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(incorrectly captioned ALAIN JEFFERY IFRAH)

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CHAD ELIE,

Plaintiff,

vs.

IFRAH PLLC, a Professional Limited Liability Company, ALAIN JEFFERY IFRAH a/k/a JEFF IFRAH, individually, DOE individuals I through XX, and ROE CORPORATIONS I through XX,

Defendants.

CASE NO. 2:13-CV-00888-JCM-VCF

APPENDIX IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

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DATED this 3 day of June, 2013

THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER

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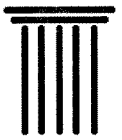
CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5 , I hereby certify that I am an employee of the law firm of THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER, a Professional Corporation, and that on this 3 day of June, 2013, I duly deposited for mailing at Las Vegas, Nevada, a true and correct copy of the above and foregoing APPENDIX IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT , postage prepaid, addressed to:

NAME	TEL., FAX NO. & E-MAIL	PARTY REPRESENTING
Sigal Chattah, Esq. LAW OFFICES OF SIGAL CHATTAH 5875 South Rainbow Blvd., #204 Las Vegas, Nevada 89118	Tel.: (702) 360-6200 Fax: (702) 643-6292 E-Mail: chattahlaw@gmail.com	Plaintiff

Employee of THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER



LAW OFFICES
THORNDAL ARMSTRONG
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A PROFESSIONAL CORPORATION
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EXHIBIT A

C3Q4ELIP

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

v. (S6)10CR336(LAK)

CHAD ELIE,

Defendant.

----------x

New York, NY
March 26, 2012
3:50 p.m.

Before:

HON. LEWIS A. KAPLAN

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
ANDREW D. GOLDSTEIN
ARLO DEVLIN-BROWN
Assistant United States Attorneys

KRAMER LEVIN NAFTALIS & FRANKEL
Attorneys for Defendant
BARRY H. BERKE
DANI R. JAMES

ALSO PRESENT:
Roy Pollitt, FBI
Jonathan Ball, FBI

(Case called)

THE COURT: Good afternoon.

I am not sure I would recognize Mr. Elie. Have we not now accounted for everybody at counsel table without his presence; is he here?

MR. BERKE: This is Mr. Elie right here.

THE COURT: OK. You don't look exactly like your photos on the Internet.

I understand we have a plea; is that right, Mr. Berke?

MR. BERKE: That is true, your Honor. We have an application to withdraw Mr. Elie's plea of not guilty to the superseding indictment and to enter a plea of guilty to the one-count superseding information.

(Defendant sworn)

THE COURT: Mr. Elie, I understand you want to enter a plea of guilty to the superseding information, is that right?

THE DEFENDANT: Yes, sir.

THE COURT: Before I accept your plea, I am going to ask you some questions in order to satisfy myself that you are pleading guilty because you want to plead guilty and not for some other reason. If you don't understand any of my questions or you wish to consult with your lawyer at any point, please let me know and we will deal with it. All right.

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you are now under

oath and that if you answer any of my questions falsely, your answers later may be used against you in another prosecution for perjury or making false statements?

THE DEFENDANT: Yes, sir.

THE COURT: How old are you?

THE DEFENDANT: 32.

THE COURT: How far did you get in school?

THE DEFENDANT: High school and one year of college.

THE COURT: Are you under the care of a doctor or psychiatrist or another mental health professional?

THE DEFENDANT: No, sir.

THE COURT: Have you been under the care of any of those types of people in the last 30 days?

THE DEFENDANT: No, sir.

THE COURT: Have you had any medicine, pills, narcotics or alcohol in the last 24 hours?

THE DEFENDANT: No.

THE COURT: Is your mind clear this afternoon?

THE DEFENDANT: Yes, sir.

THE COURT: Does either counsel have any doubt as to the defendant's competence to plead?

Mr. Goldstein.

MR. GOLDSTEIN: No, your Honor.

THE COURT: Mr. Berke.

MR. BERKE: No, your Honor.

THE COURT: I find on the basis of his responses and my assessment of the his demeanor that Mr. Elie is fully competent to enter an informed plea at this time.

Mr. Elie, have you had an adequate opportunity to discuss your case with your attorney?

THE DEFENDANT: I have, sir.

THE COURT: Are you satisfied with your attorney and his representation of you?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Berke, in light of last week's events in the Supreme Court, I suppose I should ask you whether any plea offers other than the one that is being accepted this afternoon by your client have been made to the defendant.

MR. BERKE: No plea offers, your Honor, that were better than the plea offer that ultimately was accepted by Mr. Elie.

THE COURT: Have any and all plea offers that have been communicated to you by the government been communicated to your client?

MR. BERKE: They have, your Honor.

THE COURT: Have you given him your is best judgment as to those that were communicated.

MR. BERKE: I have indeed, your Honor.

THE COURT: Mr. Elie, without getting into the substance, have you had full and satisfactory discussions with

your attorney about any plea offers that he communicated to you apart from the one that we are going to talk about with you this afternoon?

THE DEFENDANT: Yes.

THE COURT: Mr. Goldstein, anything else you think recent events suggest that I ought to ask.

MR. GOLDSTEIN: I think that's sufficient, your Honor.

THE COURT: Mr. Elie, I am going to describe your rights under our Constitution and laws. Please listen carefully. At the end I am going to ask whether you have understood what I have said.

You are entitled to a speedy and a public trial by a jury on the charges contained in the information against you. If there were a trial, you would be presumed innocent and the government would be required to prove you guilty by competent evidence and beyond a reasonable doubt before you could be found guilty. You would not have to prove that you are innocent. You would be entitled to be represented by a lawyer at every stage of your case. If you couldn't afford a lawyer, a lawyer would be provided for you at government expense.

The government would have to bring its witnesses into court. They had would have to testify in your presence. Your attorney could cross-examine the government's witness and object to evidence offered by the government. He could also offer evidence on your behalf. You would have the right to the

issuance of subpoenas which would require anyone whom you wished to have come and give evidence in this case and who was within the court's power to come here and do that.

You would have the right to testify if you chose to do so. You would also have the right not to testify. In the event you elected not to testify, no inference of guilt could be drawn from that fact.

You have the right to continue in your previous plea of not guilty even now, but if I accept your plea and that is to say if you plead guilty and I accept that plea, there will be no trial of any kind, you will waive your right to a trial and to the other rights I just mentioned. I will enter a judgment of guilty and sentence you on the basis of your guilty plea after considering the presentence report. You will have also have to waive your right not to incriminate yourself because I will ask you questions about what you did in order to satisfy myself that you in fact are guilty as charged.

Do you understand everything I have said so far?

THE DEFENDANT: Yes, sir.

THE COURT: Have you received a copy of the superseding information number (S6)10CR336?

THE DEFENDANT: Yes, sir.

THE COURT: Have you discussed fully with Mr. Berke the charges in that information to which you intend to plead guilty?

THE DEFENDANT: Yes, sir.

THE COURT: I believe you have before you as Court Exhibit A, the original of a document waiving your right to be indicted and prosecuted on the basis of an indictment returned by a grand jury. Do you have Court Exhibit A there?

THE DEFENDANT: Yes, sir.

THE COURT: Does it bear your signature?

THE DEFENDANT: Yes, sir.

THE COURT: Did you read it before you signed it?

THE DEFENDANT: I did, sir.

THE COURT: Did you consult fully with your attorney --

THE DEFENDANT: Yes, sir.

THE COURT: -- with respect to the execution of this document and the significance for you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you are charged in Count 1 of the superseding information with conspiracy under Title 18 U.S.C. Section 371?

THE DEFENDANT: Yes, sir.

THE COURT: The charge is that you conspired to commit an offense against or to defraud the United States by the commission of bank fraud in violation of 18 U.S.C. Section 1344 and by the operation of an illegal gambling business in violation of Title 18 U.S.C. Section 1955.

Do you understand that's the charge?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Goldstein, please state the elements.

MR. GOLDSTEIN: Yes, your Honor. The defendant is charged in a conspiracy, which requires the government to show that the defendant agreed with at least one other person to violate the United States law. The object of the conspiracy as alleged in the indictment is twofold. The first object is to commit bank fraud. The second object is to operate an illegal gambling business or to aid and abet in the same.

The elements of bank fraud are that the defendant knowingly executed a scheme or artifice to defraud a financial institution or to obtain money, funds or other property owned by or under the control of a financial institution by means of false or fraudulent pretenses, representations or promises, second, that the defendant did so with the intent to defraud, and third, that the financial institution at the time was insured by the Federal Deposit Insurance Corporation.

The elements of Section 1955, operation of an illegal gambling business, are: first, that the gambling business as referred to the information violated at least the laws of at least one state, here, they violated the laws of New York and other states; second, that the gambling business was in substantially continuous operation for at least 30 days or had gross revenues of more than $2,000 on a single day and that at

least five people conducted, financed, managed, supervised or directed the operation; and third, that the defendant knowingly conducted, financed, managed, supervised or directed the gambling business or aided and abetted same.

As part of the conspiracy the defendant also had to commit at least one overt act in furtherance of the conspiracy.

THE COURT: Mr. Goldstein, I think it's appropriate for me to restate a little bit because, especially on the last point, I am not in agreement with you.

As I understand the elements of the offense with which you are charged, there are three. The first is that you conspired, combined or agreed with at least one other person, Mr. Elie. The second element is that it was an object of that conspiracy that in furtherance of the conspiracy, one or more of the conspirators would commit bank fraud, the elements of which Mr. Goldstein recited, or that one or more of the conspirators would conduct, finance, manage, supervise, and so forth businesses engaged in and facilitating online poker in violation of the New York Penal Law, which has other elements that Mr. Goldstein alluded to.

The third element that would be necessary to convict on this count is that you or others acting in furtherance of the conspiracy would have committed an overt act or did commit an overt act in furtherance of the conspiracy.

So three elements: an agreement, one or both of the

objects charged in the conspiracy, and an overt act in furtherance of the conspiracy. Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you agree, Mr. Goldstein?

MR. GOLDSTEIN: I do, your Honor.

THE COURT: Any dispute, Mr. Berke?

MR. BERKE: No dispute, your Honor.

THE COURT: Do you understand, Mr. Elie, that in order to convict you of that single count of conspiracy, the government would have to prove all three of the elements that I juries articulated beyond a reasonable doubt?

THE DEFENDANT: I do, your Honor.

THE COURT: Do you understand that the maximum possible sentence that could be imposed upon you would be 5 years in jail?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that the superseding information also contains a forfeiture allegation?

THE DEFENDANT: Yes, sir.

THE COURT: In the event of conviction on this superseding information, you would be required or could be required to forfeit to the United States the sum of $500,000 in United States currency. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Goldstein, what is the status of the

other forfeiture allegations under the agreement; the plea agreement has other kinds of property.

MR. GOLDSTEIN: The defendant as part of the plea agreement has agreed to forfeit $500,000 within 60 days and then also to waive his rights or any claim that he has to a series of other accounts to which he made a claim in a related civil forfeiture proceeding.

THE COURT: Thank you.

Do you understand that under the terms of the plea agreement which we will discuss in more detail in a moment or two, you also would be required to waive your claims in the civil forfeiture proceedings to which Mr. Goldstein has alluded?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you a United States citizen?

THE DEFENDANT: Yes, your Honor.

THE COURT: I am now going to describe the sentencing process. I am sure Mr. Berke has done this but it's my job to do it as well. The law requires that the sentence in this case be imposed in accordance with the Sentencing Reform Act. The court will take into account the United States sentencing guidelines. Under the sentencing guidelines, which the court is obliged to consider, the court will consider the actual conduct in which you engaged which may be more extensive than what is charged in the information, to consider the victim or

victims of your offense if there were any, the role that you played, whether you engaged in any obstruction of justice, whether you accepted responsibility for your acts and your criminal history if you have one.

The sentencing guidelines provide for a range of a minimum and a maximum number of months of imprisonment. You may but you need not be sentenced within this guidelines range. The court must consider the guidelines range and other factors enumerated in the Sentencing Reform Act but is not bound by the sentencing guidelines. The one thing you can be sure of is that the court cannot sentence you to a term of imprisonment longer than the statutory maximum that I have described.

Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The probation office will prepare a written report setting forth the result of an investigation it will conduct into your background and the offense to which you are pleading guilty. It is only after it does that investigation that the probation office will advise the court of its view of the applicable guidelines range.

I understand you have entered into a plea agreement, and we are going to talk about that as I indicated in a moment. Even though the plea agreement apparently contains stipulations regarding the application of the sentencing guidelines to your case, you must understand that those stipulations are not

binding on the court or on the probation office or in certain circumstances even on the government. The court can accept or reject those stipulations. The court alone will determine your sentence.

Do you understand all that?

THE DEFENDANT: Yes, sir.

THE COURT: For the reasons I have just stated, it's not possible to say definitively right now what your guidelines range would will be. If anyone has tried to predict to you what your guidelines range will be, that prediction could be wrong. Whoever made it may have not have had all the information that the court will have at the time you are sentenced. In any case, the guidelines range as I said before, whatever it turns out to be, is not binding on the court. To reiterate, the only thing you can be sure of about your sentence is that you can't get more than 5 years in jail.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: It's important that you understand that you will not be able to withdraw your guilty plea on the grounds that any prediction as to the guidelines range that you may have heard turns out to be incorrect or if the court rejects the sentencing stipulations or if the court imposes a sentence higher than the guidelines range.

Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Has anyone offered you any inducements or threatened you or anyone else or forced you in any way to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: I believe you will have before you the original of the document marked Court Exhibit B which I understand to be the plea agreement in this case, dated March 23, 2012. Do you have it there?

THE DEFENDANT: Yes, sir.

THE COURT: Does it bear your subject on the last page?

THE DEFENDANT: It does.

THE COURT: Did you read it before you signed it?

THE DEFENDANT: I did.

THE COURT: Did you consult fully with your counsel before you signed it?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you have any unanswered questions about the plea agreement or any of the matters that it discusses?

THE DEFENDANT: I do not.

THE COURT: Do you understand that if the court does not accept the plea agreement, you are still going to be bound by your plea of guilty and you will have no right to withdraw it?

THE DEFENDANT: I do.

THE COURT: Has anyone made any promises other than whatever is set forth in the plea agreement that induced you to plead guilty?

THE DEFENDANT: No, your Honor.

THE COURT: Has anyone made any promises or assurances to you as to what your sentence will be?

THE DEFENDANT: No, your Honor.

THE COURT: I want to draw your attention particularly to the last paragraph commencing on page 5 of the agreement, which in word or substance says that you give up any right to appeal or otherwise challenge any sentence of 12 months imprisonment or less. Do you understand that?

THE DEFENDANT: I do, your Honor.

THE COURT: Do you understand also with reference to subsection C on page 4 that you have agreed not to seek a sentence outside the stipulated guidelines range 6 to 12 months; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand also that under the terms of the plea agreement you have waived any right to appeal any fine of $20,000 or less?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand that you have agreed not to file a claim or petition for remission of the funds that you

have agreed to forfeit as a result of committing the offense alleged in the superseding information?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you for all or some part of the period from in or about May 2008 to and including April 14, 2011 serve as a payment processor for, at various times, each of the three entities identified in the original indictment in this case as the poker companies?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you as charged in the information in 2008 assist Australian poker processor Intabill in disguising poker payment transactions for the poker companies including by establishing a bank account that you represented would be used to process payments for so-called payday loans but that you in truth and in fact was used to process transactions for Pokerstars?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you in or about the summer of 2009 establish a bank account at Fifth Third Bank that you claimed would be used to process payments for various Internet membership clubs but that in truth and in fact you used to process millions of dollars in payments for the poker companies?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you beginning in and around the fall

of 2009 and continuing into 2011 offer to invest millions of dollars in three failing banks, including Sunfirst Bank, all of which have since been ordered closed by bank regulators in return for processing Internet poker transactions?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you from in or about May 2008 to and including April 14, 2011, or at least some part of that period, in the Southern District of New York and elsewhere, combine conspire, confederate, and agree with at least one other person to commit bank fraud, in violation of the laws of the United States?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you during the same period combine, conspire, confederate, and agree with at least one other person to violate Title 18 Section 1955 of the United States Code?

THE DEFENDANT: Yes, your Honor.

THE COURT: In each case did you do that willfully and knowingly?

MR. BERKE: May we have a moment.

THE COURT: Of course.

(Pause)

THE DEFENDANT: Yes, your Honor.

THE COURT: Was it a part and an object of the conspiracy that you and others willfully and knowingly would and did execute and attempt to execute a scheme and artifice to

defraud to a financial institution, the deposits of which were insured by the Federal Deposit Insurance Corporation?

THE DEFENDANT: Yes, your Honor.

THE COURT: Was it further a part and an object of that conspiracy that you and co-conspirators would obtain money, funds, credits, assets, securities, and other property owned by and under the custody and control of that financial institution by means of false and fraudulent pretenses, representations and promises, all in violation of 18 U.S.C. Section 1344?

THE DEFENDANT: Could I have one second, your Honor.

(Pause)

MR. BERKE: Your Honor, if I could just clarify one instance. I think the allegations are that based on the misrepresentations, the banks made decisions to process certain transactions they would not otherwise as opposed to money was actually taken from the bank other than funds that were under their control as part of the processing.

