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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – WEST DISTRICT

CARDROOM INTERNATIONAL L.L.C, a Florida Limited Liability Corporation,

Plaintiff,

vs.

MARK SCHEINBERG, an individual; ISAI SCHEINBERG, an individual; OLD FORD GROUP LTD., a limited liability company; RATIONAL ENTERTAINMENT ENTERPRISES LTD., a limited liability company; PYR SOFTWARE LTD., a limited liability company; STELEKRAM LTD., a limited liability company; SPHENE INTERNATIONAL LTD., a limited liability company; TILTWARE LLC, a California limited liability company; KOLYMA CORPORATION A.V.V., a Curacao company; POCKET KINGS LTD., an Irish limited liability company; POCKET KINGS CONSULTING LTD., an Irish limited liability company; FILCO LTD., a limited company; VANTAGE LTD., a limited company; RANSTON LTD., a limited company; MAIL MEDIA LTD., a limited company; CHRIS FERGUSON, an individual; HOWARD LEDERER, an individual; RAYMOND BITAR, an individual; PHILLIP GORDON, an individual; ANDY BLOCH, an individual; PHIL IVEY, an individual; PERRY FRIEDMAN, an individual; JOHN JUANDA, an individual; ERIK LINDGREN, an individual; ERIK SEIDEL, an individual; MICHAEL MATUSOW, an individual; ALLEN CUNNINGHAM, an individual; GUS HANSEN, an individual; PATRIK ANTONIUS, an individual; RAFE

Case No.: SC114330

NOTICE OF DEMURRER AND DEMURRER OF DEFENDANT CHRIS FERGUSON, TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Date of Hearing: November 29, 2012
Time: 9:00 AM
Place: 1725 Main Street, Santa Monica, CA
Dept: F
Judge: John H. Reid

FURST, an individual; NELSON BURTNICK, an individual; and DOES 1 through 30, inclusive,)
)
Defendants.

TO THE PLAINTIFF AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on November 29, 2012 at 9:00 am, or as soon thereafter as the matter may be heard in Department WEF of the above-entitled court, located at 1725 Main Street, Santa Monica, California, Defendant Chris Ferguson (hereinafter "Defendant" or "Ferguson") will and hereby does demur to the operative First Amended Complaint ("FAC") filed by Plaintiff, Cardroom International, LLC, on the following grounds:

DEMURRER TO PLAINTIFF'S FIRST CAUSE OF ACTION

1. Defendant demurs to Plaintiff's first cause of action for Civil RICO on the grounds that Plaintiff fails to allege facts that constitute a cause of action under Civil RICO because Plaintiff cannot set forth facts tying the alleged predicate acts to actionable harm. The alleged harm to Plaintiff's ability to compete is far too attenuated for Plaintiff to present a viable claim. In addition, the FAC is bereft of the sort of specific allegations required in a RICO claim, particularly with respect to the alleged predicate acts. Further, Plaintiff fails to plead a RICO enterprise.

DEMURRER TO PLAINTIFF'S SECOND CAUSE OF ACTION

2. Defendant demurs to Plaintiff's second cause of action because the FAC fails to state facts that constitute a cause of action under the Florida Anti-Trust Act, 542 FLA. STAT. *et seq.* Plaintiff's claim is fatally flawed because it is based on alleged harm in a market that Plaintiff simultaneously alleges to be illegal. Plaintiff avers that the real money online poker market is illegal. Plaintiff cannot recover, however, for alleged antitrust violations because Plaintiff cannot profit from an illegal market. Plaintiff also fails to aver an antitrust injury that is cognizable under Florida antitrust law. The FAC also fails to allege an antitrust conspiracy. Plaintiff's claim also fails because the FAC is devoid of any factual allegation to establish an actionable tying arrangement. Finally, Plaintiff also fails to allege facts specific to the individual Defendant. Accordingly, Plaintiff fails to state facts that constitute a cause of action against the individual Defendant.

DEMURRER TO PLAINTIFF'S THIRD CAUSE OF ACTION

3. Ferguson's demur to Plaintiff's third cause of action on the grounds that Plaintiff fails to allege facts that constitute a cause of action under the Cartwright Act. Plaintiff's claim fails because it is based on alleged harm in a market that Plaintiff simultaneously claims to be illegal. Plaintiff avers that the real money online poker market is illegal. Plaintiff cannot recover, however, recover for alleged antitrust violations in an illegal market. Plaintiff also fails to allege an antitrust injury that is cognizable under the Cartwright Act. The FAC also fails to allege an antitrust conspiracy. Plaintiff's claim under the Cartwright Act further fails because the FAC is devoid of any factual allegation to establish an actionable tying arrangement. Finally, Plaintiff fails to allege facts specific to the individual Defendant. Accordingly, Plaintiff fails to state facts that constitute a cause of action against any of the individual Defendants.

