

The Legality Under US Federal Law
of Peer to Peer Virtual Online Poker Cardrooms
as Conducted on the Worldwide Internet

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I. Introduction

This is a well-reasoned legal opinion under the final regulations for the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. 5361-5367, 12 C.F.R. §233.1 et seq. and 31 C.F.R. §132.1 et seq. The regulations provide that a state-licensed attorney may issue a "reasoned legal opinion" consisting of "a written expression of professional judgment . . . that addresses the facts of a particular client's business and the legality of the client's provision of its services to relevant customers in the relevant jurisdictions under applicable federal and state law." 12 C.F.R. §233.2(x), duplicated at 31 C.F.R. §132.2(x).

The Unlawful Internet Gambling Enforcement Act, codified at 31 U.S.C. §§ 5361-5367, ("UIGEA")—directly addresses payment methods for certain internet gaming. UIGEA, however, does not define what constitutes "unlawful internet gaming and does not prohibit online peer-to-peer poker. Other federal statutes, such as the Wire Act of 1961, § 1084 ("Wire Act"), Illegal Gambling Business Act of 1970, 18 U.S.C. 1955 ("the IGBA"), or the Travel Act, 18 U.S.C. § 1952, also do not apply to games like poker, which are not casino games or lotteries but rather are games that are not house-bank and which predominately consists of skill ,not chance.

II. Summary of Argument

In order to violate UIGEA, an online game must meet three criteria: (1) it must be "betting or wagering," 31 U.S.C. § 5363, as that term is defined under UIGEA -- i.e. chance must be a dominant element in the outcome of the game, *id.* § 5362(1)(A); (2) it must be illegal "under any applicable Federal or State law in the State or Tribal lands [where] the bet or wager is initiated, received, or otherwise made[.]" *id.* § 5362(1)(A); and (3) the recipient of funds related to online poker must be "engaged in the business of betting or wagering." *Id.* § 5363. The failure of any one of these criteria, standing alone, is sufficient to defeat application of UIGEA. All three fail with regard to online peer-to-peer poker: it is not "betting or wagering" because it is a game of skill, not chance; it is not "unlawful" under most state laws, which prohibit only games of chance; and processors of online poker proceeds are not "engaged in the business of betting or wagering," because they have no stake in the game. Proceeds of online peer-to-peer poker thus are not "unlawful proceeds" based on UIGEA.

Likewise, as discussed in more detail below, online poker does not fall within the definition of gambling in § 1955. The IGBA, which was enacted as part of Title VIII of the Organized Crime Control Act of 1970, makes it a federal offense to "conduct[], finance[], manage[], supervise[], direct[], or own[] all or part of an illegal gambling business." 18 U.S.C. § 1955(a). "[I]llegal gambling business," is defined, in relevant part, as "a gambling business which . . . is a violation of the law of a State or political subdivision in which it is conducted, and "involves five or more persons." 18 U.S.C. § 1955(b)(1)(i)-(ii).² In other words, to be an "illegal gambling business" under the IGBA, the business must first be engaged in the business of gambling, and it must also be operated in violation of the law of the state in which it is

² To be classified as a business, an operation must operate for at least 30 days or earn at least \$2,000 in any one day. 18 U.S.C. § 1955(b)(1)(iii).

operating.³ *Sanabria v. United States*, 437 U.S. 54, 70 (1978) (“Congress did not assimilate state gambling laws *per se* into the federal penal code, nor did it define discrete acts of gambling as independent federal offenses.”); *cf. Johnson v. Collins Entm’t Co.*, 564 S.E.2d 653, 664 (2002) (explaining that the IGBA is violated only if a gambling business is carried on outside the limits of the state law). But online poker sites are not in the business of gambling as gambling is used in 18 U.S.C. § 1955, and online peer-to-peer poker is not illegal pursuant to most state anti-gambling statutes because it is a game in which skill overwhelmingly predominates over chance. Therefore, it does not violate the IGBA.

The Wire Act, 18 U.S.C. § 1084, has no application to online poker. That statute is limited to prohibiting gambling on sporting events. *See Thompson v. MasterCard Int’l Inc.*, 313 F.3d 257, 263 (5th Cir. 2002) (“[T]he Wire Act does not prohibit non-sports internet gambling.”) Any argument that § 1084 applies to non-sports betting is against the weight of authority and directly contrary to the plain text and legislative history of the statute. Moreover, the Wire Act applies only to actors “engaged in the business of betting or wagering.” Online poker is not “betting or wagering,” but rather a game dominated by skill. And site operators and payment processors—which have no stake in any wager—are not “engaged in the business of betting or wagering.”

III. UIGEA Does Not Prohibit Online Poker.

The UIGEA is the most recent, specific, and comprehensive statute to address gambling, and it is the only statute that directly addresses online gambling. It was passed as Title VIII of the Security and Accountability For Every Port Act, Pub. L. 109-347, 120 Stat. 1952 (Oct. 13, 2006), with the “primary purpose” of giving authorities “tools for combating offshore Internet gambling sites that illegally extend their services to U.S. residents via the Internet.” HR. Rep. No. 109-412(I), at 8 (2006). As principally relevant here, the UIGEA declares that “[n]o person engaged in the business of betting or wagering may knowingly accept[funds] in connection with the participation of another person in unlawful Internet gambling” 31 U.S.C. § 5363.⁴

UIGEA thus does not prohibit the processing of funds related to online peer-to-peer poker for at least three independent reasons: (1) online peer-to-peer poker is not “betting or wagering” as that term is defined by UIGEA; (2) it is not illegal under relevant state law; and (3) online poker hosts and processors are not “engaged in the business of betting or wagering.” Accordingly, UIGEA cannot serve as the basis for an enforcement action related to Internet poker.

³ Violating state law alone would not be sufficient if the activity was not gambling. For example, if a state gambling law outlawed providing prizes for spelling bees, a bee organizer who invited residents of that state to compete in a spelling bee might be violating state law but would not be violating 18 U.S.C. § 1955 because under § 1955, spelling bees cannot be gambling no matter what a state calls them under its own law.

⁴ Specifically, UIGEA applies to “credit, or the proceeds of credit,” “an electronic fund transfer, or funds transmitted by or through a money transmitting business,” “any check, draft, or similar instrument,” and “the proceeds of any other form of financial transaction.” 31 U.S.C. § 5363(1), (2), (3), (4).

A. **Poker Is A Game Of Skill, Not “Betting or Wagering.”**

The word “poker” is nowhere to be found in the text of UIGEA. Rather, a particular online game falls within UIGEA’s ambit if and only if the players “place, receive, or otherwise knowingly transmit *a bet or wager* by any means which involves the use, at least in part, of the Internet *where such bet or wager* is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.” 31 U.S.C. § 5362(10) (emphasis added). “Bet or wager,” in turn, is specifically defined by the statute 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,” 31 U.S.C. § 5362(1)(A).⁵ Online peer-to-peer poker is plainly not “a contest of others” or a “sporting event.” Thus, online poker is within UIGEA’s reach if and only if (i) it is a “game subject to chance,” and (ii) the bet or wager is illegal under the relevant State or federal law. *See MMJK, Inc. v. Ultimate Blackjack Tour LLC*, 513 F. Supp. 2d 1150, 1152 (N.D. Cal. 2007) (noting in the course of a patent dispute that “online card game tournaments [] are operated legally if they conform with the Unlawful Internet Gambling Enforcement Act of 2006.”). Neither is the case. UIGEA does not define “game subject to chance.” The Federal Reserve and the Secretary of the Treasury (jointly referred to as the “Agencies”) declined to further define the term when issuing UIGEA’s implementing regulations, noting that “questions regarding what constitutes unlawful Internet gambling should be resolved pursuant to the applicable Federal and State gambling laws.” 73 Fed. Reg. 69382, 69386 (col. b) (Nov. 18, 2008). The Agencies, however, did note that in their view, chance did not have to be a predominant feature of the game to qualify as a “game subject to chance.” *Id.* at (col. c). The Agencies reasoned that section 5362(1)(B) describes “other prize” as one where the “opportunity to win is predominately subject to chance.” They claim that because Congress used the adverb “predominantly” in paragraph (B) to describe the phrase “subject to chance,” but did not do so in paragraph (A), then chance does not have to be a predominant feature of those games falling within paragraph (A). *Id.* at 69386 (col. c) (“even if chance is not the predominant factor in the outcome of a game, but was still a significant factor, the game could still be deemed to be a ‘game subject to chance’ under a plain reading of the Act.”).

The Agencies’ views, even though expressed only in the preamble, are entitled to some deference unless those statements are inconsistent with the regulations themselves. *Compare United States v. Mead Corp.*, 533 U.S. 201, 234–235 (2001), with *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009), (declining to accord deference to statement in the preamble to an FDA rule because it lacked “thoroughness, consistency, and persuasiveness.”). But the Agencies’ statements in the preamble on this issue are not necessarily consistent with either the regulations

⁵ The definition of “bet or wager” also includes “the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance),” and unlawful sports gambling as defined in 28 U.S.C. § 3702. §§ 5362(1)(B)–(C). Poker plainly falls outside the reach of these categories. Section 5362(1)(D) includes within the definition of bet or wager “instructions or information pertaining to the establishment or movements of funds by the bettor or customer in, to, or from an account with the business of betting or wagering.” But because, as demonstrated *infra*, online peer-to-peer poker is not “betting or wagering,” online peer-to-peer poker accounts cannot be considered accounts “with the business of betting or wagering” pursuant to § 5362(1)(D).

or the statute. If the intent of the statute is to defer entirely to state law on the question of what constitutes gambling, many states do use the predominant factor test to determine whether a game is a game of chance or skill. So the Agencies' analysis cannot be correct. Alternatively, the Agencies could be suggesting that there are two distinct tests in UIGEA, both involving an analysis of the level of chance involved in poker. The threshold test under federal law under this view would be to determine whether the game falls under UIGEA and for that question, the analysis would be whether chance is a significant factor⁶ in the game's outcome. If a game is a "game of chance" under UIGEA, the test then turns to whether state law prohibits the game, as states can still allow playing games of chance if they so choose. Under either analysis, poker is not a game of chance, either because, as a matter of federal law, chance does not predominate, or because chance is not a material factor, or because it is not a game of chance under the majority of state laws.