I think Mr. Elie can certainly state that he understood that based on various statements, the banks agreed to process transactions that they understood were not, that they would have not have otherwise processed if they had understood that it had related to poker.

THE COURT: Mr. Elie, do you agree with counsel's statement?

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Goldstein, does that do it for the government?

MR. GOLDSTEIN: Just to proffer that in so doing --

THE COURT: Before we get to the proffer, is that satisfactory to the government?

MR. GOLDSTEIN: It is, your Honor.

THE COURT: If you want to make a proffer now I will hear it.

MR. GOLDSTEIN: The proffer is that in so doing, it exposed the bank to financial risk and loss by virtue of processing those transactions.

THE COURT: Was it a further part and an object of the conspiracy, Mr. Elie, that you and others would and did conduct, finance, manage, supervise, direct, and own all and part of illegal gambling businesses, namely businesses that engaged in and facilitated online poker, in violation of New York Penal Law Sections 225.00 and 225.05 and the laws of other states and which businesses involved five and more persons who conducted, financed, managed, supervised, directed, and owned all and part of such businesses and which businesses have been and have remained in substantially continuous operation for a period in excess of 30 days and had gross revenues of $2,000 in a single day, all in violation of 18 U.S.C. Section 1955?

MR. BERKE: Your Honor, in connection with this

separate object of the conspiracy, I think what Mr. Elie can certainly state is that he understood that they were processing transactions for poker companies that had five or more employees, were in continuous operation for more than 30 days, and had gross revenue of more than $2,000 per day. He certainly knew that poker was gambling. He certainly knew that the government had taken the position that Internet poker was illegal gambling under the statute.

THE COURT: Do you adopt your attorney's statement, Mr. Elie?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is that satisfactory to the government?

MR. GOLDSTEIN: Yes, your Honor.

THE COURT: Did you, Mr. Elie, in furtherance of the conspiracy and to effect its illegal objects commit at least the following overt act in the Southern District of New York, which includes among other places Manhattan and Bronx; that is, on or about July 27, 2009, you processed an electronic check for Full Tilt Poker from the bank account of a customer in New York, New York through a payment processing account you had established at Fifth Third Bank?

Did you do that, sir, and for that purpose?

MR. BERKE: Your Honor, again, Mr. Elie can certainly say that he understood that the companies for which he was processing transactions had customers in New York, and while he

doesn't know about this specific transaction, he doesn't dispute it and agrees that there were customers in New York for whom he processed transactions.

THE COURT: Do you adopt that statement, Mr. Elie?

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Goldstein.

MR. GOLDSTEIN: That's fine, your Honor.

THE COURT: In a super abundance of caution, it occurs to me to say to you, Mr. Elie, do you understand that by entering this plea you are surrendering any claim that you did not act with criminal intent because you relied on the advice of counsel? Do you understand that?

THE DEFENDANT: Could I have one second.

THE COURT: Yes.

(Pause)

MR. BERKE: Your Honor, just to clarify as necessary, obviously the conspiracy requires that Mr. Elie be guilty of one of the two objects and certainly Mr. Elie has, we think, allocuted to the bank fraud and agrees that there is no object, no issue rather with regard to reliance on counsel as to the bank fraud counts which are obviously separate and that are involved in the case.

Mr. Elie agrees that in pleading guilty to a conspiracy charge with two objects, one to commit bank fraud, one to conspire to run an illegal gambling business, that he

will no longer have a reliance-on-counsel defense in any way with regard to the second object of the conspiracy.

THE COURT: I don't know if I want to take a plea under those circumstances. There is no advice-of-counsel defense. This man is admitting that he is guilty of the felony of conspiracy.

MR. BERKE: Absolutely, your Honor.

THE COURT: In order to do that, he has to satisfy me that he is admitting that he had the requisite criminal intent, and reliance on counsel in some circumstances is not consistent with that event. I want a flat-out statement from him to be perfectly frank that he is here admitting that he acted with criminal intent in committing this conspiracy.

MR. BERKE: Absolutely, your Honor. I didn't mean my statements in any way to mean anything other than that. What I was referring to, let me explain and then Mr. Elie will be able to do that. Mr. Elie is obviously admitting to bank fraud and the conspiracy that charges bank fraud as well as a separate object, operating an illegal gambling business. The only point I was make something, there was, he certainly understood that he was involved in transacting in a business for poker. He is not relying on any reliance-on-counsel defense in connection with this case or otherwise, and he is prepared to say that, your Honor.

THE COURT: Let's hear it from you, Mr. Elie.

THE DEFENDANT: Your Honor, in 2009, I worked with others to establish an account at Fifth Third --

MR. BERKE: One moment.

THE COURT: We are not there yet, Mr. Elie.

(Pause)

THE DEFENDANT: Yes, your Honor. I am not relying on advice of counsel and I am pleading guilty to the conspiracy.

THE COURT: You are acknowledging that in committing this conspiracy you acted with criminal intent. Is that right?

THE DEFENDANT: Yes, sir.

THE COURT: OK. Satisfactory to the government?

MR. GOLDSTEIN: That is, your Honor.

THE COURT: OK.

MR. BERKE: Thank you, your Honor. I apologize; attempting to clarify did anything but. Thank you for clarifying, your Honor.

THE COURT: OK. Now it's your turn, Mr. Elie. Tell me in your own words what it is you did that in your mind makes you guilty of Count 1.

THE DEFENDANT: In 2009, I worked with others to establish an account at Fifth Third Bank to process transactions for certain online poker companies. When I opened the account, I did not tell the bank that the account would be used for poker transactions. Instead, I told the bank the account would be used for my unrelated existing e-commerce

business. Later, when the bank became suspicious about the transactions, I denied that the account was being used for gaming transactions.

I made these statements to the bank in order to get the bank to process poker transactions which I believed the bank would not otherwise agree to process.

I knew that my conduct was wrong.

I understood that the poker companies for which I processed transactions had customers located in New York.

THE COURT: Did you understand that the poker companies were involved in violating New York law.

THE DEFENDANT: The poker companies had more than five employees who were in continuous operation for more than 30 days and had gross revenues of more than $2,000 per day.

THE COURT: And were violating New York law?

THE DEFENDANT: Yes, sir.

THE COURT: Satisfactory?

MR. GOLDSTEIN: That is, your Honor. The only other thing I would proffer again that I believe was covered in your original allocution is that the banks at issue were insured by the FDIC and as Mr. Elie said that the gambling businesses at issue were in operation continuously for 30 days or more and had gross revenues of more than $2,000 in a single day.

THE COURT: Thank you.

Mr. Elie, how do you now plead to the charge in Count

1 of the superseding information, guilty or not guilty?
THE DEFENDANT: Guilty, your Honor.
THE COURT: Are you pleading guilty because you are in fact guilty as charged?
THE DEFENDANT: Yes, your Honor.
THE COURT: I accept the plea. I will enter a judgment of guilty because the defendant acknowledges that he is guilty as charged in the information, he knows that he has a right to a trial, he knows what the maximum possible sentence is, he understands that the court will take into account the sentencing guidelines. I find that the plea is voluntary and supported by an independent basis in fact containing each of the essential elements of the offense.
Mr. Elie, as I indicated to you, the probation department will be preparing a presentence report to assist in sentencing you. You will be interviewed by the probation officer who does that. It's important that the information you give to the probation officer be truthful and accurate. The report can have an important bearing on the decision as to what your sentence will be. You and your attorney will have the right to read and to comment on the report and to speak on your behalf before sentence is imposed.
Any written submissions on behalf of the defendant, must be in my chambers no later than two weeks before sentencing. Sentencing date.

THE DEPUTY CLERK: Wednesday, October 3, at 4:00.
THE COURT: Does that work for everybody?
MR. GOLDSTEIN: It's fine with the government.
MR. BERKE: It's fine with the defense as well.
THE COURT: Sentencing October 3 at 4:00 p.m.
Mr. Goldstein, the prosecution case summary is due to the probation officer within two weeks. The defendant is to make himself available to probation for an interview within two weeks. Does the government have any objection to the present bond being continued pending sentence?
MR. GOLDSTEIN: No, your Honor. I believe that defense counsel has one minor modification that the government does not object to.
THE COURT: Mr. Berke.
MR. BERKE: Thank you, your Honor. Our application is simply to extend the travel restrictions to allow Mr. Elie to travel to Massachusetts to visit his grandmother and Connecticut to visit his father. He is now permitted to visit a variety of states but not those two.
THE COURT: Granted.
Mr. Elie, do you understand that you must be in my courtroom for sentencing at 4:00 on October 3, 2012 and that if you don't show up, you may be guilty of a violation of the Bail Reform Act and subject to a fine of up to a quarter million dollars and/or an additional prison term?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that all the conditions on which you have been released up to now continue to apply and that any violations thereof could result in the imposition of serious penalties.

THE DEFENDANT: Yes, your Honor.

THE COURT: OK.

Mr. Devlin-Brown, is this still going on April 9?

MR. DEVLIN-BROWN: Your Honor, this took us somewhat unexpectedly on Friday. We have had a conversation with counsel for Mr. Campos. I think all I can really say at this point is I think by Wednesday we will know if it's going or we will be in a similar situation as today.

THE COURT: If it is going, how long a trial do you anticipate?

MR. DEVLIN-BROWN: I think it's a 2-week trial; I think that's the longest it would be.

THE COURT: OK. All right.

Thank you all. I assume there is nothing else.

MR. BERKE: Nothing else. Thank you, your Honor.

MR. GOLDSTEIN: Thank you, your Honor.

THE COURT: Thank you.

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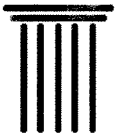

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EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA : SUPERSEDING INFORMATION

-v- :

CHAD ELIE, : S6 10 Cr. 336 (LAK)

Defendant. :

- - - - - - - - - - - - - - - - - - x

The United States Attorney charges:

Background

1. From at least in or about 2006, up through and including on or about April 14, 2011, the three leading internet poker companies doing business in the United States were PokerStars, Full Tilt Poker and Absolute Poker/Ultimate Bet (collectively, the "Poker Companies"). Because United States banks were largely unwilling to process payments for an illegal activity such as internet gambling, the three Poker Companies used fraudulent methods to avoid these restrictions and to receive billions of dollars from United States residents who gambled through the Poker Companies. To accomplish this deceit, the Poker Companies relied on third party payment processors who lied to United States banks about the nature of the poker transactions they were processing and covered up those lies through the creation of phony corporations and websites to disguise payments to the Poker Companies.

2. From in or about May 2008 up through and including on or about April 14, 2011, CHAD ELIE, the defendant,

served as a payment processor for, at various times, each of the three Poker Companies. In 2008, ELIE assisted Australian poker processor Intabill in disguising poker payment transactions for the Poker Companies, including by establishing a bank account that ELIE represented would be used to process payments for "payday loans" but that, in truth and in fact, was used to process transactions for Pokerstars. In or around the summer of 2009, ELIE established a bank account at Fifth Third bank that ELIE claimed would be used to process payments for various internet membership clubs, but that, in truth and in fact, ELIE used to process millions of dollars in payments for the Poker Companies. Beginning in or around the fall of 2009, and continuing into early 2011, ELIE offered to invest millions of dollars in three failing banks, including Sunfirst Bank, all of which have since been ordered closed by bank regulators, in return for processing internet poker transactions.

Statutory Allegations

3. From in or about May 2008 up through and including on or about April 14, 2011, in the Southern District of New York and elsewhere, CHAD ELIE, the defendant, together with others known and unknown, willfully and knowingly did combine, conspire, confederate, and agree together and with each other to commit offenses against the United States, in violation of Sections 1344 and 1955 of Title 18 of the United States Code, to

wit, processing financial transactions for internet poker and lying to banks to induce them to process these transactions.

4. It was a part and an object of the conspiracy that CHAD ELIE, the defendant, and others known and unknown, willfully and knowingly would and did execute and attempt to execute a scheme and artifice to defraud a financial institution, the deposits of which were insured by the Federal Deposit Insurance Corporation, and to obtain monies, funds, credits, assets, securities, and other property owned by and under the custody and control of that financial institution by means of false and fraudulent pretenses, representations, and promises, in violation of Title 18, United States Code, Section 1344.

5. It was a further part and an object of the conspiracy that CHAD ELIE, the defendant, and others known and unknown, knowingly would and did conduct, finance, manage, supervise, direct, and own all and part of illegal gambling businesses, namely businesses that engaged in and facilitated online poker, in violation of New York State Penal Law Sections 225.00 and 225.05 and the laws of other states, and which businesses involved five and more persons who conducted, financed, managed, supervised, directed, and owned all and part of such businesses, and which businesses had been and had remained in substantially continuous operation for a period in excess of thirty days and had gross revenues of $2,000 in a

single day, in violation of Title 18, United States Code, Section 1955.

OVERT ACTS

6. In furtherance of the conspiracy and to effect the illegal objects thereof, CHAD ELIE, the defendant, and others known and unknown, committed the following overt acts, among others, in the Southern District of New York and elsewhere:

a. On or about January 20, 2009, PokerStars, Full Tilt Poker, and Absolute Poker each received an electronic transfer of funds from a customer located in the Southern District of New York.

b. On or about July 27, 2009, CHAD ELIE, the defendant, processed an electronic check for Full Tilt Poker from the bank account of a customer in New York, New York through a payment processing account ELIE had established at Fifth Third Bank.

c. On or about September 22, 2009, ELIE sent an e-mail to a Fifth Third Bank employee falsely denying that the account had been used for internet gambling.

(Title 18, United States Code, Section 371.)

FORFEITURE ALLEGATION

7. As a result of committing the offense alleged in Count One of this Information, CHAD ELIE, the defendant, shall forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C), 28 U.S.C. § 2461(c), and 18 U.S.C. § 982(a)(2)(A), all property constituting or derived from proceeds obtained directly and indirectly as a result of the offense alleged in Count One, including but not limited to $500,000 in United States currency.

Substitute Asset Provision

8. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to 18 U.S.C. § 982(b) and 21 U.S.C. § 853(p), to seek forfeiture of any other property of said defendant up to the value of the above

forfeitable property.

(Title 18, United States Code, Sections 981 and 982; Title 21, United States Code, Section 853; Title 28, United States Code, Section 2461.)

PREET BHARARA
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

CHAD ELIE,

Defendant.

INFORMATION

S6 10 Cr. 336 (LAK)

(18 U.S.C. Section 371)

PREET BHARARA
United States Attorney.

3/26/12

Defendant Chad Elie present with attorneys Barry Berke and Dani R. James. AUSAs Arlo Devlin-Brown & Andrew Goldstein. Court Reporter Toni Stanley present. Waiver of indictment & (S6) information filed in open court. Defendant Elie entered a plea of guilty as charged to the (S6) information. PSI was ordered. Sentencing was scheduled for 10/3/12 at 4:00pm. Defendant remained released on bail. Hearing duration was 45 minutes.

Kaplan, J

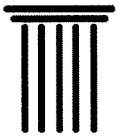

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EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
v.	:	No. 10 CR. 336 (LAK)
	:	ECF Case
CHAD ELIE and JOHN CAMPOS,	:	
Defendants.	:	

DEFENDANTS' REPLY TO THE GOVERNMENT'S MOTION *IN LIMINE* REGARDING THE RELEVANCE OF SKILL AND REQUISITE *MENS REA*

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Background

As part of a misguided attempt to avoid its burden to prove every element of each charged offense by seeking to substitute its views of the facts for that of the jury, the government includes a lengthy recitation of its allegations, many of which will be contested at trial or are wholly irrelevant to the charges in this case. All of those arguments go to the weight to be afforded such evidence at trial, not the availability of defenses based on that evidence.

It bears noting, however, that the government's purported summary of what the legal opinion evidence would be at trial leaves out many significant facts. For example, the government neglected to mention that the legal opinions received by Elie and Campos included a detailed opinion addressed to SunFirst from Ashcroft Hanaway, the law firm of former United States Attorney General John Ashcroft and Catherine Hanaway, the former United States Attorney for the Eastern District of Missouri who had testified before Congress regarding UIGEA and had initiated one of the leading prosecutions on Internet gambling. In addition, both Elie and Campos received opinions addressing the lawfulness of the transactions from other law firms and experts in the gaming area, including Marc Zwillinger of Sonnenschein Nath & Rosenthal LLP, a former federal prosecutor experienced in Internet and online gaming law; Ian Imrich, a specialist in gaming law; and Akin Gump.[1] *See* Opinions attached as Exh. A to Gov't Br.[2]

Although the government tries to diminish the significance of these legal opinions by

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[1] A March 2010 memorandum from Akin Gump indicated that the Department of Justice considers "[t]ransfers of funds related to on-line poker that are conducted accurately and transparently . . . and pursuant to any license required for transferring money" to be lawful. While the government contends that the lawyer from Akin Gump issued a revised opinion in mid-July 2010 "walking back" his earlier opinion, Gov't Br. 10, neither Elie nor Campos ever saw or heard about the revised memorandum.