The Demurrer is based on the attached Memorandum of Points and Authorities, the Declaration of Ian J. Imrich and exhibits attached thereto, all matters of which this Honorable Court may take judicial notice, as well as the files and records in this action, and related actions filed in Los Angeles Superior Court and the U.S. District Court for the Central District of California.

Dated: August 15, 2012

LAW OFFICES OF IAN J. IMRICH

By: _____
Ian J. Imrich
Attorneys for Defendant,
CHRIS FERGUSON

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I. INTRODUCTION

Plaintiff's lawsuit is nothing more than a base attempt to capitalize on an indictment and civil forfeiture action that is wholly unrelated to the claims alleged. Plaintiff, Cardroom International LLC ("Plaintiff"), claims to be a Florida company that has created software for online poker and that maintains a free play online website.[1] Plaintiff sued PokerStars and Full Tilt Poker, two competitors in the online poker industry, and anyone that Plaintiff can tie to these two entities for antitrust and Civil RICO violations based on what Plaintiff claims is anticompetitive behavior.

Defendant Chris Ferguson ("Ferguson") filed the instant Demurrer to Plaintiff's operative First Amended Complaint ("FAC") because the FAC fails to allege facts that constitute a cause of action. The FAC contains three causes of action: (1) Civil RICO; (2) antitrust violations under the Cartwright Act; and (3) antitrust violations under Florida law. The claims are all based on legal proceedings in the Southern District of New York relating to alleged online gambling and payment processing issues. However, neither the criminal indictment of certain individuals nor the civil proceedings have anything whatsoever to do with Plaintiff or with anticompetitive conduct.

Defendant Ferguson demurs to all three causes of action set forth in Plaintiff's FAC. The Demurrer should be sustained as to the claim under Civil RICO because Plaintiff cannot set forth facts tying the alleged predicate acts to actionable harm. The alleged harm to Plaintiff's ability to compete is far too attenuated for Plaintiff to present a viable claim. Second, the FAC is bereft of the sort of specific allegations required in a RICO claim, particularly with respect to the alleged predicate acts. Third, Plaintiff fails to plead a RICO enterprise.

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[1] Plaintiff's counsel, Cyrus Sanai, has sued various Full Tilt Poker related entities and individuals in other lawsuits in Los Angeles County based on the same underlying (irrelevant) conduct alleged here, one in Superior Court, *Kennedy v. Full Tilt Poker et al.*, BC423036. There are related actions pending in the Central District of California, *Kennedy v. Full Tilt Poker et al.*, 09-cv-07964 MMM, and *Lary Kennedy, et al. v. Chris Ferguson, et al.*, 2:11-cv-08591 MMM (AGRx) ("*Kennedy II*"). Plaintiffs' Motion for Leave to Amend and File a Third Amended Complaint in *Kennedy v. Full Tilt Poker*, BC423036 is set to be heard on September 10, 2012 by Judge Minning; a hearing on Plaintiff's Motion to Vacate Dismissal is set for August 27, 2012 in *Kennedy v. Full Tilt Poker et al.*, 09-cv-07964 MMM.

Plaintiff's antitrust claims (both of which are based on state laws that are modeled after the Sherman Act) are equally meritless. First, Plaintiff's claim fails because it is based on alleged harm in a market that Plaintiff simultaneously alleges to be illegal. Plaintiff avers that the real money online poker market is illegal. Plaintiff cannot recover, however, for alleged antitrust violations because Plaintiff also could not profit from an illegal market.[2] Second, Plaintiff fails to aver an antitrust injury; the FAC merely alleges that Plaintiff itself was harmed. But that is not enough. Plaintiff appears to be primarily engaged in the business of providing software for the free online poker market. (*See* FAC ¶ 1.) Third, to the extent that the claim concerns the free online poker market, that market is thriving. Indeed, a company referenced in the FAC, Zynga, is the world's largest online poker company and continues to thrive. Fourth, it is nonsensical for Plaintiff to claim that alleged anticompetitive conduct in the real money online poker market somehow impacted its ability to compete in the free play poker market. Fifth, Plaintiff fails to allege an antitrust conspiracy. Not only is the FAC wholly conclusory, but the allegations of conspiracy fly in the face of common sense because PokerStars and Full Tilt Poker are competitors. Fifth, Plaintiff fails to allege an actionable tying arrangement. Finally, Plaintiff also fails to allege facts specific to the individual Defendants.

Accordingly, Plaintiff fails to state facts that constitute a cause of action against Ferguson and the Demurrer should be sustained as to all causes of action and without leave to amend.

II. STATEMENT OF FACTS

A. Plaintiff's Operative Complaint

On September 30, 2012, Plaintiff filed its initial complaint in Los Angeles Superior Court. On November 9, 2011, prior to service on any Defendant, Plaintiff filed its FAC. The FAC alleges claims for (1) violation the Racketeer-Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964 *et seq.*, (2) violation of the Florida Anti-Trust Act, 542 FLA. STAT. et seq.; and (3) violation of the Cartwright Act, Cal. Bus. & Prof. Code §§ 16700 *et seq.*

[2] Defendants vehemently dispute that real money online poker constitutes "gambling" under any Federal or state law, that there was anything illegal about the processing of payments from online poker played on the Full Tilt websites, and that there is anything whatsoever that is illegal or unlawful about their online poker business.