B. Skill Is The Predominant Factor In Determining The Result Of A Poker Game.

As is true for similar games like golf, billiards, and bridge, when good poker players play against bad players, the good players consistently and routinely prevail. Players who enter golf and bridge tournaments pay a fee to enter, and earn a cash reward if they win, but these games are contests of skill because their outcome is determined principally by skill. See *Commonwealth of Pa. v. Two Elec. Poker Game Machs.*, 465 A.2d 973, 977 (Pa. 1983) ("It cannot be disputed that football, baseball and golf require substantial skill, training and finesse[even though] the result of each game turns in part upon luck or chance."); *In re Allen*, 377 P.2d 280, 281 (Cal. 1962) (bridge requires skill and is not a "game of chance"). So too with poker. To be sure, there is some accumulation of luck over the course of a poker match that will affect how individual players perform. That is also true, for example, of golf, where "changes in the weather may produce harder greens and more head winds for the tournament leader than for his closest pursuers. A lucky bounce may save a shot or two." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 687 (2001). But, as in golf and bridge, skill is nonetheless predominant in poker play.⁷ The

⁶ The Agencies' regulations do not define what is meant by "significant factor," other than recognizing that it is something less than a "predominant factor." See *United States v. Genes*, 405 U.S. 93 (1972) (discussing the difference between predominant and significant for federal income purposes). The word "significant" is defined to mean "[h]aving or likely to have a major effect; . . . [f]airly large in amount or quantity." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1619 (4th ed. 2006). While a "significant factor" may be smaller than one that is a predominant factor, it is greater than a "contributing factor." See *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). Courts often treat the term "significant factor" as synonymous with "substantial factor." See *id.*; *Ostad v. Oregon Health Sciences Univ.*, 327 F.3d 876, 884 (9th Cir. 2003); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875 n. 9 (11th Cir. 1985) (plaintiff must show discriminatory motive was "significant or substantial factor" in employment decision).

⁷ To appreciate the role that chance plays in almost every game, it is important to keep in mind just how few games exist in which luck plays no role whatsoever. Chess is the prototypical example of a game of pure skill, because both players have perfect information regarding the other's pieces and all that matters is how skillfully a player deploys them. But games of pure skill are exceedingly rare; at least some degree of luck plays a substantial role in almost every game we play. In fact, between two equally

fact that every hand of poker involves multiple decision points (at each of the multiple rounds of betting), multiple decisions at each decision point (bet, call, raise, or fold), and innumerable factors that call for skill to evaluate each of those decisions (for example, the player's own cards, the odds of his hand improving, his sense of the strength of the other player's hand, his sense of the other players' perception of him), establishes that poker is a contest of skill. Indeed, as recently as 2006, the Chief of the Organized Crime and Racketeering Section testified that poker might not be a game predominately subject to chance. *Statement of Bruce G. Ohr, Chief of Organized Crime and Racketeering Section, Concerning H.R. 4777, The "Internet Gambling Prohibition Act," Before the H. Comm. on the Judiciary, Subcomm. on Crime, Terrorism, and Homeland Security* (Apr. 5, 2006), available at http://www.traditionalvalues.org/pdf_files/04.05.06.ohr_testimony.pdf.

Two general methods of determining the role of chance in an activity have been developed to analyze the issue of whether a game is one of skill or chance. The first method is to evaluate the game's structure and rules. If the structure and rules allow sufficient room for a player's exercise of skill to overcome the chance element in the game, the game is one of skill and the gambling laws do not apply. This is commonly referred to as the predominance factor test. *See, e.g., In re Allen*, 377 P.2d at 281-82 (holding the card game of bridge to be one predominantly of skill). A second approach, which the scientific community favors, is an empirical approach that examines the actual play of the game. Using the well-accepted premise that in a game predominated by skill the more skillful players will consistently perform better (*see, e.g., Patrick Larkey et al., Skill in Games*, 43 *Management Science* 596 (1997)(attached as App. B)), this approach looks for specific instances over repeated trials to see if in fact the "[m]ore skillful players tend to score better than less skillful players." *Id.* at 596. Under either method, poker is a game of skill.

1. Making Correct Decisions In Poker Requires A Diverse Array Of Sophisticated Skills That Games Of Chance Do Not.

The essence of poker is correct decision-making. Each time it is a player's turn to act, the player must choose among several decisions, typically whether to bet, raise, or fold. During the course of a single session, a player will have to make hundreds of those decisions. In order to make the optimal decision, the player must take into account a variety of factors. The importance of correct decision-making in poker cannot be understated: in a recent statistical analysis of millions of actual poker hands, the study concluded that the players' decisions alone rather than the cards dealt accounted for the result in 76% of all the hands played. *See Paco Hope & Sean McCulloch, Statistical Analysis of Texas Hold 'Em 5* (Mar. 4, 2009).⁸ In other words, in those 76% of hands, all but one player folded, making the remaining player the hand's winner, and the actual cards were never revealed. Moreover, according to this report, in roughly

matched chess players, the coin flip to determine who plays black or white may have an effect on the outcome. *See e.g. Jonathan Rowson, Chess For Zebras: Thinking Differently About Black and White* 193 (Gambit Publications 2005) ("[T]he conventional wisdom is that White begins the game with a small advantage and, holding all other factors constant, scores approximately 56% to Black's 44%").

⁸ <http://www.cigital.com/resources/gaming/poker/100M-Hand-AnalysisReport.pdf> (attached as App. C).

50% of hands that do play to a showdown,⁹ a player who would have won had he stayed in will have folded, meaning that in only 12% of hands -- that is, half of the 24% that play to showdown -- does the player who was dealt the “luckiest” hand win.¹⁰ *Id.* With player decisions deciding close to 90% of all poker hands, the players who consistently make good decisions will win. Those who do not will generally lose.

To make the right decisions consistently, poker players must employ a range of skills. Skill does not mean simply a sophisticated knowledge of odds, which is merely a prerequisite to competent poker play. To be skilled at poker, players must develop an ability to directly influence the way an individual hand turns out -- who collects the pot at the end, and how much is in the pot. As one court recently held, “[s]uccessful players must possess intellectual and psychological skills. They must know the rules and the mathematical odds. They must know how to read their opponents’ ‘tells’ and styles. They must know when to hold and fold and raise. They must know how to manage their money.” *Pennsylvania v. Dent*, No. 2008-733, slip op. at 13-14 (Pa. Ct. Com. Pl. Jan. 14, 2009).¹¹

Of course, it is true that individual moves in poker are called “bets.” But that vocabulary is misleading. The “bet” is not a wager on a chance event nor is it a “bet” as defined in UIGEA. Unlike poker “bets,” true wagers do not alter the outcome of the event. A bet on the Super Bowl does not change the score; bets at a blackjack table are generally made before the cards are dealt and have no impact on the play of the game; bets on roulette wheels are placed before the ball is dropped. Bets at a poker table are different. What is called a “bet” in poker is really like a “bid” in Bridge or a “move” in any other game: it is a gambit designed to provoke a desired reaction from an opponent.¹²

The importance of these moves is heightened because, in typical complex poker games, a player must contend with a large number of decision-making points and a variety of possible courses of action at each stage. In each hand of Texas Hold ‘Em and of Omaha games, for example, a player has four principal decision-making opportunities: the first after he receives his down cards, and the next three as the common cards are turned over in three stages.¹³ Draw

⁹ A “showdown” is when all of the cards have been dealt and the players still in the hand expose their hold cards and the best hand wins the pot. It is only at the showdown where the winner is determined by the fall of the cards rather than by which players have folded in response to the moves of other players.

¹⁰ Twelve percent is also the gap between white and black winning percentages in a study of chess matches. *See* fn. 7, *supra*.

¹¹ Styles and tells are not unique to the physical world, but are also involved in online poker. The tells and styles in online poker include betting amounts, betting habits, speed and timing of bets and raises.

¹² Indeed, evidence compiled by such organizations as the Poker Player’s Alliance dramatically illustrate the way in which “bets” affect gameplay, many of which are drawn from televised footage of actual tournaments.

¹³ Statistics available from at least one online virtual poker cardroom operator show that 93% of online poker players play Texas Hold ‘Em or Omaha.

games require three decisions -- a “bet” after the initial draw, a decision about which and how many cards to exchange for new cards, and another “bet” after the exchange. Stud games, played with an initial deal of two cards and then additional cards dealt one at a time until each player has a total of either five (five-card stud) or seven (seven-card stud) cards, require either four or six moves, the first after the initial deal and the rest after each additional card. At each stage the player has available to him many courses of action. The focus of each decision is how worthwhile it is to risk additional chips relative to the chance of winning all the chips in the pot in that hand. These decision-making stages reduce the element of chance in the game, since logical decision-making at each of these stages allows the player to control whether, and how much, he wins or loses.