[2] While the government correctly notes that Mr. Elie retained William Cowden, a former Department of Justice attorney, following the seizures of his bank accounts, the government neglected to mention that after Mr. Elie participated in two proffer sessions in an effort to recover the seized funds and receive a non-prosecution agreement, Mr. Cowden provided him with a written legal opinion that Mr. Elie did not need to register as a money transmitter to remit money to merchants located abroad. The opinion by Mr. Cowden noted that Mr. Elie had been separately advised concerning the legality of Mr. Elie's company processing funds for its specific merchants, which included the online poker companies. *See* Exh. A to Feb. 29, 2012 Decl. of Barry H. Berke ("Berke Feb. 29 Decl.") at 6.

deriding them as nothing more than "self-serving" opinions for the poker companies, Gov't Br. 1, the opinions were not rendered by the poker companies. They were authored by respected lawyers, including former officials of the Department of Justice, in accordance with professional standards which require lawyers to exercise their independent judgment.[3] It is of course quite common for lawyers to provide legal opinions to third parties, such as the opinions that were shared with the banks and other third parties here considering whether to process poker transactions. *See* Model Rules of Prof'l Conduct R. 2.3 (authorizing lawyers to provide opinions to non-clients). There is no basis for the government to suggest that these lawyers did anything but comport with their ethical obligations.[4]

In any event, the government's complaints regarding the source and substance of the opinions have no bearing on the present motion. The question before the Court is whether the defendants should be permitted to challenge the government's proof as to all of the elements of UIGEA, IGBA, and money laundering, by presenting evidence regarding the characteristics of poker, their lack of knowledge of the factual elements, and their good faith belief that the conduct was lawful. It is respectfully submitted that it is for the jury to decide in light of all the facts and circumstances what weight should be given to such evidence.

Argument

I. Evidence Concerning the Level of Skill Involved in Online Poker is Relevant

The government contends that evidence of the role of skill and chance in online peer-to-

[3] *See, e.g.*, Model Rules of Prof'l Conduct R. 1.2 (lawyer may not counsel or assist in criminal or fraudulent conduct); *id.* R. 2.1 (lawyer must exercise independent professional judgment and provide candid advice).

[4] Not only is it appropriate for the defendants to have received the legal memoranda prepared by counsel for the poker companies, but the government agency tasked with issuing rules for the implementation of UIGEA affirmatively recommends that banks and processing businesses obtain legal opinions from counsel for their customers. *See* Exh. B to Berke Feb. 29 Decl. at 3, Board of Governors of the Federal Reserve System, *Prohibition on Funding of Unlawful Internet Gambling—A Small Entity Compliance Guide* (businesses involved with processing payments for commercial customers without Internet gambling licenses "should obtain from the commercial customer a reasoned legal opinion from the commercial customer's legal counsel that demonstrates that the commercial customer's Internet gambling business does not involve transactions that are prohibited by UIGEA").

peer poker is "irrelevant" because poker constitutes gambling as a matter of law under UIGEA, IGBA, and the underlying state laws. In so arguing, the government ignores the federal statutory elements in UIGEA and IGBA that the conduct at issue must constitute a "game subject to chance" and "gambling," respectively, and instead claims that state law is determinative. Gov't Br. 10-12.

With respect to UIGEA, before addressing the legality of the conduct under state law, the jury must first find that poker is a "game subject to chance." Defs.' Moving Br. 6-10. The government admits as much in stating that UIGEA "applies to any games that are 'subject to chance,' . . . *and* that are prohibited under the law of the state in which the 'bet or wager is initiated, received, or otherwise made." Gov't Br. 12. The government nonetheless argues that the Court should usurp the role of the jury by determining as a matter of law that poker satisfies the statutory requirement that it be "subject to chance."

So too under IGBA, the government must prove, and the jury must find, that the alleged conduct is "gambling" under federal law before evaluating whether it is unlawful under state law. *See* 18 U.S.C. § 1955(b)(1); Defs.' Moving Br. 11-14.[5] In order to give meaning to each of the statute's provisions, subsection (b)(2) must be understood as defining the types of activities that constitute gambling under the statute, which, if carried on by a "business" operating in the manner set forth in subsection (b)(1)(i)-(iii), are rendered unlawful.[6] Defs.' Moving Br. 14-17. Even when a federal statute defers to state law for determination of the illegality of certain conduct, federal definitions of the operative language in federal statutes continue to apply. *See,*

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[5] The government takes the Court's statement that "the focus of IGBA is upon the conduct of gambling businesses in the United States in violation of the laws of the states and political subdivisions in which they are conducted" completely out of context. Gov't Br. 11. The Court was not considering whether a state conclusion that poker is gambling is determinative under IGBA, but instead was addressing the defendants' extraterritoriality arguments under *Morrison*. *See United States v. Elie*, 2012 WL 383403, at *3 (S.D.N.Y. Feb. 7, 2012).

[6] That IGBA uses the phrase "includes, but is not limited to" does not alter this analysis. *See Molloy v. Metro. Transp. Auth.*, 94 F.3d 808, 812 (2d Cir. 1996) (with respect to statute defining "alteration" as "a change to an existing facility, including, but not limited to" seven enumerated examples, court held that only changes "similar to the specific items in the list" were captured by the statute).

e.g., *United States v. Campbell*, 167 F.3d 94, 97 (2d Cir. 1999) (holding that when evaluating enhanced penalties for reentry into the United States due to earlier convictions of a felony under state law, "the matter of [w]hether one has been 'convicted' within the language of [federal] statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State").[7]

The government's argument that the Court, not the jury, should determine whether poker is a "game subject to chance" or "gambling" is contrary to the Supreme Court's holdings in *United States v. Gaudin*, 515 U.S. 506, 512-13, 115 S. Ct. 2310, 2314-15 (1995), *Apprendi v. New Jersey*, 530 U.S. 466, 484-85, 120 S. Ct. 2348, 2359 (2000), and their progeny, that every element of a criminal statute requires separate determination by the jury. Even where the government argues that the evidence as to an element is strong, it must still be determined by the jury. *See United States v. Needham*, 604 F.3d 673, 679 (2d Cir. 2010) (instruction that drug robbery affected interstate commerce as a matter of law in Hobbs Act case "improperly supplanted the required jury finding"); *United States v. DeFries*, 129 F.3d 1293, 1311-12 (D.C. Cir. 1997) (reversing RICO conviction where court determined that "enterprise" existed as a matter of law because, "[a]s *Gaudin* makes clear, a court must give the jury the opportunity to evaluate whether the government has proven its case beyond a reasonable doubt for every element of the crime charged" despite the Court's assessment of the strength of the evidence presented).[8]

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[7] Limiting the reach of IGBA to federally-defined gambling businesses is necessary given that 18 U.S.C. § 1955(b)(1)(i) is not, on its face, limited to state *gambling* laws. State illegality is also not determinative because it is uncontested that even if a state decided to criminalize chess or stock trading, such activities would still remain outside IGBA's reach. That other IGBA cases have not so held has no bearing because the issue has never been presented to a court. *Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 149 (1924) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *Khulmani v. Barclay Nat'l Bank*, 504 F.3d 254, 321 (2d Cir. 2007) (same).

[8] The government's extensive recitation of various state gambling laws and jurisprudence is beside the point given that the disputed evidence is relevant to the separate question of whether online poker falls under the federal threshold determinations in UIGEA and IGBA. While defendants disagree with the government's characterization of the various state laws, the elements of those state law violations can be addressed in the jury instructions.

In fact, the Second Circuit's opinion just last week in *United States v. Banki*, __ F.3d __, 2012 WL 539962 (2d Cir. Feb. 22, 2012) confirms that whether online poker meets a statutory definition is not a question of law for the Court, but rather requires the jury to apply the facts to the legal standard set forth in the statute. In *Banki*, the defendant engaged in money transfers with family members in Iran through an intermediary called a "hawala." The government charged the defendant under 18 U.S.C. § 1960, which proscribes operation of an unlicensed "money transmitting business." The court instructed the jury that a "hawala is a money transmitting business." The Second Circuit vacated the conviction because by so instructing the jury, the "district court arguably was instructing the jury that if it found that Banki operated a 'hawala,' then he necessarily operated a money transmitting business, thereby taking the latter issue away from the jury." *Id.* at *13. This is precisely what the government is asking the Court to do here: take away from the jury the issue of whether online poker is "a game subject to chance" or "gambling." *See also Medley v. Runnels*, 506 F.3d 857, 864 (9th Cir. 2007) (vacating sentence enhancement based on discharge of a "firearm" during a felony because court impermissibly instructed jury that a flare gun is a "firearm" under state law rather than requiring jury to make that determination); *United States v. Hohn*, 8 F.3d 1301, 1307 (8th Cir. 1993) (affirming that in prosecution under statute prohibiting sale of drugs near a school, "[t]he final determination as to whether Central Park met the statutory definition of school was . . . a question of fact appropriate for the jury"); *see also* Defs.' Moving Br. 6-10, 17-21.[9]

[9] Far from supporting the government's IGBA argument, the central holding of *United States v. Hill*, 167 F.3d 1055, 1059-60, 1066-67 (6th Cir. 1999) (cited at Gov't Br. 16) reaffirms the *defendants'* contention that to prove a money laundering charge, the government must prove that defendants knew that the laundered funds came from a "criminal activity." The court rejected defendant's proffered evidence that he did not know that the laundered funds came from felonious, as opposed to misdemeanor, activities, because only knowledge of criminal activity was required. *Id.* at 1069. Moreover, opinions that the machines were not "gambling devices *per se*" were irrelevant because the defendant placed machines in places of business *intending* they be used for gambling. *Id.* After already holding the evidence inadmissible, the court's comments that it is within the sole province of the court to instruct the jury as to Tennessee's gambling laws are uncontroverted and inconsequential. *Id.*

Lastly, the government's argument that Congress intended UIGEA to reach poker is unsupported by the record and, in any event, is only relevant to the legal standard by which the jury will determine whether the government has proven that online poker is a "game subject to chance." The Court should reject the government's suggestion that Congress intended the test under UIGEA to be less than predominance in order to cover poker as a matter of law because it included the word "predominantly" in House Resolution 4777, an earlier unenacted internet gambling bill (whose purpose – unlike UIGEA – was to amend the Wire Act), and excluded that word in its later enactment of UIGEA. Gov't Br. 11-12. In fact, there was no discussion in committee reports or the statements of sponsors regarding the reason, if any, that the word "predominantly" was not included in UIGEA or its applicability to poker, and the government's bare speculation on this point is immaterial. *See Mead Corp. v. Tilley*, 490 U.S. 714, 723, 109 S. Ct. 2156, 2162 (1989) (holding that "[w]e do not attach decisive significance to the unexplained disappearance of one word from an unenacted bill because 'mute intermediate legislative maneuvers' are not reliable indicators of congressional intent") (citation omitted).[10]

[10] Incidental statements by the Federal Reserve and Department of Treasury suggesting that there may be some significance to the inclusion of the word "predominantly" in 31 U.S.C. § 5362(1)(B), are not the sort of lawmaking authority that entitle their views to deference since the agencies affirmatively declined to adopt a definition of a "game subject to chance" by rule or regulation. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27, 121 S. Ct. 2164, 2171 (2001). *See also* §5362(1)(C), which does not diminish or alter the scope of §5362(1)(A) with respect to sports betting, just as the word "predominantly" in §5362(1)(B) does not diminish or alter the term "game subject to chance" in §5362(1)(A). Indeed, even the agencies recognized that there will be some games that do not qualify as "games subject to chance" and noted that "the characterization of [each activity] depends on the specific facts and circumstances." Prohibition on Funding of Unlawful Internet Gambling, 73 Fed. Reg. 69,382, 69,386, 2008 WL 4915226 (Nov. 18, 2008). Contrary to the government's position, Gov't Br. 11-12, the record also shows that the April 5, 2006 statements of Department of Justice representative Bruce Ohr did not have any influence on Congress. Ohr testified about a wholly separate bill (an amendment to the Wire Act), which included the word predominantly both before and after his comments. *Compare* H.R. 4777, 109th Cong. § 1081(6)(A) (Feb. 16, 2006), *with* H.R. 4777, 109th Cong. § 1081(6)(A) (as reported by Comm. on the Judiciary, May 25, 2006). As for UIGEA, neither the initial bill prior to Ohr's testimony nor its final enactment included the word predominantly. *Compare* H.R. 4411, 109th Cong. § 5362(1)(A) (Nov. 18, 2005), *with* 18 U.S.C. § 5362(1)(A) (enacted Oct. 13, 2006). Finally, the government's arguments about the 1999 National Gambling Impact Study are similarly misplaced. *See* Elie's Mem. of Law in Supp. of Mot. to Dismiss the UIGEA Counts at 14-15.

II. Evidence of Defendants' Good Faith and Lack of Knowledge Is Relevant

The government's assertion that UIGEA and IGBA do not require proof of "willfulness" is inconsequential. The statutes clearly require proof of "knowing" conduct, a point that even the government concedes, admitting that it must prove "defendant's knowledge of the facts comprising the offense." Gov't Br. 18; *see also Flores-Figueroa v. United States*, 556 U.S. 646, 129 S. Ct. 1886, 1894 (2009) (holding that knowing *mens rea* standard applies to each element of the offense); *United States v. Godin*, 534 F.3d 51, 63 (1st Cir. 2008) (Lynch, J., concurring) (relying on *Apprendi* in noting that the jury needed to find "beyond a reasonable doubt that all of the statutory requirements have been met," including the requisite knowledge). That the charged conduct is "a game subject to chance" and "gambling" are "facts comprising the offenses" expressly set forth in UIGEA and IGBA, respectively. Therefore, the defendants are entitled to challenge the government's proof that defendants knew that online poker was a game subject to chance or had the "characteristics," *Staples v. United States*, 511 U.S. 600, 614-15, 114 S. Ct. 1793, 1802 (1994), that make it "gambling" under IGBA.

Additionally, as noted in our opening brief, proof of the "facts constituting the offense" under UIGEA requires not only knowledge that the conduct at issue constituted a game of chance, but also knowledge that the conduct constituted unlawful internet gambling. Defendants' argument that the government must prove the latter element does not change the analysis, or convert a mistake of fact defense into a mistake of law defense. Here, UIGEA expressly provides that defendants must have knowledge of unlawful internet gambling and, as the *Lyons* court recognized in its UIGEA jury instruction, defendants must "know that certain activities were prohibited by law" and the jury may consider whether "defendant acted with a good faith belief that his actions complied with the law[.]" *See* Feb. 21, 2012 Decl. of Barry H.

Berke Ex. 4 at 69-70, Transcript of Jury Charge, *United States v. Lyons*, 10 CR 10159 (D. Mass. Dec. 15, 2011).[11] Where a statute includes knowledge of illegality as an element of the offense – as UIGEA does – knowledge of illegality becomes a fact that must be proved beyond a reasonable doubt. *See, e.g., Liparota v. United States*, 471 U.S. 419, 425, 105 S. Ct. 2084, 2088 (1985) ("[W]e believe that § 2024(b)(1) requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations."); *United States v. Golitschek*, 808 F.2d 195, 203 (2d Cir. 1986) (reversing conviction where court failed to charge jury that defendant must know that he acted unlawfully because "when the law makes knowledge of some requirement an element of the offense, it is totally incorrect to say that ignorance of such law is no excuse or that everyone is presumed to know such law"); *United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989) (where statutes "incorporate knowledge of illegality as an element of the offense. . . the illegality is a fact of which the defendant must be aware to have the necessary *mens rea*"); *see also* Defs.' Br. 25-27.[12]

The Court should reject the government's reliance on *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001) for the proposition that the government is not required to prove that defendants knew that the conduct violated the law. Gov't Br. 20-21. *Cohen* concerned a violation of the Wire Act which, unlike UIGEA, does not include an express statutory provision regarding knowledge of the illegality of the underlying conduct. This distinction is clearly recognized by the *Cohen* court's reliance on *Bryan v. United States*, 524 U.S. 184, 118 S. Ct. 1939 (1998). In

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[11] IGBA also requires the government to prove that defendant knew the conduct violated state law. Defs.' Br. 31-32.

[12] The cases relied upon by the government for its assertion that good faith ignorance of the law is no defense, such as *United States v. Ansaldi*, 372 F.3d 118, 128 (2d Cir. 2004), are inapposite because they either involve statutes that do not include knowledge of illegality as an element, or where knowledge of illegality was not in doubt. Gov't Br. 17-18. *United States v. Ingredient Technology Corp.*, 698 F.2d 88 (2d Cir. 1983), cited by the government at pages 15 and 24, also does not support the government's efforts to preclude the evidence proffered here because the court simply held that after-the-fact expert evidence regarding whether the defendants' conduct was proscribed by law was irrelevant to the question of whether at the time the conduct occurred, defendants were acting in good faith or knew that they were committing a wrongful act. *Id.* at 97.

