATE OF SERVICE

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

_____/s/_____
William R. Cowden