To make optimal moves at each of these stages, players must be mathematicians, observers of human nature, and capable deceivers. Poker players use their “bets” principally to communicate with, manipulate, and intimidate their opponents. Skeptics sometimes say that no amount of skill can turn a deuce into an ace. It is true that skill cannot change the cards, as a great golfer cannot change the wind. But skill allows a poker player with the deuce to make his opponent believe he has an ace, causing his opponent to fold a hand that would have won the pot. Skill also means that a good player will lose less with a deuce and win more with an ace than a bad one. Indeed, as noted, more than 75% of all hands are won when one player bets and all remaining players fold in response. *See Hope & McCulloch, supra*, at 5.

Even in that subset of hands that do go to a showdown, the players typically are not betting on the outcome of a chance event. For example, when a poker player bets as a bluff, he is not hoping that his cards will prove to be better than his opponents’ cards. Instead, the player hopes to win the pot by convincing his opponent to fold the best hand. As it turns out, in roughly 50% of hands that do play to a showdown, a player who would have won had he stayed in will have folded earlier, meaning that in only 12% of hands -- that is, half of the 24% that play to a showdown -- does the player who was dealt the best hand win. *See Hope & McCulloch, supra*, at 5. That fact attests to the skill required of the winning player in bluffing his competitor into folding. Of course, a player trying to chase another player out may get called and lose. But what he was betting on was not what cards his opponents held -- the essence of gambling. He was betting to influence what his opponents would do -- the essence of strategy.

Furthermore, the outcome of a hand of poker is not only who wins and who loses, but how much each player wins or loses. A player’s assessment of his own cards and what cards the other players are holding will affect whether and how much the player bets. So even in the 12% of hands that reach a showdown and in which the best hand dealt wins the pot, the players’ skill will determine how much is won. Thus, in every single hand played, the skill of the players determines the outcome of the game.

The dominance of skill in poker is further demonstrated by the fact that a novice poker player can improve his talents and raise the level of his game through study and accumulating game experience. After only a short time, a player can acquire basic game skills, such as learning when to fold and how to make the basic calculations. The more a person continues to practice and learn, the more his skills will improve, something that is also true for chess, golf,

and bridge players.¹⁴

2. Online Poker Requires The Same Skills As Offline Poker

All of the strategic decision making skills required are the same for online poker and for live poker. A player will make the strategic decisions discussed above based on deductions about an opponent that are derived from the opponent's moves themselves and from remembered (or recorded) prior game play. In fact, applying the lessons of prior game play to the current situation -- much like a caddy's notes on previously played holes in a golf tournament -- is the skill that may be most essential to poker success. Analyzing that prior history and predicting opponents' behavior is the same whether the play is online or live. And while a player may learn something from looking at another live player -- watching facial expressions and the like for tells -- online poker requires different but equivalent sensitivity to an opponent's play. For example, players often send messages to one another during online poker play, and learning to make deductions about a player's style and hand from those messages is a skill. Similarly, being able to learn from the timing of opponents' moves is a skill.

Indeed, online poker involves special skills not required in live play, and has characteristics that reduce the role of chance in determining outcomes. First, online play typically involves many more hands than an ordinary live poker match, because hands are dealt much faster and many players play multiple tables simultaneously. Whatever element of chance is involved in individual hands thus evens out as a statistical matter more quickly than in live play. Statistics from one online poker operator show that approximately 95% of players played eleven or more hands during a day of play. Second, players have access to tools that help heighten their play. For example, popular programs that players can run alongside their games can help them to track large quantities of data about other players' betting patterns in great detail. Such a program helps smart players make even smarter moves, based to a larger degree on logic and strategy than on intuition. And of course being able to process and apply a large amount of detailed data about a number of opponents' betting histories is a skill in itself. For all these reasons, online poker requires specialized skills that live play does not.

Together, the specific skills required to play poker in general and online poker in particular, combined with the fact that poker hands are won by maneuvering rather than in a showdown the vast majority of the time, and the fact that in every hand the players' skill determines the amounts won and lost by each player, show that skill is required to be a winning poker player.

¹⁴ A significant body of literature is available to help the novice player develop. See, e.g., Gus Hansen, *Every Hand Revealed* (2008); Daniel Negreanu, *Power Hold'em Strategy* (2008); David Apostolico, *Machiavellian Poker Strategy: How to Play Like a Prince and Rule the Poker Table* (2005); Dan Harrington, *Harrington on Hold 'Em: Expert Strategy for No Limit Tournaments* (2005); Eric Lindgren, *World Poker Tour: Making the Final Table* (2005); Blair Rodman & Lee Nelson, *Kill Phil: The Fast Track to Success in No-Limit Hold 'Em Poker Tournaments* (2005); Doyle Brunson, *Doyle Brunson's Super System: A Course in Power Poker* (2002); David Sklansky, *Tournament Poker for Advanced Players* (2002); David Sklansky, *The Theory of Poker* (1994).

3. **Skilled Players Beat Simple Players In Simulated And Real Poker Play.**

Several recent studies have definitively demonstrated that a player must be skilled in order to win at poker. Indeed, every single study to examine this issue has reached the very same conclusion: poker turns on skill. Until quite recently, any rigorous analysis of whether skill or chance predominated in poker involved only an assessment of the rules of play themselves, because no research had assembled a statistical assessment of the role of skill in poker. The subject has now received academic attention, and the studies uniformly confirm that skill determines the outcome in poker games. This reflects an evolving understanding, and popularization, of the sophistication of the game of poker.

In one recent game-theoretical study, for example, the author used a computer simulation to prove that a combination of the skills discussed above is required in order to win consistently at poker. See Larkey, *supra*, at 596. For his 2001 paper *Skill in Games*, Professor Larkey built a computer model of a “simplified version of . . . poker.” See *id.* “The general behaviors mandated for player success” at this simplified game were: “observation, memory, computation, knowledge of the random device, misleading opponents about the actual strength of your position, and correct interpretation and forecasts of opponents’ behaviors. *Id.* at 597. To evaluate the relative importance of these areas of skill, singly and in combination, the authors programmed twelve different robot players who would compete against one another. Each was programmed to use a different combination of strategies. *Id.* at 599-605.

The simplest robot only knew the rules of the game -- when to bet and how much it was allowed to bet -- but aside from that essentially played randomly and without regard to its hand. A second robot understood the relative values of the hands. It would bet aggressively when it was dealt a good hand, and hold back when it got a bad hand. It ignored its opponents, while three other similar robots made conservative or aggressive assumptions about what the other player’s hands contained. Another robot bluffed aggressively. The more sophisticated robots watched their opponent’s betting patterns and made deductions about what those opponents were likely to be holding. Some of these robots would bluff by playing randomly a small percentage of the time in order to confuse other opponents capable of watching and learning.

The authors ran a tournament that pitted each robot player against each other player in 100 one-on-one games. Over the course of the tournament, the random-play robot won only 0.4% of its games. It lost \$546,000. The four robots that dominated the contest were the ones capable of sophisticated calculations about their odds of winning. The robot that could only calculate odds came in fourth. The robot that could calculate odds and that also bluffed occasionally came in third. But the two most successful robots of all were the robots that most closely emulated real poker players. A robot that not only calculated odds but also observed fellow players and adjusted its style of play came in second at \$400,000. The best robot of all calculated odds, learned about its opponents, and bluffed occasionally in order to throw its competitors off track.

Even in the simplified game of poker designed for the study, with simple hands and only two rounds of betting, the best robot was the robot with the essential skills that every poker

player learns, practices, and tries to master. It calculated the odds it was playing against, which was essential to its success. But it outperformed the others by deceiving its competitors with strategic bluffs while learning about and adjusting to its competitors' style of play. It won 89% of the hands it played, and earned \$432,000. See Larkey, *supra*, at 601 tbl. 2.

A substantial number of other studies -- including every study ever to have addressed the issue -- reach the same conclusion as Professor Larkey.