Bryan, the Supreme Court held that a knowing provision requires proof of knowledge of the facts that constitute the offense and not knowledge of the law "*unless the text of the statute dictates a different result*" and pointed to *Liparota* where the term "knowingly" "referred to knowledge of the law as well as knowledge of the relevant facts" as an example of that latter circumstance. *Id.* at 193, 193 n.15, 118 S. Ct. at 1946, 1946 n.15 (emphasis added).[13]

With respect to the money laundering charge, the government does not seriously contest that defendants are entitled to present evidence of their good faith and lack of knowledge that they were engaged in monetary transactions in promotion of, or derived from, unlawful activity. The government does not present any argument or even a single case establishing that such evidence should be excluded and instead buries its sparse and inaccurate remarks on the subject in a footnote. Gov't Br. 21 n.9. Specifically, the government misstates that 18 U.S.C. § 1956 requires an "intent to promote the carrying on of *unspecified* activity" when the statute states that Section 1956 requires proof of intent to "promote the carrying on of specified *unlawful* activity." 18 U.S.C. § 1956 (emphasis added). Moreover, *United States v. Ables*, 167 F.3d 1021, 1031 (6th Cir. 1999) – the only case cited by the government – does not even address the point and instead holds that a challenged, and likely erroneous, money laundering jury charge was superfluous in light of a stipulation between the parties.

The government's arguments regarding an advice of counsel defense are irrelevant because defendants are not asserting an advice of counsel defense. Rather, defendants seek to introduce evidence – including the legal opinions received by them – to show that they did not

[13] *Cohen's* discussion regarding defendant's claim that he lacked the requisite *mens rea* because he did not "knowingly transmit bets" given the creative "account-wagering" structure he employed are likewise inapposite. 260 F.3d at 76. There was no question in *Cohen* that defendant knew his conduct was in connection with sports betting and that his business solicited and accepted bets from its customers, activities expressly proscribed by the Wire Act. Here, neither UIGEA nor IGBA specifically identify poker as a prohibited gambling activity. In addition, the *Cohen* court found that regardless of defendant's knowledge about his transmission of bets, he "admitt[ed] that he knowingly transmitted information assisting in the placing of bets," a violation of the statute "[i]n any event." *Id.*

have knowledge of the essential elements of the offenses, namely that poker was a "game subject to chance," and "unlawful Internet gambling" under UIGEA, or constituted "gambling" under IGBA. While the government presents arguments concerning the strength of such evidence, these arguments go to weight and not admissibility. The defendants should be able to present all of the facts that informed their knowledge and influenced their state of mind, even if that evidence takes the form of legal opinions.[14]

The government's final argument, that the jury will be unable to adhere to the Court's legal instructions if it is presented with the legal memoranda, Gov't Br. 24, is purely speculative and does not come close to "substantially outweighing" the highly probative value of the evidence to defendants' knowledge and state of mind, particularly if the Court gives an appropriate limiting instruction. Just as in the KPMG matter where this Court allowed the government to introduce documents that contained legal conclusions over defendants' objection, there is "no reason to think that the jury could not follow limiting instructions with respect to any statement in documents that may be admitted or that it would not scrupulously adhere to the Court's instructions at the close of the evidence." *See United States v. Stein*, 2007 WL 3009650, at *3 (S.D.N.Y. Oct. 15, 2007).[15]

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[14] This Court in the KPMG case when instructing the jury that it may consider legal opinion letters that the government alleged the defendants knew were false indicated that even though they are "not evidence as to what the law is," the jury may still consider them as evidence on what "the author and anybody who read the letter actually thought the law was[.]" *See* Exh. C to Berke Feb. 29 Decl. at 5278, Transcript of Jury Charge, *United States v. Larson*, 105 CR 888 (S.D.N.Y. Dec. 11, 2008); s*ee also SEC v. M&A West Inc.*, 538 F.3d 1043, 1054 (9th Cir. 2008) (legal opinions concerning safe harbor provisions upon which defendant relied were relevant to defendant's state of mind).

[15] The government also argues that the legal memoranda should not be admitted because they are self-serving and "plainly wrong on the law." Gov't Br. 24. Such contentions – erroneous as they are – are irrelevant because the key inquiry is whether defendants saw the memoranda, and whether the memoranda informed their knowledge. *See Cheek v. United States*, 498 U.S. 192, 203, 111 S. Ct. 604, 611 (1991) (rejecting requirement that a claimed good-faith defense be objectively reasonable); *United States v. Regan*, 937 F.2d 823, 826 (2d Cir. 1991) (holding that appellants' belief need not be "correct or even objectively reasonable" but rather that it be "made in good faith"). Indeed, far from being "plainly wrong," these opinions correctly opine that poker is not covered by the Wire Act, which the Department of Justice now admits.

Dated: February 29, 2012
New York, New York

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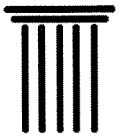

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EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

10 Cr. 336 (LAK)

-v.- :

CHAD ELIE and :
JOHN CAMPOS,

:

Defendants.

- x

GOVERNMENT'S MOTION *IN LIMINE* REGARDING RELEVANCE OF SKILL AND REQUISITE MENS REA

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GOVERNMENT'S MOTION *IN LIMINE* REGARDING RELEVANCE OF SKILL AND REQUISITE MENS REA

The United States of America, by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, Arlo Devlin-Brown and Andrew D. Goldstein, of counsel, submits this motion *in limine* to address two issues raised by counsel for defendants Chad Elie ("Elie") and John Campos ("Campos") regarding their expected defenses at trial: first, whether or to what extent the nature of the game of poker presents factual determinations for the jury as opposed to legal determinations for the Court; and second, the requisite mens rea under the Illegal Gambling Businesses Act of 1970 ("IGBA"), 18 U.S.C. § 1955; the Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C §§ 5361-67 ("UIGEA"); and money laundering conspiracy, 18 U.S.C. § 1956, including the availability of a good faith defense. As set forth below, the Government respectfully submits that (a) evidence regarding the amount of skill involved in poker is irrelevant and therefore should be excluded from jury consideration, because poker is a form of gambling covered by the referenced state statutes as a matter of law, and (b) because neither IGBA nor UIGEA requires violations to be willful, there is no good faith defense to these charges. Given this, the Government further submits that defendants should be precluded from introducing evidence regarding self-serving legal opinions prepared by counsel

for the poker companies – provided to Elie, Campos and others that the poker companies sought to induce to process their transactions – that assert that because poker involves a certain level of skill, running a poker business may not violate particular state and/or federal laws.

PRELIMINARY STATEMENT

Based on communications with defense counsel, the Government anticipates that Elie and Campos will attempt to present evidence and argument at trial that (1) poker involves more skill than chance, and that poker therefore does not technically constitute illegal gambling under the statutes charged, and (2) even if poker is prohibited, Elie and Campos have a "good faith" defense because they believed that the skill involved in the game of poker made it different from the kinds of gambling prohibited under state and federal law. With regard to the first issue, the Government anticipates (although the defense has provided no notice), that defendants would seek to call one or more "experts" who would attempt to quantify the degree of skill versus the degree of chance involved in poker. With respect to the second issue, the Government expects that defendants will attempt to introduce or reference legal opinions prepared not by their own counsel, but by counsel to the internet gambling companies for whom they did financial processing, that suggest that because there is some measure of skill involved in online poker, there may be a defense as to its illegality. As set forth below, the Government submits that (a) because the law applicable in this case makes it clear that online poker constitutes illicit gambling, there are no factual determinations for the jury to make regarding whether or to what extent poker is a game of skill versus a game of chance, and thus any evidence or argument defendants seek to introduce regarding the level of skill involved in poker, expert or otherwise, should be excluded; and (b) because the IGBA and UIGEA charges do not require a showing of willfulness, a "good faith" defense is not available to defendants on those counts. Moreover, to

the extent that defendants seek to introduce as part of a good faith or advice of counsel defense those select legal opinions that the poker companies chose to share with processors they were soliciting, that evidence should be excluded as irrelevant, prejudicial, and confusing to the jury.

BACKGROUND

I. Elie and Campos's Purported "Good Faith" Defense

The general facts regarding the offenses charged in this case are set forth in the Indictment and in the Government's Response to Defendants' Pretrial Motions to Dismiss, filed on November 7, 2011 (Docket #90). The following additional background information, which the Government expects to establish at trial, is relevant to defendants' attempt to make an issue out of the level of skill involved in poker, and the potential for a "good faith" defense.

A. Elie's Involvement with Intabill, and His Deal with Pokerstars

The Indictment alleges that Elie began processing transactions for internet gambling companies – specifically, for Pokerstars, Full Tilt Poker and Absolute Poker (the "Poker Companies") – beginning in or around 2008. The Government's evidence will show that Elie assisted a company called Intabill with processing these transactions, which were disguised by Elie's conspirators so that the banks would believe the transactions were not related to gambling. As Intabill collapsed in late 2008 – owing tens of millions of dollars to the Poker Companies – Elie transferred to his own bank account $4 million from an Intabill account Pokerstars had used to obtain money from customers throughout the United States. Elie refused to return the money notwithstanding what Elie claimed were threats on his life by mafiosi linked to one of his Intabill processing co-conspirators. Elie, however, ultimately negotiated a deal directly with the head of Pokerstars, co-defendant Isai Scheinberg, through which he would return some of the money and find new processing opportunities for Pokerstars. In fact, in the summer of 2009 Elie processed

millions of dollars of transactions for all three Poker Companies through his company Viable Marketing Corporation via an account Elie had opened at Fifth Third Bank. Elie did not tell the bank he would be processing internet gambling transactions, and when the bank halted the processing, alarmed by the high volume of returned transactions, Elie falsely denied that the transactions related to internet gambling.

B. The Court-Ordered Seizures Of Elie's Bank Accounts In October 2009

On or about October 26, 2009, the Government obtained warrants from a United States Magistrate Judge for the seizure of approximately $8.6 million in bank accounts controlled by Elie at Fifth Third Bank and Bank of America. The affidavit in support of the warrants alleged that the accounts contained funds traced to the operation of gambling businesses operating in violation of IGBA, 18 U.S.C. § 1955, as did the warrants themselves. On that same day, Elie spoke briefly to two FBI agents, who informed Elie that the funds were seized because they related to the processing of illegal gambling transactions. Elie stated that he would travel to New York the following week to meet with the FBI agents and discuss the matter, but did not do so. In fact, Elie continued with negotiations already underway with defendant Campos whereby Elie and Elie's partner, Jeremy Johnson, would purchase a substantial share of Sunfirst Bank ("Sunfirst") in Saint George, Utah, in return for Sunfirst processing transactions for the Poker Companies and for internet marketing programs offering "services" like financial advice and access to supposed grant money.[1] Following the seizures of the Viable Marketing account at Fifth Third Bank, however, Elie stepped back to serve as a silent partner in the new venture, instructing Sunfirst to keep his name off the account and arranging for Jeremy Johnson to hold

[1] Jeremy Johnson has since been indicted for fraud in the District of Utah and sued by the Federal Trade Commission relating to internet marketing scams that used processing accounts at Sunfirst to bilk consumers. *See United States* v. *Johnson*, 11 Cr. 501 (D. Utah).

the stock in the bank on Elie's behalf.

C. Problems at Sunfirst Bank

Sunfirst's processing for Elie and Johnson ran into trouble from the outset. The high volume of transactions and returns were difficult for the bank to manage and posed risks to its capital, which caused the FDIC to express concerns. Additionally, in the spring of 2010 the FTC contacted Sunfirst to investigate fraudulent marketing schemes that Johnson was sending to Sunfirst to process along with the poker traffic. Then, also in the spring of 2010, Sunfirst received grand jury subpoenas from two United States Attorney's Offices (including this one), demanding documents relating to the internet gambling transactions. Campos, in fact, was stopped at the airport by the FBI in July 2010 as he traveled with a lawyer who routinely represented Full Tilt Poker and Pokerstars en route to Europe to meet with the principals of the poker companies. Campos, however, remained firm in supporting Sunfirst's continued processing of payments for the Poker Companies, even soliciting Johnson for further investment in the bank and, in April 2010, accepting a $4,500 payment from Johnson for "consulting" even though the bank's BSA officer told Campos it violated the bank bribery law to do so.

The poker processing at Sunfirst lasted until early November 2010 when, following an examination, the FDIC issued a consent order directing Sunfirst to cease all processing in the accounts used to process transactions for the Poker Companies as well as third party payment processing generally. As a result, the Poker Companies lost access to millions of dollars held by Sunfirst (the accounts were effectively frozen per the FDIC order) and were in need of a new payment processing channel.[2] Elie helped the Poker Companies find replacements for Sunfirst. In November 2010, Elie contacted Full Tilt Poker's Director of Payments, co-defendant Nelson

[2] The FDIC ultimately seized Sunfirst on November 4, 2011.

Burtnick, and told Burtnick that he "treated [] 2 banks like I did with SF [Sunfirst]." In fact, as with Sunfirst, Elie identified two small banks under FDIC scrutiny for low capital and promised investment in return for processing transactions for the poker companies. The FDIC directed the banks (one of which, All American Bank, has since been seized) to cease such processing shortly after it began.

D. The Poker Company Legal Opinions

In late summer or early fall of 2009 – after Elie had processed millions of dollars in transactions for all three Poker Companies through his Viable Marketing Corporation – Elie obtained a "confidential draft" of a legal opinion authored by Full Tilt Poker's longtime lawyer, Ian Imrich, entitled "The Legality Under Substantive Federal Law of Peer to Peer Virtual Online Poker Cardrooms as Conducted on the Worldwide Internet" (the "Imrich Opinion"). (The Imrich Opinion and the other legal opinions provided by the Poker Companies described below are attached hereto as Exhibit A.) The 28-page Imrich Opinion asserted that internet poker was not covered by federal law, including UIGEA, because that Act allegedly required that "chance must be the dominant element in the outcome of the game" and because poker purportedly was not considered unlawful gambling under "most" state laws. The ensuing discussion, much of it apparently lifted from other poker industry legal opinions then making the rounds,[3] drew heavily on studies funded by the internet poker industry purporting to show the significant role of skill in poker, and simply ignored precedent under state law and IGBA treating poker as a form of gambling. (As set forth in more detail below and in the Government's Opposition to Defendants' Motions to Dismiss, numerous states explicitly prohibit poker and similar card

[3] Sunfirst also maintained in its files a July 17, 2009 legal opinion from Sonnenschein, outside counsel to Pokerstars, that was addressed to the Israel-based attorneys for Pokerstars and that contained much of the same analysis, verbatim, as the Imrich Opinion. It is not clear when Sunfirst Bank obtained the Sonnenschein opinion.

games.) Nor did Imrich note the numerous federal seizures of poker processing funds to date, seizures which Imrich was well aware of and which Full Tilt Poker pointedly had elected not to challenge.

On September 28, 2009 – before Sunfirst began its processing of poker transactions – Elie forwarded the Imrich opinion to his partner Jeremy Johnson. Johnson then forwarded the opinion to Campos, stating that "I think they can have one of these legal docs made in the bank[']s name if you want."

The next day, September 29, 2009, Campos forwarded the Imrich opinion by e-mail to Ray Quinney, the Utah law firm that was Sunfirst Bank's regular outside counsel. Campos commented in the e-mail to the bank's counsel that Elie wanted to invest in the bank and "[t]he question is, can Sunfirst Bank process these checks [for Elie's company]; because we believe that Online Poker does not constitute gambling?" Campos asked the bank's lawyers to "review and render a legal opinion for Sunfirst Bank on this issue." Later that day, one of the bank's attorneys, Scott Clark, a partner at Ray Quinney, responded in an e-mail to Campos. The bank's attorney began with the observation that:

> One rule of thumb with regard to lawyers (I am one, I should know) is that the longer it takes for a lawyer to answer a simple question, the more doubtful is the response. Note the length of the opinion of counsel in reaching the opinion that 'Online Poker' is not prohibited under U.S. law because (among other reasons) it is a game between two persons based predominantly upon the exercise of skill, not chance. . . . Utah law is very simple. . . . "Gambling" is to risk "anything of value for a return or risking anything of value upon the outcome of a contest, game, gaming scheme, or gaming device when the return is based upon an element of chance."

Disagreeing with the Imrich opinion, Clark concluded his email by stating, "I cannot conclude that Utah law would deem poker, if played for money or credits, would be a game of skill only," and he warned that "proceeds from gambling in possession of the bank would be subject to

seizure or forfeiture if the Utah court found that the gambling violated Utah law."

Campos responded by e-mail later that day: "Scott, you are up to your old tricks again, being a wet blanket." Campos further asserted that "On Line Poker, is not gambling it is almost a sport like bowling" but promised to "do our due diligence and make sure we are cleared by the state and the Fed."

Campos then appears to have forwarded the e-mail from the bank's lawyer to Elie (thus waiving any privilege), commenting that "it looks like there is some question about whether or not On Line Gambling will be considered gambling. It is better to cross this bridge now than to jump in and make a mistake." Elie e-mailed in response that his company "needs to work with a bank in a very special and trusted way" and that the "draft opinion that was circulated over the past few days . . . more than covers any and all liabilities of the bank" and that they had "dozens of other attorneys who completely concur." Campos replied to Elie that they had "forwarded the legal opinion along with our position to the state for their blessing" and that they "need approval from the State."

The State of Utah, however, did not provide approval. Tom Bay, the Supervisor of Banks in the Utah Department of Financial Institutions, e-mailed Sunfirst's president on September 30, 2009 that the state would be concerned about "any perceived implication of the bank being involved in gambling" and that "[t]he attorney opinion may or may not be solid – I don't know." Bay pointed out that the opinion did not address "the Utah prohibition against gambling" and that "[i]t would probably come down to reputational risk for the bank, and how Utah law enforcement would possibly perceive the bank's involvement in gambling by taking deposits. I don't know if the attorney opinion would hold water." *Id.* Sunfirst's president forwarded Bay's e-mail to Campos – a non-lawyer – who replied, inexplicably, "I would say that

is a big yes."