- Noga Alon, *Poker, Chance and Skill* (attached as App. D.1). Professor Alon provides a detailed analysis of several simplified models of poker in order to allow a precise mathematical analysis. Though simplified, these models capture many of the main properties of sophisticated poker play. The article concludes that skill is the major component in deciding the results of a long sequence of hands because knowledge of hand probabilities is a learned skill fundamental to determining and implementing an advanced strategy; and an advanced strategy will earn more than a strategy of an unskilled player in the long run. As the common practice is to play many hands, the conclusion is that poker is predominantly a game of skill.
- Laure Elie & Romauld Elie, *Chance and Strategy in Poker* (Sept. 2007) (unpublished manuscript) (attached as App. D.2). The Elie study expands on Professor Alon's work by testing its hypothesis not on a simplified version of poker, but on games with 2 or 4 players (up from Alon's two-player model), with or without blind betting, and with constant or variable stakes. Using computer simulation, Elie & Elie confirmed that the quality of a player's strategy -- the skill with which the player plays the game -- has an overriding influence over the game's outcome.
- Abraham J. Wyner, *Chance and Skill in Poker* (Apr. 2008) (unpublished manuscript) (attached as App. D.3). Reviewing the Alon and Elie & Elie studies, Professor Wyner concludes that both studies accurately described a salient fact about the game of poker: a skilled player who can calculate the odds and bet and bluff on that basis has a substantial advantage over players who lack these skills.
- Peter Borm & Ben van der Genugten, *On a Measure of Skill for Games with Chance Elements* (1996) (attached as App. D.4). In order for laws restricting games of chance to be sensibly applied, Borm and van der Genugten argue that some threshold level of skill must be established beyond which games cease to be games of chance and become games of skill. They developed a scale by which a game of pure chance ranks "0" and one of pure skill ranks "1," and then sought to rank a series of games on that scale. For a "0" game, the odds of a beginner winning are the same as those of the most advanced player winning; in a "1" game, the most optimal player can always win. Blackjack, considered a game of chance, is ranked 0.16. Based on their mathematical model, the authors conclude that an extremely simplified "poker" game, with three players playing with only four cards, valued at 10, 20, 30, and 40, has a skill level more than *double* that of blackjack.
- Rachael Croson, Peter Fishman & Devin G. Pope, *Poker Superstars: Skills or Luck?* 21,

No. 4 Chance, (2008) (attached as App. D.5). The authors compared data from 81 poker tournaments and 48 Professional Golfers' Association Tournaments in an effort to determine whether the success achieved by the elite poker players -- individuals who have finished in the top 18 of at least one high-stakes Texas Hold'em tournament -- is due to skill or luck. Analysis of the data led the authors to conclude that poker seems to involve a significant amount of skill because success in a given tournament can be predicted based on past success in tournament play. The authors also found that there are quantifiable skill differentials between elite poker players which are similar to skill differentials between comparably elite golfers.

- Zvi Gilula, Expert Opinion (attached as App. D.6). Professor Gilula concludes that winning a poker tournament depends significantly more on the participants' strategic capabilities and understanding than on luck. He notes that players must learn to: evaluate, within a predetermined interval of time, the strength of the hand that he holds in each stage of the game; mask his own strategy; evaluate his opponents' strategies; and translate the insights which arise from using these other abilities into a rational decision making policy. The effect of these abilities is that the probability for an insightful player with strategic skills to win a poker tournament, when playing against a player who does not have these skills, is much higher than 50%.
- Paco Hope (Cigital Inc.) & Sean McCulloch, *Statistical Analysis of Texas Hold'Em* (Mar. 4, 2009) (attached as App. C). Hope and McCulloch examine 103 million hands of a particular poker variant -- Texas Hold' Em -- played on PokerStars. For each hand analyzed, they ask whether the hand ended in a showdown, and if so, whether the player with the best two cards won the hand. They conclude that in the majority of cases -- 75.7% of the time -- the game's outcome is determined with no player seeing more than his or her own cards and some or all of the community cards. In those hands, all players folded to a single remaining player, who took the pot. In the remaining 24.3% of hands that go to a showdown, where cards are revealed to determine a winner, only 50% are won by the player who, had everyone stayed in the game, would have held the winning hand. The remaining hands are won by a player with an inferior hand, because the player with the best hand folded. From this, the authors determine that the winner in a majority of games is determined by something other than randomly drawn cards.

The number of identifiable skills required to excel at poker and the simulations and studies just discussed all predict that, in real life, the more skilled players will win. In fact, that is what actual poker play makes clear. The best poker players beat other poker players as often as the best golfers beat other golfers, if not more often. It is true that poker has a "random device" (*see Larkey, supra*, at 597) that introduces short term uncertainty into each hand, but over time the randomness of the cards evens out and all players eventually get the same share of good and bad hands. Their results differ based on how skillfully they play those hands.

A striking example of the limited role that the cards play in determining the outcome of poker matches may be found in the recent story of Annette Obrestad, a 19-year-old poker prodigy who beat 179 other players -- without looking at her own cards (except one peek on one hand). *See* Shawn Patrick Green, *Online Poker: Interview With Annette 'Annette_15' Obrestad*,

CardPlayer.com (Aug. 12, 2007).¹⁵ Obrestad's feat shows it is the player's skill rather than the deal of the cards that determines the outcome of poker play.¹⁶

The same result is demonstrated by comparing the results of recent golf and poker tournaments. In the 25-year period beginning with 1976 and ending in 2000, 21 different players won the World Series of Poker.¹⁷ One player won three times in that span (Stu Ungar), and three more players won twice (Johnny Moss, Doyle Brunson and Johnny Chan). Three of these repeat winners won back-to-back wins in consecutive years (Brunson, Ungar and Chan). Fourteen of the twenty-one were "repeat finalists" who finished among the top ten in one or more of the other tournaments.

In the same period, there were twenty-two different winners of the PGA Championship, and three multiple winners. Only Tiger Woods won back-to-back titles. Fifteen of the twenty-two champions made it into the top ten in another Championship. These numbers confirm that poker requires as much skill as golf to win consistently. *Accord* Rachel Croson, Peter Fishman & Devin G. Pope, *Poker Superstars: Skill or Luck?* 21, No. 4 Chance (2008) (concluding that golf and poker require similar amount of skill to win).

As noted above, the common test for whether an activity is gambling is whether chance or skill predominates in determining the outcome of the activity. A minority of states apply a variant of this test, asking whether chance plays a material or dominant role in determining that outcome. Given the data discussed above regarding the skill involved in poker play, and for all of the reasons stated, under any of these tests, poker is not gambling. Certainly, as the Pennsylvania decision cited above squarely held, "skill predominates over chance" in determining poker outcomes. *Dent*, No. 2008-733, slip op. at 14.

C. Online Peer-To-Peer Poker Is Not Illegal Under Relevant Underlying Law.

Even if online poker were considered "betting or wagering," under federal law it still falls outside UIGEA's reach because it is not illegal under relevant state law. UIGEA's prohibition extends only to games that have been determined to be illegal under other applicable laws. Indeed, the plain text of UIGEA indisputably fails to reach *all* online gaming. If that were the case, the word "unlawful" in § 5363 would be utterly meaningless. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a 'cardinal principle of statutory construction' 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.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))). By restricting UIGEA to "unlawful" gambling, Congress clearly acknowledged that some Internet games are *lawful* and that such games are beyond the statute's purview.

¹⁵ <http://www.cardplayer.com/poker-news/article/2536/online-poker-interview-with-annette-annette-15-obrestad>, last accessed Feb. 9, 2009.

¹⁶ This example also refutes the conclusion that the "chance" of what a player is dealt as initial hole cards has a substantial affect on outcome; it cannot affect someone who never looks at them.

¹⁷ Results of all World Series of Poker Tournaments for this period are available at <http://www.worldseriesofpoker.com/tourney/results.asp>.

Courts have recognized as much. *See, e.g., MMJK, Inc.*, 513 F.Supp.2d at 1152. The question, then, is whether online peer-to-peer poker is “unlawful” under UIGEA. The clear answer is no.

The rules promulgated by the Federal Reserve and Department of Treasury (in consultation with the Department of Justice) have refrained from adopting any specific definition of “unlawful” activity. “[T]he Act itself does not specify which gambling activities are legal or illegal and relies on prohibitions contained in statutes that are not under the jurisdiction of the Agencies.” *See* Prohibition on Funding of Unlawful Internet Gambling, 73 F.R. 69,382, 69,382 (Nov. 18, 2008) (to be codified at 12 C.F.R. pt. 233 and 31 C.F.R. pt. 132).

[T]he Agencies have determined that a single, regulatory definition of “unlawful Internet gambling” would not be practical. The Act’s definition of “unlawful Internet gambling” relies on underlying Federal and State gambling laws. The States have taken different approaches to the regulation of gambling within their jurisdictions and the structure of State gambling law varies widely, as do the activities that are permitted in each State. Accordingly, the underlying patchwork legal framework does not lend itself to a single regulatory definition of “unlawful Internet gambling.”

Id. at 69,384 (footnote call number omitted). Thus, whether UIGEA deems a “bet or wager” “unlawful” depends whether it is contained within a “prohibition[] . . . contained in statutes.” *Id.* at 69,382.¹⁸ In jurisdictions where online poker is not separately prohibited, UIGEA does not make it unlawful.

Gaming is unlawful in most states only if three elements are present: “consideration, chance, and reward.” *Dent*, No. 2008-733, slip op. at 4. “[I]t is apparent that the ante and the betting is consideration and that the pot is the reward.” *Id.* But the element of chance is lacking. As the *Dent* court put it, “if chance predominates, [poker] is gambling. If skill predominates, it is not gambling.” *Id.* This “dominant factor” test has been adopted by the high courts of Nebraska, California, Nevada, North Carolina, Utah, Missouri, and Alaska, among others. *See, e.g., Indoor Recreation Enters., Inc. v. Douglas*, 235 N.W.2d 398, 400 (Neb. 1975); *In re Allen*, 377 P.2d at 281; *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961); *State v. Stroupe*, 76 S.E.2d 313, 316-17 (N.C. 1953); *D’Orio v. Startup Candy Co.*, 266 P. 1037, 1038 (Utah 1928); *Harris v. Mo. Gaming Comm’n*, 869 S.W.2d 58, 62 (Mo. 1994); *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973); *see also* Michael A. Tselnik, *Check, Raise, or Fold: Poker and the Unlawful Internet Gambling Enforcement Act*, 35 Hofstra L. Rev. 1617, 1663 (2007) (“Most jurisdictions favor the dominant factor test.”).

¹⁸ Those agencies acknowledge that UIGEA “states that its provisions should not be construed to alter, limit, or extend any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States. The Act also does not spell out which activities are legal and which are illegal, but rather relies on the underlying substantive Federal and State laws.” Prohibition on Funding of Unlawful Internet Gambling, *Id.* (footnote call number omitted).

Other states have excluded from their definitions those games that are “[b]ona fide contests of skill, speed, strength, or endurance in which awards are made only to entrants or the owners of entries.” See e.g. Colo. Rev. Stat. § 18-10-102(2)(a) (2008); Wyo. Stat. Ann. § 6-7-101(iii)(A) (2006); N.D. Cent. Code. § 12.1-28-01(1)(a) (2007). Still other states have limited gambling to games of chance by defining “bet” to “mean[] an agreement that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value.” Ga. Code Ann. § 16-12-20(1) (2009); see also N.M. Stat. Ann. § 30-19-1(B) (West 2009); Kan. Stat. Ann. § 21-4302(a) (West 2009).

New York, though its statute uses slightly different language, employs essentially the same dominant factor test. See, e.g., N.Y. Penal Law § 225.00(1) (McKinney 2008) (“[A] ‘[c]ontest of chance’ [is] any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”); see also *New York v. Hua*, 2009 WL 1575188, *3 (N.Y.C. Crim. Ct. Queens County June 5, 2009) (dismissing case because there was “no support given for the claim that mahjong is a game of chance”). As the *Hua* court explained:

[W]hile some games may involve both an element of skill and chance, if “the outcome depends in a material degree upon an element of chance,” the game will be deemed a contest of chance. “The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the *dominating element* that determines the result of the game?” It follows then that wagering on the outcome of a game of skill is therefore not gambling as it falls outside the ambit of the statute.

Id. at *2 (emphasis added) (citations omitted).

Online poker is also legal in certain other States with laws that are “place specific”—*i.e.*, they outlaw “gambling” only in specified locations. These laws clearly do not prohibit online poker, which is not conducted in the specific places prohibited by those laws. The South Carolina statute, for example, focuses on playing “at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open place.” S.C. Code. Ann. § 16-19-40 (1976). And the affirmative defense of “social gambling” under the Hawaii law allows for games where “[n]o player receives . . . anything of value . . . other than the player’s personal gambling winnings” and which are “not conducted or played in or at a hotel, motel, bar, nightclub, cocktail lounge, restaurant, massage parlor, billiard parlor, or any business establishment of any kind, public parks, public buildings, public beaches, school grounds, churches or any other public area.” Haw. Rev. Stat. § 712-1231 (1973).

Even in states that strictly apply the “material degree” test, the conclusion is the same.¹⁹ In this context -- “material” simply means “significant.” See Black’s Law Dictionary 998 (8th

¹⁹ Thus, even if one were to argue that *New York v. Hua* was incorrectly decided, the result would still be the same under a materiality standard.

ed. 2004). The discussion and data above demonstrate that chance does not play a significant role in determining the outcome of a poker match because, over time, the role of chance in determining outcomes is miniscule.

Under any of these tests, the “chance” element is lacking in peer-to-peer online poker. It follows that online peer-to-peer poker does not violate these states’ laws. *Compare Dent*, No. 2008-733, slip op. at 13-14 (“Using the predominance test . . . [t]his court finds that Texas Hold’em poker is a game where skill predominates over chance.”), *with Commonwealth of Pa., Pa. Liquor Control Bd. v. Liberty Fire Co. of Schuylkill Haven*, 537 A.2d 974, 976 (1988) (indicating that state gambling law extends to raffle tickets because they are “purely games of chance, where the element of skill is inconsequential”); *see also In re Allen*, 377 P.2d at 281 (collecting cases).

D. Online Poker Operators And Processors Are Not “Engaged In The Business Of Betting Or Wagering.”

Even if online poker involved “betting or wagering” and was “unlawful” under relevant state law (and neither is the case), UIGEA still would not apply to players, payment processors, or online poker operators. That is because acceptance of monies related to “unlawful Internet gambling” is prohibited by UIGEA only if it is knowingly accepted by a person “engaged in the business of betting or wagering.” Poker website operators and processors are not “engaged in the business of betting and wagering.”

UIGEA does not define the term “in the business of betting or wagering.”²⁰ That limitation, however, is identical to the limitation found in the Wire Act, 18 U.S.C. § 1084(a) -- the only other federal statute to use this language. The Wire Act therefore offers helpful guidance in understanding what Congress intended by restricting UIGEA to those “engaged in the business of betting or wagering.” *See Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (“[W]e begin with the premise that when 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.”); *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (same).

The Wire Act, which is discussed in greater depth elsewhere in this paper, targets sports gambling and, by its terms, applies only to parties “engaged in the business of betting or wagering.” 18 U.S.C. § 1084(a). “Courts considering the phrase ‘business of betting or wagering’ appear to have universally concluded that it involves a professional gambling or bookmaking business.” *Pic-A-State Pa., Inc. v. Commonwealth of Pa.*, Civ. A. No. 1:CV-93-0814, 1993 WL 325539, *3 (M.D. Pa. Jul. 23, 1993), *rev’d on other grounds*, 42 F.3d 175 (3d Cir. 1994). An essential feature of such enterprises is that the bookmaker participates in the other half of the transaction with the player -- i.e., if the player wins, the bookmaker loses, and vice-versa.

²⁰ The statute states that “[t]he term ‘business of betting or wagering’ does *not* include the activities of a financial transaction provider, or any interactive computer service or telecommunications service[.]” but it does not offer an affirmative definition of the term. 31 U.S.C. § 5362(2) (emphasis added).

Online poker operators, by contrast, simply provide software through which others play peer-to-peer poker, and payment processors merely transmit players' funds. Critically, neither the site operators nor the payment processors have a stake in the poker games that they facilitate. This is a significant departure from archetypical "betting or wagering," in which the player and the game operator both are gambling on the outcome of the game. In online poker, the players play against each other, not against the house, which does not risk anything of value at all, and does not have its compensation pegged to the winning or losing positions of its clients. *Pic-A-State Pa.*, 1993 WL 325539, at *2, 3 (finding that business of betting or wagering requires the setting of odds, acceptance of wagers and distribution of risks, and Pic-A-State had not done so because it charged a flat fee for services and did not share in its customers' winnings or losses); *United States v. Alpirn*, 307 F. Supp. 452, 454 (S.D.N.Y. 1969) ("[T]outing' horses in return for a fee wholly dependent upon the outcome of the predicted race [does not] constitute[] . . . betting or wagering . . .").²¹

Tellingly, Congress refused attempts to broaden the Wire Act by widening the scope of "engaged in the business of betting or wagering" in the Wire Act. The Internet Gambling Prohibition Act, H.R. 4777, 109th Cong. (2006), a proposed alternative to the bill that ultimately became UIGEA, would have expanded the Wire Act to reach all forms of Internet gaming by redefining "'gambling business' [to] mean[] a business of betting or wagering." H.R. Rep. No. 109-552, pt. 1, § 2 (2006). The proposed provision prohibited the use of "a communication facility . . . for the transmission in interstate or foreign commerce . . . to or from any place outside the jurisdiction of any nation with respect to any transmission to or from the United States, of bets or wagers, or information assisting in the placing of bets or wagers; or . . . any transmission to or from the United States, which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers . . ." Id. § 3. The bill was never passed by either the House or the Senate. Another proposed bill, H.R. 4411, would have modified the Wire Act to use the term "engaged in a gambling business" instead of "engaged in the business of betting or wagering." Internet Gambling Prohibition and Enforcement Act, H.R. 4411, 109th Cong. § 102 (as passed by House, July 11, 2006). Significantly, while portions of H.R. 4411 ended up in UIGEA, the proposed bill itself, including the modification to the Wire Act, was never voted on in the Senate.

At bottom, UIGEA criminalizes knowing acceptance of a financial instrument or other proceeds only when it results from "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," 31 U.S.C. § 5362(1)(A), only when that activity is unlawful under other relevant law, and only when the recipient is "engaged in the business of betting or wagering, *id.* § 5363." Online peer-to-peer poker fails that test in all three respects, and UIGEA therefore does not offer a statutory basis for the forfeiture of processors' funds.

IV. Online Poker Is Not Prohibited By Other Federal Law.

²¹ The basic structure of online poker sites is not unlike that of popular online stock trading websites, like E*Trade. That sites charges a fee in order to provide services used to make a stock trade, but they would not be considered to be "in the business" of playing the stock market.

UIGEA directly addresses online gaming and evinces Congress's clear intent to prohibit only certain types of conduct, not including peer-to-peer online poker. UIGEA represents Congress's most recent effort to regulate gambling and its only attempt to address the relatively recent phenomenon of online gaming directly. It is telling that, when doing so, Congress did not include a specific prohibition on online poker. Indeed, the legislative history of UIGEA shows that Congress intended the Act to be merely an enforcement tool for existing gambling statutes--*i.e.*, to give law enforcement additional tools to effectuate only those prohibitions already on the books such as the IGBA, the Wire Act, or the Travel Act. Yet again, it is telling that Congress did not attempt to amend those existing statutes to reach online poker or to otherwise indicate that those statutes already reached online poker. To the contrary, Congress rejected such attempts when considering various bills that would ultimately become the enacted version of UIGEA. All of this confirms that Congress has consistently legislated with careful precision when addressing gambling, recognizing that there is no uniform national policy against all forms of gambling and that there are important distinctions between some games and others. That is why Congress in UIGEA continued to rely on specific statutory formulations (e.g., "betting or wagering"), to incorporate terms of limitation (e.g., "in the business of" betting or wagering), and to expressly acknowledge that it did not intend to prohibit gaming or related monetary transactions in jurisdictions where the gaming in question is legal. And Congress did so fully aware of the advent of online poker, evincing a clear intent to continue its targeted approach to gambling rather than the wholesale prohibition law enforcement now urges. It would be strange to think that Congress crafted UIGEA in perfect accord with the carefully targeted scope of prior legislation but that Congresses enacting statutes decades before online poker was ever conceived must have intended—contrary to those statutes' express terms and legislative histories—to reach all forms of gambling. Thus, for the reasons set forth below neither the IGBA, the Wire Act, nor the Travel Act should be read to reach online poker.