Having been told by both Sunfirst's lawyer and regulator that the legal opinion provided by Elie and drafted by the Full Tilt Poker lawyer was dubious, Campos nonetheless continued to promote the poker processing-for-investment deal, and Sunfirst ultimately processed over $200 million in transactions for the Poker Companies from late 2009 through November 2010.

Elie, too, received advice other than that provided by Full Tilt Poker attorney Ian Imrich. Following the October 24, 2009 seizures of his bank accounts at Fifth Third Bank, Elie retained a former Department of Justice attorney, William Cowden, to represent him in connection with the Government's ongoing criminal investigation. During the ensuing months, as Elie and Mr. Cowden knew, three individuals who had processed payments with Elie, Daniel Tzvetkoff (the head of Intabill), Curtis Pope, and Andrew Thornhill (who had been part of the Sunfirst processing plan) were all arrested on charges related to processing payments for internet poker. While the precise advice Mr. Cowden may have given to Elie is unknown at this stage, Mr. Cowden arranged for Elie to participate in two proffers with the United States Attorney's Office in an effort to resolve his case and did not challenge the Government's seizure of Elie's bank accounts.

In the summer of 2010, after Sunfirst received subpoenas from two United States Attorney's Offices regarding gambling processing, Campos and the bank endeavored to collect additional legal opinions from attorneys for the Poker Companies. First, on July 3, 2010, a day after he had participated in a proffer session with the U.S. Attorney's Office, Elie e-mailed Jeremy Johnson a copy of a single-page memo addressed to Pokerstars from its attorney, which Johnson then forwarded to Campos. The single-page memo did not purport to analyze the law, but instead opined on the supposed "present enforcement position of the Department of Justice,"

suggesting that "transparent" poker processing, *i.e.* where banks were not lied to about the transactions, would not face prosecution under gambling statutes. (By mid-July, the same lawyer issued a revised one-page opinion walking back much of this argument.) Then, in late July 2010, after Campos was met by the FBI at JFK airport while in the company of a lawyer for Pokerstars and Full Tilt Poker and en route to meetings at their overseas offices, Sunfirst obtained at least one additional legal opinion drafted by attorneys for Pokerstars that purported to analyze federal law. In an e-mail dated July 24, 2010 from Pokerstars head and co-defendant Isai Scheinberg to Jeremy Johnson, Scheinberg commented that "we have another good federal opinion from a conservative law firm to strengthen the bank's overall position." At the request of Sunfirst, the bank's name was ultimately substituted for Pokerstars as the recipient for this legal opinion.

ARGUMENT

I. Evidence Concerning the Level of Skill Involved in Online Poker Is Irrelevant and Should Be Excluded

The Government anticipates that Elie and Campos will attempt to introduce, potentially through the testimony of an expert, evidence and argument concerning the degree to which skill, as opposed to chance, is involved in poker, ostensibly to show that poker is not gambling. As set forth below, however, under both IGBA and UIGEA and the underlying state laws at issue here, it is clear that poker constitutes illegal gambling as a matter of law. Accordingly, evidence and argument concerning the degree of skill involved in poker has no relevance to the factual determinations to be made by the jury, and introduction of such evidence and argument would serve only to provide Elie and Campos with an opportunity to confuse the issues and relitigate their motions to dismiss before the jury.

Under IGBA, an "illegal gambling business" is "a gambling business which (i) is a violation of the law of a State . . . in which it is conducted." 18 U.S.C. § 1955(b)(1). As the

Court noted in its opinion denying the motions to dismiss the Indictment, "[t]he focus of IGBA is upon the conduct of gambling businesses in the United States in violation of the laws of the states and political subdivisions in which they are conducted." (Feb. 7, 2012 Mem. Op. at 7.) Thus, whether poker constitutes gambling – and what if any relevance the skill involved in poker playing has on this question – is irrelevant to the application of IGBA itself and has bearing only to the extent the question is relevant under reference to state law.

The extent to which poker involves skill is similarly irrelevant to the application of UIGEA. UIGEA provides that "No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling," certain types of payments. 31 U.S.C. § 5363. As with IGBA, UIGEA defines gambling with reference to other law, providing that gambling is "unlawful" 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)(A).

Making clear that that this provision was intended to cover virtually all forms of traditional gambling, UIGEA defines "bet or wager" 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). Congress's use of the catch-all phrase "game subject to chance" was deliberate. An earlier version of the law proposed in the same 2005-2006 Congress, House Resolution 4777, contains precisely the same quoted language with one modification, applying only to "a game *predominantly* subject to chance." *See* 2005 Cong. U.S. HR 4777 (9/22/06). The word "predominantly" was not included in the final version of UIGEA after the Department of Justice expressed the concern that the phrase "predominantly subject to chance" might not be "sufficient to cover card games, such as poker." *See* Testimony of Bruce

G. Ohr, before the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security (available at http://www.gambling-law-us.com/Articles-Notes/DOJ-testimony-4477.htm).[4]

Thus, UIGEA, as finally written, applies to any games that are "subject to chance," such as poker, and that are prohibited under the law of the state in which the "bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362(10)(A). Further cementing that UIGEA was intended to reference and not alter state gambling law, Congress provided a "rule of construction" that "[n]o provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361(b). UIGEA therefore, like IGBA, was designed to incorporate state gambling law, and state gambling law gives meaning to the statute's prohibitions.

The referenced state gambling laws at issue in this case make clear that poker is gambling simply as a matter of state law. Thus, poker businesses operating in those states are in violation of IGBA and UIGEA. The relevant counts of the Indictment assert that the gambling businesses at issue violated the laws of New York and the "laws of other states" where the Poker Companies operated. In a September 20, 2011 letter addressed to defendants' request for

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[4] Moreover, as set forth in the Government's Opposition to Defendants' Motion to Dismiss, additional Congressional findings indicate that UIGEA was intended to cover games such as poker. In the Congressional findings accompanying UIGEA's enactment, Congress explicitly referenced the Congressionally-commissioned "National Gambling Impact Study Commission" of 1999. *See* 31 U.S.C. § 5361(a)(1). The Commission's report includes numerous references to "poker" and "video poker." *See, e.g.*, Nat'l Gambling Impact Study Comm. Report at pp. 1-2, 2-3, 2-4, 2-5, 3-11, 3-12, 5-3, 7-4, 7-20, 7-23 and 7-24 (*available at* http://govinfo.library.unt.edu/ngisc/reports/finrpt.html). And in its chapter on Internet Gambling, the Commission stated "[m]ost Internet gambling sites offer casino-style gambling, such as blackjack, poker, slot machines, and roulette." Commission Report at p. 5-3.

specificity, the Government articulated its position that the Poker Companies "did not operate in compliance with the laws of *any* state," but that, given that (i) state laws varied in their degree of clarity and (ii) the Government was required to prove the violation of only a single state law to support a conviction, the Government at trial would argue that the Poker Companies' operations violated the law only in those states where "the state has specifically identified poker as a form of gambling covered by the state law, either explicitly through statute /regulations, or as decided by court(s) of the state." The letter further stated that the Government, for efficiency's sake, would not seek at trial to prove violations of the laws in each of these states but rather choose only a smaller sample which would be identified in the Government's request to charge.

The Government's present intention, as has been disclosed to the defense, is to prove that the gambling offered by the Poker Companies (which included in the case of Absolute Poker, blackjack as well as poker) violated the laws of nine or fewer states, falling into two categories.[5] The first category, which includes California, Connecticut, Florida, Michigan, Nevada, Ohio and Oregon, are all states where the state gambling statutes by their own terms explicitly cover "poker" or more broadly, in the cases of Florida and Michigan, *all* card games.[6] In these states

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[5] In the interests of clarity and simplicity for the jury, the Government may further refine this list in advance of trial, depending upon among other things the Court's resolution of this and potentially other pretrial motions.

[6] *See* Cal. Pen. Code § 337j(e)(1) (including "any poker or Pai Gow game, and any other game played with cards or tiles, or both" under the definition of a "controlled game" which is unlawful to offer in California without licensing); Conn. Gen. Stat. § 52-278a(2) (gambling includes "the playing of a casino gambling game such as blackjack, poker, craps, roulette or a slot machine"); Florida Sta. § 849-08 and 085 (gambling includes "any game of cards," though exempting "poker," "bridge" and other specific card games when played for "penny-ante" of less than $10 per hand); Mich. Comp. Laws 750.313 (gambling offenses include "playing at cards" and "betting on cards"); Nevada Rev. Stat. 463.0152 (defining "gambling game" to include "poker"); Ohio Rev. Code § 2915.01(D) (explicitly identifying "poker" as proscribed "game of chance," and affirmed as applying to poker by Ohio Supreme Court in *Garono v. State*, 524 N.E.2d 496, 500 (Ohio 1988)); Oregon Rev. Stat. § 167.117(4) (including both "poker" and specifically "Texas hold-'em" – one of the poker variations offered in this case – in the statute).

and others like them, there is no factual question for the jury other than whether the gambling companies offered "poker" or "cards."

In the remaining two states – New York and Utah – the state gambling statutes also clearly cover poker, although the statutes are drafted in more generally applicable terms. New York gambling law, which has consistently been applied by New York courts to poker, covers any game in which "the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." N.Y. Penal Law § 225.00. As discussed in more detail in the Government's Opposition to Defendants' Motion to Dismiss (at 25-30), *every* reported judicial opinion in the state of New York has consistently, for over 100 years, described poker as gambling, even in applying a predecessor statute that covered games where chance had to "predominate" rather than simply be "material." *See, e.g.*, *People* v. *Turner*, 165 Misc. 2d 222, 224 (N.Y. City Crim. Ct. 1995) (observing that N.Y. Penal Law § 255.00 covers games "such as poker or blackjack which require considerable skill in calculating the probability of drawing particular cards" because the ultimate outcomes "depends to a material degree upon the random distribution of cards."); *Katz Delicatessen, Inc.* v. *O'Connell*, 97 N.E.2d 906, 907 (N.Y. 1951) (affirming liquor license suspension because deli allowed social poker games in basement, a form of gambling); *People* v. *Dubinsky*, 31 N.Y.S. 2d 234, 236 (N.Y. Ct., Spec. Sess. 1941) (affirming conviction of man who charged fee to allow individuals to play poker in an apartment, noting that there was "no question" that stud poker was a form of gambling).[7] Utah – one of the few states to not even offer a state lottery – defines gambling

[7] *See also*, *Luetchford* v. *Lord*, 11 N.Y.S. 597, 597 (N.Y. Gen. Term. 1890), rev'd on other grounds, 30 N.E. 859 (N.Y. 1892) (involving foreclosure of a mortgage to pay a gambling debt involving poker); *People* v. *Bright*, 96 N.E. 362, 363 (N.Y. 1911) (conviction of defendant as a "common gambler" based on poker playing); *People* v. *Cohen*, 289 N.Y.S. 397, 399 (N.Y. Magis. Ct. 1936) (describing any game involving delivery of cards "face down" as a game of

extraordinarily broadly to include "risking anything of value upon the outcome of a contest, game, gaming scheme or gaming device when the return or outcome: (i) is based upon an element of chance; and (ii) is in accord with an agreement or understanding that someone will receive something of value in the event of a certain outcome." Utah Stat. § 76-10-1101(2).

Thus, the state laws at issue – and which are incorporated by IGBA and UIGEA – unequivocally treat poker as illegal gambling. The construction and meaning of these laws is not a question for the jury, but rather falls squarely within the province of the Court. *See, e.g.*, *United States* v. *Ingredient Tech. Corp.*, 698 F.2d 88, 97 (2d Cir. 1983) ("Questions of law are for the court."); *United States* v. *Stein*, 473 F. Supp. 2d 597, 601 (S.D.N.Y. 2007) ("The question whether there was a legal duty to register, given particular facts, would seem to be a question of law for the Court and thus a matter on which it would be inappropriate to take evidence before a jury."). In other words, determining whether poker is covered by the anti-gambling laws of California, Connecticut, Florida, Michigan, Nevada, Ohio, Oregon, New York and Utah – and hence, by IGBA and UIGEA in this case – is for the Court, not the jury, because such a determination (while relatively straightforward, as set forth above) entails looking at the language of the statutes, case law interpreting and applying the statutes, and their legislative history. *See Ingredient Tech.*, 698 F.2d at 97; *see also United States v. Hill,* 167 F.3d 1055, 1069 (6th Cir. 1999) ("[I]t is within the sole province of the court to determine the applicable law and to instruct the jury as to that law, which in this case includes Tennessee's gambling laws.") (internal citation and quotation marks omitted).

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chance); *In re Fisher*, 247 N.Y.S. 168, 178-79 (N.Y. App. Div. 1930) ("any game of cards for stakes is technically gambling"); *People* v. *Pack*, 39 N.Y.S.2d 302, 305 (N.Y. Ct. Spec. Sess. 1947) (same); *People ex rel Felming* v. *Welti*, 179 Misc. 76, 37 N.Y.S.2d 552 (N.Y. Sp. Sess. 1942) ("every card game is a game of chance and if played for money constitutes gambling under our statute.").

United States v. *Hill* is quite instructive in this regard. In *Hill*, the Sixth Circuit affirmed a district court's decision not to permit the defendant to introduce evidence regarding whether Tennessee's gambling law prohibited the possession and placement of video poker and slot machines. 167 F.3d at 1068-69. The defendant sought to introduce evidence that he was aware that "two state circuit courts had issued opinions stating that the [video poker and slot] machines are not gambling devices per se," and that "he had discussions with a lobbyist and an official from a lobbying organization concerning whether video poker and slot machines . . . were gambling devices per se under Tennessee law." *Id.* In affirming the exclusion of this evidence, the Sixth Circuit explained that "Hill's proffered evidence concerning the scope of Tennessee's gambling laws involves a question of law, not fact, and thus would have improperly invaded a matter solely within the court's province. . . . It is the court's task to instruct the jury on the law, and it is the jury's task to then consider evidence regarding Hill's conduct." *Id.* at 1069.

The analysis here is exactly the same. Just as the defendant in *Hill* was precluded from offering evidence regarding the applicability of Tennessee's gambling laws to video poker and slot machines, Elie and Campos should be precluded from introducing evidence and argument purporting to suggest that poker is not prohibited under IGBA, UIGEA, New York law or the laws of the eight other states listed above, based on the amount of alleged skill involved in playing it. If there is any question as to whether online poker is covered by these statutes – and the Government submits there is none – the question is one of law, and thus one for the Court to address through whatever proceeding it deems necessary and then instruct the jury upon.

II. IGBA and UIGEA Are General Intent Statutes, and No Good Faith or Advice of Counsel Defense Is Therefore Available

The parties also move *in limine* to seek a ruling on the intent requirements under IGBA and UIGEA (as well as the related money laundering charge) because resolution of the issue will

have significant impact on the admissibility of evidence and permissibility of various arguments relating to intent. Given that poker manifestly *is* covered by federal gambling statutes and referenced state law, the Government anticipates that the defendants will seek to offer a good faith or quasi advice-of-counsel defense at trial – *i.e.*, that they purportedly acted under the belief, even if incorrect, that online poker was exempt from the application of relevant gambling statutes based upon the legal opinions provided by the Poker Companies discussed above (collectively, the "Poker Company Legal Opinions"). Setting aside whether the facts here could come close to supporting such a defense, which they do not, acting in "good faith" is not a defense to the IGBA and UIGEA violations charged in the Indictment and defendants should be precluded from offering a variant of an "advice of counsel" defense based on the Poker Company Legal Opinions.

A. Applicable Law

In cases in which fraudulent intent or willfulness is an element of the crime charged, courts can give a "good faith" instruction to the jury that specifies that acting based on an honestly held belief negates the element of willfulness or the intent to defraud. *See* O'Malley, Grenig & Lee, *Federal Jury Practice & Instructions* § 19:06 (citing cases); Sand, *Modern Federal Jury Instructions – Crim.* § 8:01; *see also United States* v. *George*, 386 F.3d 383, 400 n.15 (2d Cir. 2004) ("A claim of good faith can be offered in a jury instruction as a defense to willful criminal conduct.").

However, a good faith defense is not available for statutes that lack a willfulness or specific intent requirement. *See United States* v. *Ansaldi*, 372 F.3d 118, 128 (2d Cir. 2004), *cert. denied*, 543 U.S. 949 (2004) (holding that a "good faith defense" instruction is not appropriate where a defendant asserts mistake of law in a case in which knowledge of or intent to violate the

law is not an element of the offense); *United States* v. *Cohen*, 260 F.3d 68, 71-73, 75-76 (2d Cir. 2001) (holding that because willfulness is not an element of 18 U.S.C. § 1084, the defendant's proposed "good-faith" defense was "unavailing as a matter of law"); *United States* v. *Svoboda*, 633 F.3d 479, 484 (6th Cir. 2011) (good faith defense not available where statute requires only that a defendant "knowingly" took certain actions). For "general intent" statutes that do not have a willfulness requirement, a defendant's good faith ignorance of the law is no defense, and the Government need only establish the defendant's knowledge of the facts comprising the offense. *See George*, 386 F.3d at 389-90 & n.6 (citing *United States* v. *Sewell*, 252 F.3d 647, 650 (2d Cir. 2001); *Bryan* v. *United States*, 524 U.S. 184, 192-93 (1998); *United States* v. *Scotti*, 47 F.3d 1237, 1245 (2d Cir. 1995)).