A. The IGBA Does Not Prohibit Online Poker

1. The Definition Of Gambling Under the IGBA Does Not Include Non-Banking Games or Non-Lottery, Nor Does It Include Games of Skill.

The IGBA criminalizes a "gambling business" that "is a violation of the law of a State or political subdivision in which it is conducted." 18 U.S.C. § 1955(b)(1), (i). Thus, to hold a business accountable as an illegal gambling business under the IGBA, the government must show four things: (1) the business must have been in the business of gambling as that term is defined by the statute, (2) five or more people were involved in the operation of the business, (3) the business operated for more than 30 days or had gross revenue of more than \$2,000, and (4) the defendant operated the business in violation of the law of the state in which it is operating. 18 U.S.C. § 1955(b)(1)(i)-(iii). For online poker, not all of these elements are met, and therefore online poker does not violate the IGBA.

Gambling is "[t]he act of risking something of value, esp. money, for a chance to win a prize." *Black's Law Dictionary* 701 (8th ed. 2004). Where an activity contains elements of both skill and chance, as poker does, the common test for whether the activity is a game of skill or a game of chance, and thus whether it is gambling, is the so-called "dominant factor" test. Under that test, a court asks whether skill or chance "is the dominating factor in determining the result

of the game.” *In re Allen*, 377 P.2d at 281-82 (determining that bridge is not gambling because skill predominates); *see also, e.g., Indoor Recreation Enters., Inc. v. Douglas*, 235 N.W.2d 398, 400 (Neb. 1975); *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961); *State v. Stroupe*, 76 S.E.2d 313, 316-17 (N.C. 1953); *D’Orio v. Startup Candy Co.*, 266 P. 1037, 1038 (Utah 1928).

More particularly, the IGBA defines “gambling” as “includ[ing] but ... not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.” *United States v. \$734,578.82 in U.S. Currency*, 286 F.3d 641, 648 (3d Cir. 2002) (quoting 18 U.S.C. § 1955(2)). Examining “gambling” in relation to the words around it, *see, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995), courts would likely hold that the word “gambling” in the IGBA does not include skill-based poker.²² Specifically, poker is not even remotely similar to the activities enumerated by the statute. Even a cursory examination of the games listed makes that clear:

- *Pool-selling* -- Pool-selling is the selling or distribution of chances in a betting pool²³ -- i.e., “[a] gambling scheme in which numerous persons contribute stakes for betting on a particular event (such as a sporting event).”²⁴ Courts view pool-selling as a game of chance.²⁵
- *Bookmaking* -- Bookmaking is “[g]ambling that entails the taking and recording of bets on an event, such as a horse race.”²⁶ Like pool-selling, bookmaking is a game of chance, because as in pool-selling, the bettors have no way of affecting the outcome of events.²⁷ In a bookmaking scheme, the bookmaker fixes the stakes,²⁸ so bookmaking is a banking game.

²² Under the *ejusdem generis* canon of statutory construction, “general terms that follow specific ones are interpreted to embrace only objects of the same kind or class as the specific ones.” *United States v. Amato*, 540 F.3d 153, 160 (2d Cir. 2008), *cert. denied sub nom. Fasciana v. United States*, 129 S. Ct. 1635 (2009); *see also United States v. Turkette*, 452 U.S. 576, 581 (1981) (“[W]here general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated.”). Since the statute specifies certain activities which comprise gambling, to determine whether a non-enumerated activity constitutes gambling courts must determine whether that activity is “of the same kind” as the enumerated activities.

²³ Webster’s New International Dictionary 1764 (3d ed. 1971).

²⁴ Black’s Law Dictionary 1181 (7th ed. 1999).

²⁵ *See, e.g., Nat’l Football League v. Governor of State of Del.*, 435 F. Supp. 1372, 1385–86 (D. Del. 1977) (“chance rather than skill is dominant factor” in betting pool).

²⁶ Black’s Law Dictionary 194 (8th ed. 2004).

²⁷ *See Bayer v. Johnson*, 349 N.W.2d 447, 449 (S.D. 1984) (“The outcome of . . . events [in a bookmaking scheme] in no way depends upon the skill of the bettors. The wagering is therefore a contest in which chance predominates over skill”).

²⁸ *See id.*

- *Slot machines* -- Slot machines are coin operated mechanical or electronic devices that pay off when random, individually selected symbols match one another on the machine's display. Otherwise, the bet goes to the house. Slots are thus games of chance and banking games.²⁹
- *Roulette* -- Roulette is a game in which players bet whether a ball, spun along a revolving wheel, will land on a certain color (black or white) or a certain number (00 through 36). Players make their wagers against the house -- hence roulette is a banking game -- and the outcome is determined purely by the chance that the ball lands on the wagered number or color.
- *Dice tables* -- Dice are cubes, with each face typically marked with between one and six spots.³⁰ Dice tables are banking games³¹ wherein players throw dice, usually in pairs, and make wagers against the house on the chance outcome of the throw and thus they are also games of chance.
- *Lotteries* -- A lottery is “[a] method of raising revenues, esp. state-government revenues, by selling tickets and giving prizes (usu[ally] large cash prizes) to those who hold tickets with winning numbers that are drawn at random.”³² Because lottery drawings are random, a lottery participant cannot affect the outcome, and lotteries are games of chance.³³ Moreover, the house keeps any bet that does not pay out, a lottery is a banking game.
- *Numbers games* -- In a numbers game, players wager that on a certain day, a chosen series of numbers will occur in some event to which the numbers game is pegged. For instance, a player can bet on the payoff totals of a day's races, and learn of the fate of the wager by checking the paper the next day. A banker (the house) guarantees the payoffs to any winners, and “[i]n such a game neither the number of winning players nor the total amount of the payoffs can be predicted in

²⁹ See, e.g., *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1104 & n.12 (9th Cir. 2003) (quoting K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self Reliance Amendment*, 36 U.S.F. L. Rev. 1033, 1041 n.65 (2002)) (“Las Vegas-style slot machines offer “house-banked” games, which enable the house to collect players’ losses.”); *Brock v. Claridge Hotel & Casino*, 711 F. Supp. 779, 780 (D.N.J. 1989) (describing slot machines and blackjack as games of chance).

³⁰ See Random House Webster's Unabridged Dictionary 549 (2d ed. 1998).

³¹ See, e.g., *Kansas City v. Caresio*, 447 S.W.2d 535, 537 (Mo. 1969) (finding that dice game was “game of chance” under local ordinances).

³² Black's Law Dictionary 966 (8th ed. 2004); see also *Johnson v. Collins Entm't Co.*, 508 S.E.2d 575, 579 (S.C. 1998) (“Video gaming devices do not come within the plain and ordinary meaning of ‘lottery’ because they do not involve a drawing and ‘tickets’ or other indicium of entitlement to a prize.”).

³³ See, e.g., *Womack v. Comm'r of IRS*, 510 F.3d 1295, 1306 (11th Cir. 2007) (describing lottery as “game of chance”); *State ex rel. Kellogg v. Kan. Mercantile Ass'n*, 25 P. 984, 985 (Kan. 1891) (holding that plan for allocation of prizes “by chance” is a lottery).

any one day,”³⁴ making the game one of chance, as well.

- *Bolita* -- Bolita is a form of lottery “in which one attempts to guess a variably determined 2-digit number,”³⁵ sometimes derived by drawing numbered balls from a hopper,³⁶ or somehow tied to the results of the state lottery. Because the numbers are “variably determined,” courts consider bolita a game of chance.³⁷ Bolita is a banking game because it is a form of lottery.
- *Policy* -- Policy is similar to bolita or a numbers game, but differs in the method of determining the winning sequence or combination of digits. “In policy, [the winning sequence] is ascertained by the drawing *at random* from a wheel in which tags, each bearing one of the possible combinations of numbers that can be played, have been placed.”³⁸ Like numbers and bolita, policy is a game of chance³⁹ and a banking game.

2. **Poker is Not A Banking Game Or A Lottery.**

Banking games such as those enumerated in the IGBA share three principal characteristics: (1) they are games of chance, (2) they are played against the house, and consequently (3) the house’s profits are dependent on the result of the wagers. Lottery and pool-selling games are games of pure chance, wherein the house keeps any bets that are not paid out, and the bettors are not participants in the underlying activity being bet on.⁴⁰ Poker has none of these characteristics, and as such is neither a banking game nor a lottery. First, while all of the enumerated games are indisputably games of chance, as discussed in detail above, poker is a game of skill. Second, in every game listed above the player plays against the house. If he places a winning bet, the *house* pays the bet. If he places the losing bet, the *house* retains the amount bet. In poker, on the other hand, players play against other players, not the house. When a poker player wins a hand, other players -- not the house, pay the winner. Third, because it does not collect losing bets in poker -- those are paid to the winner of a hand -- the house’s profit does not depend on the results of the poker game. Instead, the house profits by charging a small fee,

³⁴ *United States v. Baker*, 364 F.2d 107, 112 (3d Cir. 1966).

³⁵ Webster’s Third New International Dictionary 248 (3d ed. 1971).

³⁶ See, e.g., *United States v. Spino*, 345 F.2d 372, 373 (7th Cir. 1965).

³⁷ See, e.g., *Santos v. United States*, 461 F.3d 886, 888 (7th Cir. 2006) (describing “bolita” as lottery), *cert denied*, 550 U.S. 902 (2007), *aff’d*, 128 S. Ct. 2020 (2008); *United States v. Febus*, 218 F.3d 784, 788 (7th Cir. 2000) (same); *Ex parte Alvarez*, 94 So. 155, 155 (Fla. 1922) (describing bolita as “game of chance”).

³⁸ *Baker*, 364 F.3d at 112 (emphasis added).

³⁹ See, e.g., *Forte v. United States*, 83 F.2d 612, 615-16 (D.C. Cir. 1936) (noting that “policy game is undoubtedly a lottery,” defined by D.C. Code as game of chance).

⁴⁰ In some lottery games where at least one participant must win money, the house may keep a percentage of all bets--such as in a 50/50 drawing where a charity splits the amount raised by selling raffle tickets evenly with the winner.

often called a “rake” for providing the opportunity for the players to play against each other. The “rake” is a generally fixed percentage of every pot, up to a maximum amount, and is no way contingent on who wins each hand. Poker therefore shares none of the three principal traits shared by the games listed in the IGBA, and thus is not properly “gambling” under the statute.

3. Poker Is A Game Of Skill.

The conclusion that poker is not gambling under either the IGBA’s definition of the term or state law rests independently on the fact that poker is a game of skill. As explained in detail above, poker is a game of skill. There can thus be no comparison between online peer-to-peer poker and a quintessential game of chance, like those enumerated in the IGBA’s definition of gambling, which has “an outcome that is decided solely by the circuitry of the machine that was programmed into it when its software was created. . . . [T]he player has no ability to affect the outcome of the game other than playing the game enough times that the laws of probability, and the pre-programmed circuitry, will allow him to win something at some point.” *People v. Delacruz*, 872 N.Y.S.2d 876, 880 (N.Y.C. Crim. Ct. Kings County 2009). Poker is therefore not “a game of chance or a lottery,” and it is therefore not within the IGBA’s carefully circumscribed prohibitions.⁴¹

4. Poker Is a Permitted Game Of Skill Under State Law And So Is Not Prohibited By The IGBA.

As noted, the IGBA applies only to gambling businesses that are prohibited under state law. But even if one were to conclude that the IGBA’s definition of gambling is somehow broad enough to encompass anything a state defines as gambling, even chess, spelling bees or 5k races, without any sort of threshold examination of whether the prohibited activity is gambling, poker is still not gambling under the laws of nearly all states.

Because the IGBA incorporates into federal law the states’ own decisions about what constitutes proscribed gambling, the statute does not apply to poker, which generally is legal under state law. If online poker comprises an “illegal gambling business” even though online poker is not a game of chance, then online bridge tournaments must too, as well as online card games like hearts and spades, and puzzle games like those found at Skilljam.com and Worldwinner.com. This reading would not only violate the spirit of the IGBA, but it would also

⁴¹ It is not surprising then that poker stands apart from the games of chance like those listed in the IGBA--television viewers do not tune in to watch a roulette wheel spin, but millions watch the world’s best poker players out-duel others on the World Poker Tour, the World Series of Poker, or Poker After Dark. Poker’s television popularity demonstrates that “skill” rather than “chance” drives the game. Like golf or football, it is the absence of chance, not its presence that rewards the watcher, even the most casual one. Indeed, networks are devoting increased time to poker programming. NBC airs over 324 hours of poker programming per year, not including repeat programming on CNBC or other wholly owned networks. Typically, poker ratings equal or surpass those of many televised sporting events, such as women’s golf, Indy car racing, and regular season college basketball. By contrast, the short-lived Ultimate Blackjack Tour on CBS was unable to sustain an audience and was quickly cancelled because unlike sporting events or skill competitions, games of chance do not make for compelling television.

lead to an absurd result. *United States v. Ryan*, 284 U. S. 167, 175 (1931) (“A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose.”).

B. Online Peer-To-Peer Poker Also Does Not Violate The Wire Act.

The Wire Act is codified at 18 U.S.C. § 1084; it provides, in pertinent part:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitled the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1084(a).

1. The Wire Act Applies Only To Sports Betting.

The Wire Act does not purport to reach every form of wagering. Rather, Congress targeted a specific problem -- sports betting -- and only those entities that actually take those bets. *See In Re MasterCard Int’l Inc. Internet Gambling Litig.*, 313 F.3d 257, 263 (5th Cir. 2002) (“[T]he Wire Act does not prohibit non-sports internet gambling”); *In re Mastercard Int’l, Inc.*, Nos. Civ.A.00MD-1321, 00-1322, 2003 WL 21783301, at *6 (E.D. La. Jul 30, 2003) (“[T]here is no possibility that plaintiffs can prevail on their claim that the defendants violated state law by ‘gambling over the Internet.’”).

(A) The Plain Text Demonstrates That The Wire Act Applies Only To Sports Betting.

The plain text of the Wire Act reaches “bets or wagers or information assisting in the placing of bets or wagers *on any sporting event or contest.*” 18 U.S.C. §1084(a) (emphasis added). The Wire Act does not define “bet” or “wager.” Any uncertainty as to the meaning of “bet” or “wager” should thus be resolved by reference to the words around it. *Gustafson*, 513 U.S. at 575. Consequently, one must read the first appearance of the term “bets or wagers” in light of the term of limitation -- “on any sporting event or contest” -- that follows. Likewise, the canon *ejusdem generis* holds that a specific term informs the meaning of an adjacent general term. Thus, even if one attempted to separate the provision into a specific component -- i.e., “bets or wagers on any sporting event or contest” -- and a general one -- i.e., “bets or wagers” -- the former provision would inform what constitutes a “bet or wager.” *See Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008) (“[A] word is given more precise content by the neighboring words with which it is associated”).

Interpreting “on any sporting event or contest” to modify only the second “bets or wagers” would have the effect of categorically prohibiting the transmission of all money related to bets or wagers -- without regard to the legality of the underlying bet or wager. One district court, in a case involving sports betting, has suggested – in dicta -- that the Wire Act prohibits the *use* of the wires only for betting on *sports* events and contests, but that it prohibits the *transmission* of monies resulting from betting or wagering on *any* event or contest. See *United States v. Lombardo*, No. 2:07-CR-286, 2007 WL 4404641, *5 (D. Utah Dec. 13, 2007) (rejecting *In re Mastercard Internet Gambling Litigation* and applying the Wire Act to non-sports betting and wagering). By reading the first “bets or wagers” in total isolation, the *Lombardo* court’s interpretation, however, runs contrary to the interpretive canons above and the rule that statutory phrases should not be read in isolation, *Beecham v. United States*, 511 U.S. 368, 372 (1994). At the same time, such an interpretation would expand § 1084’s reach far beyond what Congress intended by criminalizing every transaction associated with indisputably lawful wagering.⁴²

Most significantly, the error of the *Lombardo* court’s reasoning is demonstrated by the limitation it would impose on the exception in 18 U.S.C. § 1084(b). Section 1084(b) exempts the transmission of information only “for use in news reporting of *sporting events or contests*, or for the transmission of information assisting in the placing of bets or wagers on a *sporting event or contest* from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.” 18 U.S.C. §1084(b) (emphasis added). But if the prohibitions of § 1084(a) are read to apply to transmission of a wire communication which entitles the recipient to receive money or credit as a result of *any bets or wagers*, or for information assisting in the placing of *any bets or wagers*, while the exceptions apply only to sports betting, the federal government could prosecute any transmission that entitles the recipient to receive money as a result of information assisting in the placement of *lawful* non-sports bets or wagers -- like lottery tickets or bingo cards. For example, under the *Lombardo* reading, if a state lottery wires money in interstate commerce to a vendor who printed lawfully state-issued lottery tickets, that vendor would be receiving the transmission of a wire communication which entitles him to receive money or credit as a result of information assisting in the placing of bets or wagers. Similarly, a payment to a bingo card printer that is sent in interstate commerce would also be unlawful. That is clearly not what Congress intended. Because the exceptions in 18 U.S.C. § 1084(b) are limited to information assisting in the placement of lawful bets and wagers on sporting events, the prohibitions were intended to be similarly limited.

In addition, reading the statute this way would also render nearly all of UIGEA superfluous. The Wire Act’s prohibition on “transmission[s] of wire communication[s] which entitle[] the recipient to receive money or credit” 18 U.S.C. §1084(a), would have captured the activities undertaken by the processors of funds derived from online betting or wagering, and there would have been no need for UIGEA. That cannot be the case. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“[I]t is ‘a cardinal principle of statutory construction’ that ‘a statute ought,

⁴² In any case, *Lombardo* involved sports betting. 2007 WL 4404641, at *4. Any suggestion in that decision that the Wire Act applies to other forms of betting is therefore mere *dicta* -- in an unpublished decision, no less.

upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or significant.”) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

(B) The Legislative History Of The Wire Act Demonstrates That It Applies Only To Sports Betting.