An advice of counsel defense is a "more specific form of the defense of good faith," and is permitted only in a specific set of circumstances. O'Malley, Grenig & Lee, *Federal Jury Practice & Instructions* § 19:08; *see also* Sand, *Modern Federal Jury Instructions – Crim.* § 8:04. In order to establish an advice of counsel defense, a defendant must establish that: (1) before taking action, he "honestly and in good faith [sought] the advice of a lawyer as to what he may lawfully do"; (2) he "fully and honestly [laid] all the facts before his counsel"; and (3) he acted strictly in accordance with the advice of his attorney. *United States* v. *Evangelista*, 122 F.3d 112, 117 (2d Cir. 1997) (quoting *Williamson* v. *United States*, 207 U.S. 425, 453 (1908)); *see also United States* v. *Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1194 (2d Cir. 1989). As with the more general good faith defense, an advice of counsel defense is applicable only where "willful and unlawful intent" is an element of the statute at issue. *Evangelista*, 122 F.3d at 117; Sand, *Modern Federal Jury Instructions – Crim.* § 8:04 ("The defendant's 'unlawful intent' must be at issue" for the advice of counsel defense to apply.). Moreover, even if willfulness is an

element of the charged offense, a defendant must establish a sufficient factual basis to warrant presenting the defense to the jury. *See Evangelista*, 122 F.3d at 117-18; *United States* v. *Quinones*, 417 Fed. Appx. 65, 67 (2d Cir. Mar. 29, 2011) (affirming district court's ruling preventing defense counsel from arguing an advice of counsel defense on summation because "there was no factual predicate for an advice-of-counsel defense in the record").

B. Application to the IGBA and UIGEA Charges

Neither IGBA nor UIGEA requires a showing of willfulness or specific intent. IGBA provides that "Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be [guilty of a crime]." 18 U.S.C. § 1955. Courts have consistently held that under IGBA, while a defendant is required to have knowledge that he is operating the business at issue, he need not act with the specific intent that the business violate the applicable state anti-gambling law. *See United States v. Torres*, 68 Fed. Appx. 807, 808 (9th Cir. 2003); *United States* v. *Ables*, 167 F.3d 1021, 1031 (6th Cir. 1999) ("Because the crime of conducting an illegal gambling business as defined under § 1955 is one of general intent, [the defendant] cannot evade conviction under that section by establishing that he unwittingly or unknowingly conducted the bingo games at Castle Bingo"); *United States* v. *O'Brien*, 131 F.3d 1428, 1430 (10th Cir. 1997) (holding that to be convicted under § 1955, a defendant need not know that the gambling business, among other things, violated state law).[8]

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[8] *See also United States v. Cyprian,* 23 F.3d 1189, 1199 (7th Cir. 1994) (holding that the defendant's argument that the Government needed to prove he intended to violate the law "is not supported by the express language of the statute or any case law and is not an essential element of the offense which the government must prove for a conviction"); *United States* v. *Hawes*, 529 F.2d 1976 (5th Cir. 1976); *United States* v. *Thaggard*, 477 F.2d 626, 632 (5th Cir. 1973) ("[Section 1955] do[es] not condition guilt upon knowledge that a federal law has been violated. It is sufficient that appellants intended to do all of the acts prohibited by the statute and proceeded to do them.").

While UIGEA, as a much more recent statute, does not have the same body of case law interpreting it, there is no reason that it, unlike IGBA, would impose a specific intent or willfulness requirement. UIGEA provides that "No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling" certain types of payments. 31 U.S.C. § 5363. The statute does not include the phrase "willfully," nor does it specify any requisite intent. Rather, the statute prohibits "knowingly" accepting certain types of payments in connection with an unlawful gambling business. *Id.* The use of the word "knowingly" does not convert a general intent statute into one that requires specific intent. *See, e.g.*, *George*, 386 F.3d at 389 n.6 ("The use of 'knowingly' in a statutory mens rea provision typically signals that the statute only requires a finding of general intent for conviction."); *United States* v. *Cohen*, 260 F.3d 68, 75-76 (2d Cir. 2001).

United States v. *Cohen*, dealing with a similarly worded federal gambling statute, is instructive. In *Cohen,* the Second Circuit analyzed the requisite *mens rea* under the Wire Wager Act, 18 U.S.C. § 1084, which, like UIGEA, contains a knowledge requirement ("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. . ."). 260 F.3d at 71, 75-76. The defendant argued that the Government should have been required to prove that he knew betting was illegal in the jurisdiction in which he transmitted bet and wager information. *Id.* at 75-76. In rejecting that argument, the Second Circuit explained that "it mattered only that [the defendant] knowingly committed the deeds forbidden by § 1084, not that he intended to violate the statute" and thus the district court was correct to instruct the jury that "misinterpretation of the law, like ignorance of the law, was no excuse." *Id.* The same principles apply here: because

UIGEA prohibits only "knowingly" (as opposed to "knowingly and willfully") accepting certain types of payments in connection with unlawful Internet gambling, the Government need not prove that defendants had the specific intent to violate the statute; rather, the Government must prove only that defendants "knowingly committed the deeds forbidden by" UIGEA. *Id.* at 76.

Because IGBA and UIGEA are general intent statutes, neither a good faith defense nor the more stringent advice of counsel defense is available to defendants. *Ansaldi*, 372 F.3d at 128; *Cohen*, 260 F.3d at 75-76; *Svoboda*, 633 F.3d at 484; *George*, 386 F.3d at 389-90 & n.6; *Evangelista*, 122 F.3d at 117. Thus, evidence and argument that Elie and Campos were purportedly acting in good faith, or in ignorance of the fact that poker was clearly illegal in many, if not all, of the states in which they operated, is irrelevant and should be excluded.[9]

C. Evidentiary Implications

The fact that a good faith and/or advice of counsel defense is only available for specific intent statutes, and that the statutes at issue do not require proof of specific intent, has significant implications on the evidence defendants should be permitted to offer and arguments they should be permitted to make with respect to intent. As noted above, the defense has indicated that it may attempt to introduce evidence concerning the Poker Company Legal Opinions in an effort to argue that defendants, relying on such advice, believed that their conduct was lawful. Such evidence should be excluded for at least three reasons.

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[9] Campos and Elie are also charged with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956, which has as an element the "intent to promote the carrying on of unspecified activity." This intent requirement does not open the door to an otherwise inapplicable good faith defense. *See, e.g.*, *United States* v. *Ables*, 167 F.3d 1021, 1031 (6th Cir. 1999) (holding that good faith instruction was not appropriate in case charging both IGBA violations and money laundering in light of the fact that IGBA is a strictly "general intent" crime).

First, as set forth above, there is no good faith or advice of counsel defense available to defendants under IGBA or UIGEA. As a consequence, the Poker Company Legal Opinions are irrelevant, because the only purpose in introducing them would be in support of such a defense. *See, e.g.*, *Hill,* 167 F.3d at 1069 ("As the district court properly observed, when determining whether [the defendant] violated Tennessee's gambling statute, it 'is irrelevant . . . what somebody told the defendant concerning the legality or illegality of his operation, as long as he [] knowingly did what he did.'").

Second, even if a good faith/advice of counsel defense were available to defendants, as a factual matter, Elie and Campos cannot establish a sufficient basis to warrant presenting such a defense to the jury.[10] As set forth above, in order to establish an advice of counsel defense, a defendant must establish that: (1) before taking action, he "honestly and in good faith [sought] the advice of a lawyer as to what he may lawfully do"; (2) he "fully and honestly [laid] all the facts before his counsel"; and (3) he acted strictly in accordance with the advice of his attorney. *United States* v. *Evangelista*, 122 F.3d 112, 117 (2d Cir. 1997) (quoting *Williamson* v. *United States*, 207 U.S. 425, 453 (1908)). Defendants cannot meet any of these requirements. First, Elie began processing for the Poker Companies more than a year before he received the first of the legal opinions. Second, neither Elie nor Campos sought out the counsel provided; the principal opinion at issue, authored by Full Tilt Poker's lawyer Ian Imrich, was provided to Elie, and then to Campos, by others. Third, Elie and Campos did not lay out all, or in fact any, of the facts relied upon by the legal opinions, and the opinions themselves gloss over or ignore material

[10] While in some circumstances, a good faith defense could be broader and encompass different facts than an advice of counsel defense, in this case, defendants' anticipated effort to argue good faith is likely to be nothing more than a watered-down version of an advice of counsel defense, relying heavily, if not exclusively, on the Poker Company Legal Opinions and the analyses therein.

facts such as the historic illegality of poker under IGBA. Finally, Elie and Campos cannot claim that they strictly followed the legal advice they were given because, even after getting contrary advice from the lawyer for Sunfirst (to which Campos responded that the lawyer was being a "wet blanket") as well as warnings from the bank's regulator, Elie and Campos continued to process millions of dollars in transactions for the Poker Companies. Indeed, contrary to acting carefully on the fully-informed advice of counsel, Elie and Campos were repeatedly given reason to believe that what they were doing violated the law, and yet they continued their illegal conduct, collecting additional Poker Company Legal Opinions as pressure increased (including contacts by the FBI) as a fig leaf to justify their continuing illegal conduct and to fall back on if and when they got caught.

The advice of counsel defense is subject to various restrictions – most notably that a defendant communicate the issue fully to his or her own lawyer, and follow the advice of such counsel – precisely because a defense based on legal advice that does not meet these strictures is ripe for abuse. Defendants cannot do an end run around the requirements for such a defense by pointing to legal opinions that interested parties – namely Poker Companies desperate for access to the U.S. payment system – elected to share with Elie and Campos in an effort to induce them to handle their business and provide them with "cover" for doing so.[11] Accordingly, because defendants have not proffered, and cannot proffer, any evidence to suggest that they can establish

[11] For this reason, if defendants are permitted to introduce evidence concerning the Legal Opinions, that would constitute a subject matter waiver of privilege, and the Government should be permitted to question Elie's former attorney, William Cowden, concerning the advice he gave Elie regarding the legality or illegality of online poker. *See United States* v. *Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (because "attorney-client privilege cannot at once be used as a shield and a sword," if a defendant puts at issue his good faith reliance on legal advice, the government can cross-examine the defendant on communications with his attorney).

a good faith/advice of counsel defense, they should be precluded from introducing evidence or argument concerning such a defense during the trial.

Finally, evidence concerning the Poker Company Legal Opinions – particularly the analysis and conclusions in the opinion themselves – would serve only to confuse or mislead the jury and thus should be excluded under Rule 403. The opinions are lengthy, self-serving analyses of the law applicable to online poker transactions that simply ignore decades of precedent at the federal and state level applying gambling statutes to poker. The problem with providing these opinions to the jurors is two-fold. First, the opinions purport to advise on the very laws – IGBA and UIGEA – that the Court will instruct the jurors on at the end of evidence, creating a substantial risk that the jurors will weigh the Court's legal instructions along with the discussion of IGBA and UIGEA's alleged elements at seen through the eyes of the Poker Companies seeking to continue their operations. Presenting any extensive legal analysis to the jury that is not from the Court on precisely the matters that the Court will instruct the jury on as a matter of law risks substantial confusion. *See Ingredient Tech.*, 698 F.2d at 97 ("[I]t would be very confusing to a jury to have opposing opinions of law admitted into evidence as involving a factual question for them to decide."). Second, and compounding the problem, is the fact that the legal opinions are manifestly self-serving and plainly wrong on the law, offering arguments about the alleged categorical inapplicability of IGBA and UIGEA to internet poker that the Court has already rejected in denying motions to dismiss the Indictment based on these very same arguments. In short, allowing these opinions before the jury would inevitably (and this of course may be the point) invite the jury to philosophize for itself on the allegedly unique skill-based attributes of poker and whether, accordingly, it should be treated differently than other

forms of internet gambling – a fine issue for a legislature, but an utterly inappropriate one for a jury charged with applying existing law to the facts as it finds them.

CONCLUSION

For the reasons set forth above, the Government respectfully requests that the Court preclude defendants from (1) offering evidence and argument concerning the level of skill involved in poker; and (2) offering evidence and argument in support of a purported good faith or advice of counsel defense, including evidence concerning the Poker Company Legal Opinions.

Respectfully submitted,

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Certificate of Service **Filed Electronically**

The undersigned attorney, duly admitted to practice before this Court, hereby certifies that on the below date, he/she served or caused to be served the following document(s) in the manner indicated:

Government's Motion *In Limine* Regarding Relevance Of Skill And Requisite Mens Rea

Service via Clerk's Notice of Electronic Filing upon the following attorneys, who are Filing Users in this case:

William Cowden, Esq.
Fred Hafetz, Esq.
Neil Kaplan, Esq.

Service via e-mail upon the following attorneys who are not Filing Users in this case and who have previously given their written consent to service via e-mail:

N/A

Service via overnight courier; U.S. Mail; etc. upon the following attorneys who are not Filing Users in this case

N/A

Dated: New York, New York
February 22, 2011

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United States Attorney

By: /s/ Andrew D. Goldstein
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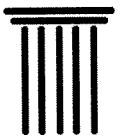

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EXHIBIT E

United States District Court
District of Nevada (Las Vegas)
CIVIL DOCKET FOR CASE #: 2:09-cv-02120-PMP-VCF

Partner Weekly, LLC v. Viable Marketing Corp et al
Assigned to: Judge Philip M. Pro
Referred to: Magistrate Judge Cam Ferenbach
Demand: $326,000
Case in other court: 9th Circuit Court of Appeals, 12-16046
8th Judicial District, Clark County, NV, A09601153
Cause: 28:1332 Diversity-Other Contract

Date Filed: 11/04/2009
Date Terminated: 04/09/2012
Jury Demand: None
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

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Date Filed	#	Docket Text
11/04/2009	1	PETITION FOR REMOVAL *NOTICE OF REMOVAL with Exhibits* from District Court of Clark County, NV, Case Number A-09-601153-C, filed by Viable Marketing Corp, Chad Elie. No changes to parties. (Attachments: # 1 Exhibit Exhibits A-E)(Lord, Nancy) Modified to reflect payment was made receipt #09780000000001428671 on 11/5/2009 (SRK). (Entered: 11/04/2009)
11/04/2009	2	CERTIFICATE of Interested Parties filed by Viable Marketing Corp, Chad Elie.. There are no known interested parties other than those participating in the case. (Lord, Nancy) (Entered: 11/04/2009)
11/04/2009		Set Deadlines: Certificate of Interested Parties due by 11/15/2009. (SRK) (Entered: 11/05/2009)
11/05/2009		Case assigned to Judge Philip M. Pro and Magistrate Judge Lawrence R. Leavitt. (ECS) (Entered: 11/05/2009)
11/05/2009	3	NOTICE PURSUANT TO LOCAL RULE IB 2-2: In accordance with 28 USC § 636(c) and FRCP 73, the parties in this action are provided with a link to the "AO 85 Notice of Availability, Consent, and Order of Reference - Exercise of Jurisdiction by a U.S. Magistrate Judge" form on the Court's website - www.nvd.uscourts.gov. **Consent forms should NOT be electronically filed.** Upon consent of all parties, counsel are advised to manually file the form with the Clerk's Office. **(no image attached)** (ECS) (Entered: 11/05/2009)
11/05/2009	4	MINUTE ORDER IN CHAMBERS of the Honorable Judge Philip M. Pro, on 11/5/2009. By Deputy Clerk: Eileen Sterba. Statement regarding removed action is due by 11/23/2009. Joint Status Report regarding removed action is due by 12/8/2009. (Copies have been distributed pursuant to the NEF - ECS) (Entered: 11/05/2009)
11/05/2009	5	NOTICE TO COUNSEL PURSUANT TO LOCAL RULE IA 10-2. Counsel Andrew Lustigman and Scott Shaffer to comply with completion and electronic filing of the Designation of Local Counsel and Verified Petition. For your convenience, click on the following link to obtain the form from the Court's website - www.nvd.uscourts.gov/Forms.aspx. Counsel is also required to register for the Court's Case Management and Electronic Case Filing (CM/ECF) system and the electronic service of

		pleadings. Please visit the Court's website www.nvd.uscourts.gov to register Attorney(s). Verified Petition due by 12/20/2009.**(no image attached)** (ECS) (Entered: 11/05/2009)
11/05/2009	6	(1st Notice) PURSUANT TO SPECIAL ORDER 109: that **Bradford R Norton** is in violation of Special Order 109. **Participation in the electronic filing system became mandatory for all attorneys effective January 1, 2006.** You are required to register for the Courts Case Management and Electronic Case Filing (CM/ECF) program and the electronic service of pleadings. Please visit the Courts website **www.nvd.uscourts.gov,** then select CM/ECF Info, to register the Attorney (s). Additionally, a review of the Courts records indicate that Bradford R Norton (NSB 11429) is not a member of the Courts bar. There is no record of a filed **Motion for Permission to Practice** as required by LR IA 10-1. Continued failure to abide by Special Order 109 and LR IA 10-1 will be brought to the courts attention for appropriate action. **(no image attached)** (RFJ) (Entered: 11/05/2009)
11/20/2009	7	STATEMENT RE: REMOVAL filed by Defendant Viable Marketing Corp. (Lord, Nancy) (Entered: 11/20/2009)
12/07/2009	8	VERIFIED PETITION for Permission to Practice Pro Hac Vice by Scott Shaffer and DESIGNATION of Local Counsel Nancy Lord (Filing fee $ 175 receipt number 0978-1457422) filed by Defendants Chad Elie, Viable Marketing Corp. Motion ripe 12/7/2009. (Lord, Nancy) (Entered: 12/07/2009)
12/07/2009	9	ORDER granting 8 Verified Petition for Permission for Attorney Scott Shaffer to Practice Pro Hac Vice and approving Attorney Nancy Lord as Designation of Local Counsel. Signed by Judge Philip M. Pro on 12/7/09. Any Attorney not yet registered with the Court's CM/ECF System shall submit a Registration Form on the Court's website www.nvd.uscourts.gov (Copies have been distributed pursuant to the NEF - ECS) (Entered: 12/07/2009)
12/07/2009	10	MOTION to Stay *Pending Arbitration, or in the Alternative, To Transfer Venue* by Defendant Viable Marketing Corp. Motion ripe 12/7/2009. (Shaffer, Scott) . (Entered: 12/07/2009)
12/07/2009	11	AFFIDAVIT re 10 MOTION to Stay *and Notice of Motion For A Stay Pending Arbitration, or in the Alternative, To Transfer Venue* ; filed by Defendant Viable Marketing Corp. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Shaffer, Scott) (Entered: 12/07/2009)
12/07/2009	12	Joint STATUS REPORT by Defendant Viable Marketing Corp. (Attachments: # 1 Exhibit A)(Shaffer, Scott) (Entered: 12/07/2009)
12/18/2009	13	RESPONSE to 10 MOTION to Stay *Pending Arbitration, or in the Alternative, To Transfer Venue*, filed by Plaintiff Partner Weekly, LLC. Replies due by 12/28/2009. (Attachments: # 1 Exhibit, # 2 Certificate of Service)(Norton, Bradford) (Entered: 12/18/2009)
12/23/2009	14	REPLY to 10 MOTION to Stay *Pending Arbitration, or in the Alternative,*