The Wire Act’s legislative history confirms that Congress intended to limit application of the Wire Act to sporting contests and events. Indeed, Congress specifically targeted individuals “dependent upon telephone service for the placing of bets and for layoff betting *on all sporting activities*,” because “the availability of wire communication facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that *a sporting event begins*.” H.R. Rep. No. 87-967 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2632 (emphasis added). There is no reason to believe Congress would pass a statute prohibiting all transmission of funds related to all gambling, regardless of whether it is legal under state law, without a word of legislative explanation about the effect of the statute. Instead, the legislative history repeatedly bears witness to Congress’ efforts “to assist the various States, territories and possessions of the United States, and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking and like offenses and to aid in the suppression of organized gambling activities.”⁴³ Congress never suggested it was supplanting state law by banning all interstate transmission of all forms of bets and wagers without regard to underlying state law. Rather, the testimony in support of the bill was intensely focused only on sports wagering. As then Attorney General Robert Kennedy stated in his testimony, “In addition to the unique transmission system in the field of commercialized horse race betting, the gamblers also have moved into large scale betting operations of such amateur and professional sports events such as baseball, basketball, football and boxing.”⁴⁴

Thus, as the district court explained in *Mastercard*, the “recent legislative history” reinforces what is plain on the face of the statute, “that [I]nternet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084.” *In re MasterCard Int’l Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001), *aff’d*, 313 F. 3d 257 (5th Cir. 2003). If betting on a game of chance is permissible, certainly betting on a game of skill like poker is as well. Congress has since declined the opportunity to bring poker under the Wire Act while considering UIGEA by rejecting proposed amendments to the Wire Act that would have redefined the Act to expressly bring online poker within the scope of that statute in H.R. 4411 (which was never passed by the Senate) and H.R. 4777 (which was never passed by either the House or the Senate). In short, Congress deliberately targeted only sports betting in the Wire

⁴³ *Martin v. United States*, 389 F.2d 895, 898 n.6 (5th Cir. 1968) (quoting H.R. Rep. No. 87-967, *reprinted in* 1961 U.S.C.C.A.N. 2631, 2633 (Apr. 6, 1961 letter from Attorney General Robert F. Kennedy to Speaker of the House of Representatives)), *cert. denied*, 391 U.S. 919 (1968); *see United States v. McDonough*, 835 F.2d 1103, 1105 n.7 (5th Cir. 1988).

⁴⁴ Legislation Related to Organized Crime, Hearings Before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 87th Cong. 1st Sess. 26 (May 17, 1961) (statement of Attorney General Robert Kennedy)

Act, and it later rejected an invitation to transform that Act into a tool for regulating online gaming.⁴⁵

(C) The Rule Of Lenity Prohibits Reading The Wire Act To Impose Criminal Liability Beyond Sports Betting.

In practice, the Wire Act has been applied almost exclusively to sports betting cases. *See, e.g., United States v. Betonsports PLC*, No. 4:06CV01064 CEJ, 2006 WL 3257797, at *1 (E.D. Mo. 2006) (explaining that 98% of money taken in was taken as “sports wagers”). Any attempt to stretch the terms of the Wire Act further to reach online poker would meet yet another potent obstacle. It well settled that “[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.” *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008); *see Bell v. United States*, 349 U.S. 81, 83 (1955); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (the rule of lenity applies regardless whether the court encounters the statute in a criminal or noncriminal proceeding). If it is a “textbook case for application of the rule of lenity” where the “text of [the statute] is ambiguous, the structure leans in the defendant’s favor, the purpose leans in the Government’s favor, and the legislative history does not amount to much,” *United States v. Hayes*, 129 S. Ct. 1079, 1093 (2009) (Roberts, C.J., dissenting), then the rule undoubtedly applies here. That is because *all* of those indicia -- text, structure, purpose, and legislative history -- “lean” squarely in favor of a narrower interpretation of the Act. Thus, the Wire Act must be interpreted as restricting only sports-related gambling and not online poker.

Indeed, the rule’s application is especially appropriate here, because the DOJ has changed its position on the applicability of the Wire Act to non-sports betting. In 1998, for example, a senior DOJ official testified to Congress that “18 U.S.C. 1084 -- the Wire Communications Act -- currently prohibits someone in the business of betting and wagering from using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers on any sporting event or contest.”⁴⁶ And that “anyone in the business of betting or wagering who transmits or receives bets and wagers on sporting events via the Internet is acting in violation of the Wire Communications Act.” The DOJ said nothing about non-sports wagers being covered by 18 U.S.C. § 1084. In fact, the DOJ said the opposite -- that § 1084 “*may relate only to sports betting and not to the type of real-time interactive gambling (e.g., poker) that the Internet now makes possible for the first time.*” The DOJ has since retreated from that position, arguing even in the face of *Mastercard* that the Wire Act is more broadly applicable. Not only does the government’s shift in position serve as a clear indication that the issue is ripe for legislative

⁴⁵ Even if the Wire Act was held to cover more than just sports betting, there is no basis to conclude it would cover games of skill, rather than chance, where money is won by participants in the games.

⁴⁶ *Gambling On The Internet, Testimony Before the Subcomm. on Crime of the H. Comm. on the Judiciary* (June 24, 1998) (statement of Kevin V. Di Gregory, Deputy Assistant Attorney Gen, DOJ), available at <http://www.usdoj.gov/criminal/cybercrime/kvd0698.htm>; *Internet Gambling and Indian Gaming, Testimony Before the S. Comm. on Indian Affairs* (June 9, 1999) (statement of Kevin V. Di Gregory, Deputy Assistant Attorney Gen., DOJ), available at <http://www.usdoj.gov/criminal/cybercrime/s692tst.htm>

intervention, but it also undercuts the notion that the DOJ's more recent position is entitled to special deference. See *Fireman v. United States*, 44 Fed. Cl. 528, 538 (1999) (“[W]hen an agency changes its position, the agency’s new interpretation is entitled to less deference.”); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (“[T]he case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views.”); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (“An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981))).

(D) The Wire Act Applies Only To Actors “Engaged In The Business Of Betting Or Wagering.”

Even if the Wire Act could be read to reach more than sports betting, the Wire Act’s prohibitions apply “only to persons who, in the normal context of the words, can be said to be ‘engaged in the business of betting or wagering.’” *Kelly v. Ill. Bell Tel. Co.*, 210 F. Supp. 456, 466 (N.D. Ill. 1962), *aff’d*, 325 F.2d 148 (7th Cir. 1963). Thus, for online poker operators or processors to fall within this category two requirements would have to be met: (1) poker would have to be “betting or wagering”, and (2) poker operators and processors would have to be “engaged in the business of betting or wagering.” Neither of these requirements is met.

As demonstrated at length above (see Part III.A., *supra*), online poker is not “betting or wagering” under the ordinary meaning of that term. That is because the game is overwhelmingly one of skill, not mere chance. Unlike sports betting, where the player exerts zero influence over the outcome of the game and his corresponding financial gain or loss, the poker player retains almost complete control over his fate in almost every regard. He may not be able to control which cards are dealt, but the rules of the game are such that it seldom matters who has the best cards. And the poker player always controls how much to bet, so a player can all but eliminate his financial risk if he is dealt a bad hand. The sports bettor, by contrast, has irrevocably committed his wager--if luck intervenes and, say, a star player is injured, the bettor has no ability to influence his fate.

Moreover, poker site hosts and processors are not “engaged in the business of betting or wagering.” The former merely provide a hosting service that allows individuals to play poker (again, a game of skill, not chance) against one another. Unlike the bookmakers and house-banked casino gaming operators targeted by the Wire Act, online poker providers are not a party to any bets, and they do not determine the customers’ odds of winning or losing or the distribution of risk among customers. The hosts have no interest in the outcome of any hand, and they are compensated for hosting the game by charging a small “rake” for providing the opportunity for the players to play against each other. See *generally, Pic-A-State Pa.*, 1993 WL 325539, at *3 (finding business not in “the business of wagering and betting” because it did not set odds, accept wagers, or distribute risks like a professional bookmaker). This is a significant departure from archetypical “betting or wagering,” in which the player and the game operator both are gambling on the outcome of the game. The payment processors are still further removed from any risk or element of chance. They merely distribute funds among the relevant participants according to contractual obligations. Even if one were to stretch the Wire Act

beyond sports betting, and even if one assumed that online poker is “betting or wagering,” the site operators and payment process are not “in the business of betting or wagering” any more than the companies that write the poker software or sell the Internet servers -- they are nothing like the layoff bettor that the statute was designed to target.

C. Online Peer-To-Peer Poker Does Not Violate The Travel Act.

The Travel Act prohibits “travel[ing] in interstate or foreign commerce . . . with [the] intent to . . . distribute[,] . . . commit[,] . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity[,]” 18 U.S.C. § 1952(a)(1)-(a)(3), including “any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed[,]” *id.* § 1952(b). As is plain on the face of the statute, a Travel Act violation depends on a predicate violation of state gambling law. As discussed above, online peer-to-peer poker is not illegal in any state that relies upon a predominance test, nor in states that have other exceptions for games of skill. It therefore does not violate the Travel Act.

V. Conclusion.

As has been established in the foregoing analyses of the pertinent points and authorities discussed in detail throughout this paper, online poker as played in peer-to-peer virtual cardrooms on the worldwide internet is a skill-based game that does not violate substantive federal gambling laws of the United States.