		To Transfer Venue *Memorandum In Reply* by Defendant Viable Marketing Corp. Motion ripe 12/23/2009. (Lord, Nancy) Modified to reflect reply to motion on 12/29/2009 (MAJ). (Entered: 12/23/2009)
12/30/2009	15	MINUTE ORDER IN CHAMBERS of the Honorable Judge Philip M. Pro, on 12/30/2009. By Deputy Clerk: Donna Andrews. RE: 10 Defendant Viable Marketing Corporation's Motion to Stay Pending Arbitration, or in the Alternative, To Transfer Venue. IT IS ORDERED a Motion Hearing is set for 1/26/2010 at 03:00 PM in LV Courtroom 7C before Judge Philip M. Pro.(no image attached) (Copies have been distributed pursuant to the NEF - DMA) (Entered: 12/30/2009)
01/19/2010	16	MINUTE ORDER IN CHAMBERS of the Honorable Judge Philip M. Pro, on 1/19/2010. By Deputy Clerk: Donna Andrews. RE: 10 Defendant Viable Marketing Corporation's Motion to Stay Pending Arbitration, or in the Alternative, to Transfer Venue. IT IS ORDERED the Motion Hearing set for 1/26/2010 at 03:00 PM is CONTINUED to 2/8/2010 at 10:00 AM in LV Courtroom 7C before Judge Philip M. Pro. The Court has a conflict in scheduling.(no image attached) (Copies have been distributed pursuant to the NEF - DMA) (Entered: 01/19/2010)
01/19/2010	17	First MOTION for Service by Publication by Plaintiff Partner Weekly, LLC. Motion ripe 1/19/2010. (Attachments: # 1 Exhibit, # 2 Proposed Order)(Norton, Bradford) (Entered: 01/19/2010)
01/26/2010	18	ORDER granting 17 Plaintiff's Motion for Publication of Summons. Signed by Judge Philip M. Pro on 1/26/2010. (Copies have been distributed pursuant to the NEF - DMA) (Entered: 01/26/2010)
02/08/2010	19	MINUTES OF PROCEEDINGS - Motion Hearing held on 2/8/2010 before Judge Philip M. Pro. Crtrm Administrator: *Donna Andrews*; Pla Counsel: *Bradford R. Norton*; Def Counsel: *Scott Shaffer (Present Telephonically)*; Court Reporter/FTR #: *Summer Rivera*; Time of Hearing: *10:00 a.m.*; Courtroom: *7C*; The Court hears the representations of Mr. Shaffer and Mr. Norton. IT IS ORDERED 10 Defendant Viable Marketing Corporation's Motion to Stay Pending Arbitration is GRANTED and DENIED as to Transfer of Venue. The parties shall file a Joint Status Report on the proceedings in arbitration by 8/8/2010. (Copies have been distributed pursuant to the NEF - DMA) (Entered: 02/08/2010)
06/22/2010	20	MOTION to Withdraw as Attorney *for All Defendants* by Defendants Chad Elie, Viable Marketing Corp. Motion ripe 6/22/2010. (Attachments: # 1 Certificate of Service)(Shaffer, Scott) (Entered: 06/22/2010)
06/22/2010	21	ORDER Granting 20 Motion to Withdraw as Attorney as to Defendants. Andrew B Lustigman and Scott Shaffer withdrawn from the case. Signed by Judge Philip M. Pro on 6/22/10. (Copies have been distributed pursuant to the NEF - ASB) (Entered: 06/22/2010)
07/28/2010	22	MOTION to Substitute Attorney by Defendants Chad Elie, Viable Marketing Corp. (Lord, Nancy) Event type corrected on 7/28/2010. (MJ**Z**) (Main Document 22 replaced on 8/4/2010) (SRK). (Entered: 07/28/2010)
07/28/2010		NOTICE of Docket Correction to 22 NOTICE of Change of Attorney. ERROR: Wrong event selected by Attorney Nancy Theresa Lord; CORRECTION: Entry corrected by Court to 22 MOTION to Substitute

		no image attached)(MJZ) (Entered: 07/28/2010)
07/30/2010	23	NOTICE: Attorney Action Required to 22 MOTION to Substitute Attorney. ***Document lacks signature of client(s) represented in accordance with LR IA 10-6(c).*** Attorney Nancy Theresa Lord advised to file a *Notice of Corrected Image/Document* event under the *Notices* category and link to 22 MOTION to Substitute Attorney. **(no image attached)**(MJZ) (Entered: 07/30/2010)
08/03/2010	24	NOTICE of Corrected Image/Document re 22 MOTION to Substitute Attorney by Defendants Chad Elie, Viable Marketing Corp. (Service of corrected image is attached). (Lord, Nancy) (Entered: 08/03/2010)
08/04/2010	25	STATUS REPORT by Plaintiff Partner Weekly, LLC. (Attachments: # 1 Exhibit)(Norton, Bradford) (Entered: 08/04/2010)
08/05/2010	26	VERIFIED PETITION for Permission to Practice Pro Hac Vice by A. Jeff Ifrah and DESIGNATION of Local Counsel Craig S. Denney (Filing fee $ 175 receipt number 0978-1697494) filed by Defendants Chad Elie, Viable Marketing Corp. Motion ripe 8/5/2010. (Denney, Craig) (Entered: 08/05/2010)
08/05/2010	27	VERIFIED PETITION for Permission to Practice Pro Hac Vice by Amy M. Lloyd and DESIGNATION of Local Counsel Craig S. Denney (Filing fee $ 175 receipt number 0978-1697527) filed by Defendants Chad Elie, Viable Marketing Corp. Motion ripe 8/5/2010. (Denney, Craig) (Entered: 08/05/2010)
08/05/2010	28	ORDER granting 22 Motion to Substitute Attorney. Attorney Nancy Theresa Lord terminated. Signed by Magistrate Judge Lawrence R. Leavitt on 8/5/10. (Copies have been distributed pursuant to the NEF - CAP) (Entered: 08/05/2010)
08/06/2010	29	ORDER granting 26 Verified Petition for Permission to Practice Pro Hac Vice for Attorney A. Jeff Ifrah for Chad Elie,A. Jeff Ifrah for Viable Marketing Corp and approving Designation of Local Counsel of Craig S Denney. Signed by Judge Philip M. Pro on 8/6/2010. Any Attorney not yet registered with the Court's CM/ECF System shall submit a Registration Form on the Court's website www.nvd.uscourts.gov (Copies have been distributed pursuant to the NEF - SD) (Entered: 08/06/2010)
08/06/2010	30	ORDER granting 27 Verified Petition for Permission to Practice Pro Hac Vice for Attorney Amy M. Lloyd for Chad Elie,Amy M. Lloyd for Viable Marketing Corp and approving Designation of Local Counsel of Craig S Denney. Signed by Judge Philip M. Pro on 8/6/2010. Any Attorney not yet registered with the Court's CM/ECF System shall submit a Registration Form on the Court's website www.nvd.uscourts.gov (Copies have been distributed pursuant to the NEF - SD) (Entered: 08/06/2010)
08/06/2010	31	STATUS REPORT by Defendants Chad Elie, Viable Marketing Corp. (Denney, Craig) (Entered: 08/06/2010)
03/17/2011	32	ORDER TO SHOW CAUSE in writing why this action should not be dismissed. Show Cause Response due by 4/6/2011. Signed by Judge Philip M. Pro on 3/16/11. (Copies have been distributed pursuant to the NEF -

		MINUTES (entered: 03/17/2011)
04/01/2011	33	RESPONSE TO ORDER TO SHOW CAUSE by Plaintiff Partner Weekly, LLC. (Norton, Bradford) (Entered: 04/01/2011)
09/12/2011	34	MOTION to to Confirm Arbitration Award; by Plaintiff Partner Weekly, LLC. Responses due by 9/29/2011. (Attachments: # 1 Exhibit)(Norton, Bradford) Modified text on 9/21/2011 (SRK). (Entered: 09/12/2011)
09/29/2011	35	RESPONSE to 34 MOTION to Confirm Arbitration Award, filed by Defendants Chad Elie, Viable Marketing Corp. *Defendant's Response To Plaintiff's Motion To Confirm Arbitration Award And Preliminary Statement In Support Of Motion To Vacate* Replies due by 10/9/2011. (Denney, Craig) (Entered: 09/29/2011)
10/06/2011	36	ORDER Denying without Prejudice 34 Motion to Enforce Judgment. Signed by Judge Philip M. Pro on 10/6/11. (Copies have been distributed pursuant to the NEF - ASB) (Entered: 10/07/2011)
10/19/2011	37	MINUTE ORDER IN CHAMBERS of the Honorable Chief Judge Robert C. Jones, on 10/19/2011. IT IS ORDERED that this case is reassigned to Magistrate Judge Cam Ferenbach for all further proceedings. Magistrate Judge Lawrence R. Leavitt no longer assigned to case. All further documents must bear the correct case number 2:09-cv-02120-PMP-VCF. **(no image attached)** (Copies have been distributed pursuant to the NEF - AF) (Entered: 10/19/2011)
11/23/2011	38	MOTION to Vacate *Arbitration Award* by Defendants Chad Elie, Viable Marketing Corp. Motion ripe 11/23/2011. (Attachments: # 1 Exhibit Exhibits)(Denney, Craig) (Entered: 11/23/2011)
11/23/2011	39	Submission of PROPOSED ORDER on 38 MOTION to Vacate *Arbitration Award* ; filed by Defendants Chad Elie, Viable Marketing Corp. (Denney, Craig) (Entered: 11/23/2011)
12/05/2011	40	RESPONSE to 38 MOTION to Vacate *Arbitration Award*, filed by Plaintiff Partner Weekly, LLC. *and Counter Motion to Confirm* Replies due by 12/15/2011. (Attachments: # 1 Exhibit, # 2 Proposed Order)(Norton, Bradford) (Entered: 12/05/2011)
12/12/2011	41	REPLY to Response to 38 MOTION to Vacate *Arbitration Award* ; filed by Defendants Chad Elie, Viable Marketing Corp. *Defendants' Reply To Plaintiff's Opposition To Defendants' Motion To Vacate Arbitration Award And Countermotion To Confirm Arbitration Award* (Denney, Craig) (Entered: 12/12/2011)
04/09/2012	42	ORDER that Defendants Motion to Vacate Arbitration Award 38 is hereby DENIED. Plaintiffs Countermotion to Confirm Arbitration Award 40 is hereby GRANTED. The arbitrators Order Granting Claimants Motion for Summary Judgment dated August 26, 2011 is hereby CONFIRMED. Judgment is hereby entered confirming the arbitrators Order Granting Claimants Motion for Summary Judgment dated August 26, 2011. Signed by Judge Philip M. Pro on 4/7/12. (Copies have been distributed pursuant to the NEF - ECS) (Entered: 04/09/2012)
05/03/2012	43	NOTICE OF APPEAL **re: 42 ORDER**; filed by Defendants Chad Elie, Viable Marketing Corp. Filing fee $ 455, receipt number 0978-2356233. E-

		mail Notice of CM-ECF sent to the US Court of Appeals, Ninth Circuit (Denney, Craig) Added docket entry relationship on 5/14/2012 (RFJ). (Entered: 05/03/2012)
05/03/2012	44	ORDER for Time Schedule as to 43 Notice of Appeal filed by Chad Elie, Viable Marketing Corp. **USCA Case Number 12-16046**. (ECS) (Entered: 05/03/2012)
05/04/2012	45	Designation of Transcripts and Transcript Order forms and instructions for 43 Notice of Appeal. The forms may also be obtained on the Court's website at www.nvd.uscourts.gov/Forms.aspx. (ECS) (Entered: 05/04/2012)
05/17/2012	46	TRANSCRIPT DESIGNATION by Defendants Chad Elie, Viable Marketing Corp re 43 Notice of Appeal,. Transcripts are **NOT** required for this appeal. *Notice That No Transcripts Will Be Ordered And Statement Of The Issues Pursuant To Circuit Rule 10-3.1* (Denney, Craig) (Entered: 05/17/2012)
05/18/2012	47	CERTIFICATE OF RECORD on 43 Notice of Appeal. The record on appeal, consisting of the reporter's transcripts and the United States District Court clerk's record is ready for the purpose of the appeal. This file exists in electronic format and is accessible via CM/ECF - PACER. The documents comprising the United States District Court clerk's record have been numbered in conformance with Rule 11(b) of the Federal Rules of Appellate Procedure. These document numbers are reflected on the United States District Court's docket sheet and should be used for reference purposes in the briefs. Appeals in Habeas Corpus and 28 USC 2255 Motion to Vacate Sentence cases are treated as civil appeals in the Court of Appeals. Criminal appeals briefing schedules will be issued upon the filing of this document. E-mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. **(no image attached)** (ECS) (Entered: 05/18/2012)
05/18/2012	48	TRANSCRIPT DESIGNATION by Defendants Chad Elie, Viable Marketing Corp re 43 Notice of Appeal,. Transcripts are **NOT** required for this appeal. (Denney, Craig) (Entered: 05/18/2012)
10/09/2012	49	MOTION to Amend/Correct *Defendants' Rule 60(A) Motion To Correct Mistake, Oversight, or Omission* by Defendants Chad Elie, Viable Marketing Corp. Responses due by 10/26/2012. (Denney, Craig) (Entered: 10/09/2012)
10/15/2012	50	MOTION Motion For An Indicative Ruling Pursuant to Fed.R.Civ.P.62.1 by Defendants Chad Elie, Viable Marketing Corp. Responses due by 11/1/2012. (Denney, Craig) (Entered: 10/15/2012)
10/26/2012	51	RESPONSE to 49 MOTION to Amend/Correct *Defendants' Rule 60(A) Motion To Correct Mistake, Oversight, or Omission*, filed by Plaintiff Partner Weekly, LLC. Replies due by 11/5/2012. (Attachments: # 1 Exhibit)(Norton, Bradford) (Entered: 10/26/2012)
10/30/2012	53	ORDER of USCA, Ninth Circuit, as to 43 Notice of Appeal. The appellants

		motion for an extension of time to file the opening brief is construed as a motion to stay appellate proceedings pending the district courts ruling on the motion for an indicative ruling. So construed, the motion is GRANTED. This appeal is stayed until January 8, 2013. At or prior to the expiration of the stay, the appellants shall file the opening brief or a status report and motion for appropriate relief. If the opening brief is filed, the answering brief shall be due February 7, 2013. The optional reply brief is due 14 days after service of the answering brief. The filing of the opening brief or the failure to file a further motion will terminate the stay. (AC) (Entered: 11/02/2012)
11/01/2012	52	RESPONSE to 50 MOTION Motion For An Indicative Ruling Pursuant to Fed.R.Civ.P.62.1, filed by Plaintiff Partner Weekly, LLC. Replies due by 11/11/2012. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit to Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 1 to Exhibit 6, # 9 Exhibit 7)(Norton, Bradford) (Entered: 11/01/2012)
11/08/2012	54	REPLY to Response to 50 MOTION Motion For An Indicative Ruling Pursuant to Fed.R.Civ.P.62.1 filed by Defendants Chad Elie, Viable Marketing Corp. (Denney, Craig) (Entered: 11/08/2012)
12/04/2012	55	ORDER Denying 49 Defendants Viable Marketing Corp. and Chad Elie's Rule 60(a) Motion to Correct. IT IS FURTHER ORDERED that 50 Defendants Viable Marketing Corp. and Chad Elies Motion for an Indicative Ruling Pursuant to Fed. R. Civ. P. 62.1 is hereby GRANTED to the extent that the Court hereby indicates it would amend the Judgment so as to confirm the arbitration award against only Defendant Viable Marketing Corp., and not against Defendant Chad Elie, if the Ninth Circuit remands the matter to this Court for that purpose. Signed by Judge Philip M. Pro on 12/4/12. (Copies have been distributed pursuant to the NEF - EDS) (Entered: 12/04/2012)
01/29/2013	56	ORDER of USCA, Ninth Circuit, Granting appellant's motion for leave to file a motion under FRCP 60(a) as to 43 Notice of Appeal, filed by Chad Elie, Viable Marketing Corp. (EDS) (Entered: 01/30/2013)
02/08/2013	57	MOTION to Amend/Correct 42 Order on Motion to Vacate,,,,,,. *Defendants' Rule 60(A) Motion To Correct Mistake, Oversight Or Omission* by Defendants Chad Elie, Viable Marketing Corp. Responses due by 2/25/2013. (Denney, Craig) (Entered: 02/08/2013)
02/25/2013	58	RESPONSE to 57 MOTION to Amend/Correct 42 Order on Motion to Vacate,,,,,,. *Defendants' Rule 60(A) Motion To Correct Mistake, Oversight Or Omission*, filed by Plaintiff Partner Weekly, LLC. Replies due by 3/7/2013. (Attachments: # 1 Exhibit)(Norton, Bradford) (Entered: 02/25/2013)
03/07/2013	59	REPLY to Response to 57 Rule 60(A) MOTION to Amend/Correct Mistake, Oversight or Omission 42 Order on Motion to Vacate filed by Defendants Chad Elie, Viable Marketing Corp. (Denney, Craig) (Entered: 03/07/2013)
03/15/2013	60	ORDER Granting 57 Motion to Correct Mistake, Oversight, or Omission. IT IS FURTHER ORDERED that the 42 Order is hereby amended to reflect that the arbitrator's Order Granting Claimant's Motion for Summary Judgment dated August 26, 2011 is CONFIRMED as between PartnerWeekly, LLC and Viable Marketing Corp. only. Defendant Chad

		Elie shall file an answer or otherwise respond to the Complaint within 20 days from the date of this Order. Pursuant to Federal Rule of Civil Procedure 54(b), there is no just reason for delay in entering final judgment as between PartnerWeekly, LLC and Viable Marketing Corp. Signed by Judge Philip M. Pro on 3/15/2013. (Copies have been distributed pursuant to the NEF - SLD) (Entered: 03/18/2013)
03/18/2013	61	CLERK'S JUDGMENT in favor of Plaintiff Partner Weekly, LLC and against Defendant Viable Marketing Corp. Signed by Clerk of Court, Lance S. Wilson. (Copies have been distributed pursuant to the NEF - SLD) (Entered: 03/18/2013)
03/25/2013	62	ORDER of USCA, Ninth Circuit, as to 43 Notice of Appeal. The motion for voluntary dismissal is GRANTED. This appeal is DISMISSED. This order served on the district court shall constitute the mandate of this court. (AC) (Entered: 03/25/2013)
03/26/2013	64	ORDER ON MANDATE as to 62 USCA Order DISMISSING the 43 Notice of Appeal. (Copies have been distributed pursuant to the NEF - SLD) (Entered: 03/26/2013)
04/05/2013	65	First MOTION to Extend Time regarding discovery/nondispositive matter (First Request) to Respond to the Complaint re 1 Amended Petition for Removal by Defendants Chad Elie, Viable Marketing Corp. Motion ripe 4/5/2013. (Denney, Craig) (Entered: 04/05/2013)
04/08/2013	66	NOTICE of Appearance by attorney Sigal Chattah on behalf of Defendant Chad Elie. (Chattah, Sigal) (Entered: 04/08/2013)
04/08/2013	67	MOTION to Withdraw as Attorney *OF RECORD FOR DEFENDANTS CHAD ELIE AND VIABLE MARKETING CORP.* by Craig S. Denney/Jeff Ifrah. by Defendants Chad Elie, Viable Marketing Corp. Motion ripe 4/8/2013. (Denney, Craig) (Entered: 04/08/2013)
04/09/2013	68	ORDER Granting 67 Motion to Withdraw as Attorneys of Record for Defendants Chad Elie and Viable Marketing Corp. Attorneys Craig S. Denney and A. Jeff Ifrah withdrawn from the case. Signed by Judge Philip M. Pro on 4/9/2013. (Copies have been distributed pursuant to the NEF - SLD) (Entered: 04/09/2013)
04/10/2013	69	RESPONSE to 65 First MOTION to Extend Time regarding discovery/nondispositive matter (First Request) re 1 Amended Petition for Removal, Complaint filed by Plaintiff Partner Weekly, LLC. Replies due by 4/20/2013. (Norton, Bradford) (Entered: 04/10/2013)
05/01/2013	70	ORDER Granting in Part and Denying in Part 65 Motion to Extend Time to Respond to Complaint. Chad Elie answer due 6/3/2013. Signed by Magistrate Judge Cam Ferenbach on 5/1/2013. (Copies have been distributed pursuant to the NEF - SLD) (Entered: 05/01/2013)
05/31/2013	71	MOTION to Dismiss for Lack of Jurisdiction by Defendant Chad Elie. Responses due by 6/17/2013. (Chattah, Sigal) (Entered: 05/31/2013)

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EXHIBIT F

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

*****

PARTNER WEEKLY, LLC Plaintiffs, vs. VIABLE MARKETING CORP. and CHAD EDWARD ELIE, individually and in his capacity as an officer of VIABLE MARKETING CORP.; and DOE DEFENDANTS I-X inclusive; Defendants.	**Case No 2:09-cv-02120-PMP-VCF** **MOTION TO DISMISS**

DEFENDANT CHAD EDWARD ELIE'S MOTION TO DISMISS

COME NOW, Defendant CHAD EDWARD ELIE (hereinafter "Mr. Elie") by and through the undersigned attorney of record, SIGAL CHATTAH, ESQ., of the LAW OFFICES OF SIGAL CHATTAH, who hereby moves to dismiss the Complaint pursuant to FRCP 12(b)(6) for failure to state a claim upon which relief can be granted.

This Motion is based upon the points and authorities set forth herein, the exhibits submitted herewith, the pleadings and papers on file in this matter, as well as any supplemental

briefs filed and evidence submitted hereof and any oral argument may entertain at any hearing of this matter.

I.

INTRODUCTION

Plaintiff Partner Weekly, LLC and Defendant Viable Marketing Group entered into an Advertising Agreement pursuant to which Partner Weekly was to provide Viable internet advertising services and promote Viable's goods and services. On March 15, 2013, this Court entered an Order Confirming the Arbitrator's Order Granting Claimant Partner Weekly, LLC's Motion for Summary Judgment as between Partner Weekly, LLC and Viable Marketing Corp. only.

II.

STATEMENT OF FACTS

This litigation arises out of an Advertising Agreement entered into by the parties on or about December 12, 2007, whereby Partner Weekly contracted to promote Viable's good and/or services through various online advertising channels. Partner Weekly is an online media and marketing firm, which specializes in lead generation using a network of affiliate marketers to drive Internet traffic or sale to its advertiser's clients. Viable markets products and services on the Internet and assist third-party advertisers with this process.

In late, October 2008, Partner Weekly used its affiliate network to advertise the "Media Mogul Me" campaign for Viable. Viable paid Partner Weekly hundreds of thousands of dollars in commission payments before learning that over thirteen thousand leads purported to be valid consumer transactions were, in reality, stolen and unauthorized credit card data.

Nevertheless, in December 2008 prior to learning of these invalid leads, Viable entered into an Exclusivity Agreement with Partner Weekly, which provided Viable's exclusive rights to advertise membership and club programs on the Partner Weekly, affiliate network in

consideration for a higher cost-per-acquisition price for each paid by Viable to Partner Weekly. Partner Weekly breached this Exclusivity Agreement by promoting competing membership programs during the exclusivity period, and Viable notified Partner Weekly that it had learned of the breach by letter dated August 18, 2009.

III.

LEGAL AUTHORITY

A. PLAINTIFF'S HAVE NO GROUNDS TO ASSERT CLAIMS AGAINST CHAD ELIE PERSONALLY

Rule 12(b) provides that, "if on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b). However, "a motion to dismiss is not automatically converted into a motion for summary judgment whenever matters outside the pleading happen to be filed with the court and not expressly rejected by the court." *North Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 580 (9th Cir. 1983).* Where a Court makes a determination pursuant to Rule 12(b)(6), it is "precluded from relying on matters outside the four corners of the [Plaintiff's] Complaint." *United States v. LSL Biotechnologies, 379 F.3d 672, 700 (9th Cir. 2004).* *Nev. Power Co. v. Calpine Corp.*, *2006 U.S. Dist. LEXIS 36135.*

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will only be granted if the complaint fails to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).* On a motion to dismiss, "we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)). Moreover, "[a]ll allegations of material fact in the complaint are taken as true and construed in the light most favorable to the non-moving party." *In re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996).*

Although courts generally assume the facts alleged are true, courts do not "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).* Accordingly, "[c]onclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss." *In re Stac Elecs., 89 F.3d at 1403.*

1. <u>There Can Be No Personal Liability Found Against Mr. Elie As Partners Weekly Could Prove No Set of Facts To Pierce The Corporate Veil Against Viable Marketing Corp.</u>

The Advertising Agreement entered into by the Parties herein was entered into by Partner Weekly LLC and Viable Marketing Group, as the party purchasing the services. Furthermore, there is no personal type guarantee to the Agreements leaving the Parties to the Agreement as the corporate entities themselves. Plaintiff wrongfully attempts to pierce the corporate veil against Viable Marketing Corp. in their Fifth Cause of Action for relief, despite a failure to provide any merit thereon or pursuing .

To determine whether the corporate veil should be pierced, three factors are of primary importance: (1) the degree to which the shareholders respected the separate identity of the corporation; (2) the degree to which injustice to the litigants would result were the corporate identity recognized; and (3) the fraudulent intent of the incorporators. *Id.* at 1111. The *Seymour* test has been consistently applied in this Circuit. *See, e.g., Audit Servs., Inc. v.*

Rolfson, 641 F.2d 757, 764 (9th Cir. 1981); *Operating Eng's Pension Trust v. Reed*, 726 F.2d 513, 515 (9th Cir. 1984); *Valley Cabinet & Mfg. Co.*, 877 F.2d at 772.

A claim based on the alter ego theory is not in itself a claim for substantive relief, but rather is procedural. FLETCHER § 41.10. "A finding of fact of alter ego, standing alone, creates no cause of action. It merely furnishes a means for complainant to reach a second corporation or individual upon a cause of action that otherwise would have existed only against the first corporation. An attempt to pierce the corporate veil is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract. The alter ego doctrine is thus remedial, not defensive, in nature." *Id.*

An alter ego finding is merely a remedy that results in the corporate veil being pierced only to impose "liability." *SEC v. Hickey, 322 F.3d at 1130.* In *Valley Cabinet & Mfg. Co.*, the Court agreed that respect for the separate identity of the corporation had been shown where the corporation was adequately capitalized, shares of common stock were issued, board of directors meetings were held, and federal and state taxes were paid. *877 F.2d at 772.*

Furthermore, Nevada law states that an individual can only be held liable for a corporation's liabilities if there is a finding of an alter ego relationship. *See* Nev. Rev. Stat. Ann. § 78.747. Under Nevada law, "the corporate cloak is not lightly thrown aside and…the alter ego doctrine is an exception to the general rule recognizing corporate independence." *Truck Ins. Exch. v. Palmer J. Swanson, Inc., 124 Nev. 629, 635, 189 P.3d 656, 660 (Nev. 2008) (internal citations and quotations omitted).*

In order to state a claim for alter ego liability in Nevada, a plaintiff must allege that: "(1) [t]he corporation [is] influenced and governed by the person asserted to be its alter ego[;] (2)[t]here [is] such unity of interest and ownership that one is inseparable from the other; and

(3)[t]he facts [are] such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice." *Hall v. High Desert Recycling, Inc., 03:11-CV-00137-LRH, 2011 WL 2600483 (D. Nev. June 29, 2011) (quoting Lorenz v. Beltio, Ltd., 963 P.2d 488, 496 (Nev.1998)).*

Plaintiff herein has failed to demonstrate any reason why Viable's corporate identity should be ignored and cannot prevail under an alter ego theory. Furthermore, as stated *infra*, Plaintiff is legally precluded from asserting claims against Mr. Elie personally post Arbitration Judgment.

2. Plaintiff's Failure to Pursue Their Claims In the Arbitration Bars Them From Pursuing Their Claims In This Action Under Estoppel and Res Judicata.

Historically the term "res judicata" has been used in reference to two related but separate (and often confused) concepts: issue preclusion (sometimes called "collateral estoppel") and claim preclusion. Five Star Capital Corp. v. Ruby, 124 Nev. 1048, 1051, 194 P.3d 709, 711 (2008). Previous opinions published by the Nevada Supreme Court did not clearly explain claim and issue preclusion and attorneys failed to properly distinguish these important concepts.

In response, the Nevada Supreme Court did away with the "res judicata" and "collateral estoppel" terminology and adopted the concepts of claim preclusion and issue preclusion in *Five Star*. In *Five Star* the court expressly outlined the elements of these separate and distinct concepts, which unequivocally show that claim and issue preclusion are not interchangeable and must be separately analyzed for a movant to reap the benefits of their respective preclusive effects.

Claim preclusion may apply in a suit to preclude both claims that were or could have been raised in a prior suit, while issue preclusion would not preclude those issues not raised in

the prior suit. *Five Star Capital Corp. v. Ruby*, *124 Nev. 1048, 194 P.3d 709 (2008).* The test for claim preclusion has three elements:

1) The parties or their privies are the same;

2) the final judgment is valid; and

3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case.

Id. at 713.

The three-part test above for claim preclusion was affirmed in *Five Star*, but the court added a fourth factor in order to better clarify the distinction between claim and issue preclusion. The fourth factor requires that the issue be actually and necessarily litigated, thereby confirming the four-factor operative test for issue preclusion as:

1) The issue decided in the prior litigation must be identical to the issue presented in the current action;

2) the initial ruling must have been on the merits and have become final;

3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and

4) the issue decided in the prior litigation must have been actually and necessarily litigated.

Five Star, 194 P. 3d *at* 713.

Due to the fact that Partner Weekly filed a lawsuit against Viable and Elie yet pursued only its claims against Viable and obtained its summary judgment against Viable; Plaintiff is now precluded from asserting an action against Elie. Allowing Plaintiff to maintain an action

against Elie individually, when Plaintiff has exhausted all remedies in the Arbitration proceeding is a direct violation of Res Judicata and claim preclusion.

The Court in *Federated Dep't Stores v. Moitie, 452 U.S. 394;101 S. Ct._2424 (1981)* provided: "The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata." *citing to Heiser v. Woodruff, 327 U.S. 726, 733 (1946).* The Court of Appeals' reliance on "public policy" is similarly misplaced. This Court has long recognized that "[public] policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Citing to Baldwin v. Traveling Men's Assn., 283 U.S. 522, 525 (1931).* We have stressed that "[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts . . . ." *Citing to Hart Steel Co.* v. *Railroad Supply Co., 244 U.S. 294, 299 (1917). Id. at 110-111.*

Plaintiff had ample opportunity to assert claims against Elie in the Arbitration as this action was submitted to Arbitration on behalf of all Parties in accordance with the Arbitration Clause. Plaintiff's failure to present necessary evidence to prevail against Elie personally during the course of Arbitration and in the Motion for Summary Judgment does not allow Plaintiff to thereafter, attempt a second "bite at the apple" in United States District Court. All claims for relief should have been brought against all Parties to the action; A failure to do so is Plaintiff's own fault and cannot be brought thereafter.

IV.

CONCLUSION

In light of all the evidence as stated *supra*, Defendant CHAD ELIE hereby request this Court grant this Motion to Dismiss and dismiss Plaintiff's Complaint against him personally.

Dated this 31st day of May, 2013.

LAW OFFICES OF SIGAL CHATTAH

/S/ Chattah

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CERTIFICATE OF MAILING

I, the undersigned, hereby certify that service of the foregoing was served on the 31st day of May, 2013 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service list.

/S/ Chattah
An Employee of the Law Offices of Sigal Chattah