According to the FAC, Plaintiff is a small Florida-based company that owns a software system for online poker and maintains an internet website for free online poker called cardroom.com. The FAC names over *25* separate individuals and entities as Defendants, grouped around two former competitors in the online poker industry, Full Tilt Poker and PokerStars. Almost all of the Defendants are out-of-state residents including some residents of other countries . According to the FAC, the Defendant conspired to engage in anticompetitive behavior, harming Plaintiff's ability to compete in the free play online poker marketplace.

B. Removal to Federal Court

On April 2, 2012, Defendant Tiltware removed this action to Federal Court (and Ferguson filed a Notice of Joinder therein) on the ground that the Civil RICO claim pled in the FAC conveys federal question jurisdiction on this Court. Plaintiff filed an *ex parte* motion for remand based on the ground that not all Defendants Plaintiff claims to have served via certified mail had consented to the removal. Defendant Tiltware opposed that motion for remand. Judge Morrow granted the motion on the grounds that one of the Defendants, Perry Friedman, did not give his express consent to removal, even though he disputed that he was served.

C. Relevant Allegations in the FAC

1. The RICO Allegations Are Conclusory and Unspecified

a. General Allegations

The FAC alleges an antitrust conspiracy between two former competitors in the online poker market, Full Tilt Poker and PokerStars, and related individuals and entities. Ferguson is alleged to be a part of the Full Tilt Poker Defendants. According to the FAC, Cardroom, an online poker software with a website, was harmed because it was prevented from competing in the real money online poker market as a result of the Defendants' anticompetitive conduct. Plaintiff makes this claim despite its concession that Full Tilt Poker and PokerStars were no longer in the real money online poker business as of April 2011 at which time the Federal Government seized their websites. (FAC ¶ 27.) Plaintiff's claims are grounded in the notion that the Defendant prevented it from competing in an admitted illegal market. (*See id.*) According to Plaintiff, the Defendant's

marketing dominance hindered its ability to license its software to major media companies and to otherwise compete. (FAC¶¶ 36,37.)[2]

b. Civil RICO Allegations

The allegations in the Civil RICO claim are copied whole-cloth from an unrelated indictment handed down against Defendant Bitar in the Southern District of New York and a related civil forfeiture action. The conduct underlying the indictment has nothing whatsoever to do with Plaintiff or alleged anticompetitive conduct – the gravamen of the FAC. The predicate acts alleged in the FAC's Civil RICO claim include the following: (1) engaging in an illegal gambling business under various state laws which constitutes violations of 18 U.S.C. § 1955, *et seq*; (2) engaging in wire and mail fraud in violation of 18 U.S.C. §§ 1341, 1343 and 1344; and (3) processing payments from an online gambling business in violation of 18 U.S.C. §§ 1956, *et seq*. (FAC, ¶¶ 59-61.)[3] As noted above, Plaintiff does not allege any facts supporting the claim that Defendant Ferguson actually committed any of these alleged predicate acts. Indeed, the Civil RICO claim is bereft of specific allegations against the Defendant; rather, the allegations are wholly conclusory. In addition, Plaintiff fails to allege facts establishing that the alleged Civil RICO conduct and resulting harm to competition in the online poker market proximately caused its alleged injuries.

c. Antitrust Allegations

The two antitrust claims (claims 2 and 3) are identical. Plaintiff alleges that the PokerStars Defendants conspired with the Full Tilt Defendants to conduct anticompetitive conduct through the illegal payment processing and PokerStars' requirement that a network use the PokerStars online poker site in exchange for purchasing airtime on the network.[4] Plaintiff's conspiracy allegations are

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[2] Absent from the FAC is any allegation that Plaintiff would have been able to secure any contracts with network but for illegal conduct attributed to the Defendants. Also missing from the FAC is any claim that Plaintiff actually had the ability to compete in the online poker marketplace. These omissions are significant because, as mentioned in the FAC, the free play online poker marketplace is very robust. For example, the company "Zynga" discussed in the FAC operates a free play poker website, the largest poker website in the world. (See Request for Judicial Notice.) Accordingly, it appears that there are larger and more obvious hurdles to Plaintiff's success in the market place aside from Plaintiffs' convoluted theory of anti-competitive conduct on the part of defendants.

[3] Defendant vehemently denies all of the alleged predicate acts, that online poker constitutes "gambling" under any Federal or state law, and that there is anything "illegal" about the real money online poker business.

[4] Notably, Plaintiff concedes that the Full Tilt Defendants (including Ferguson) did not enter into such contracts. (See FAC ¶ ¶ 36-38.)

wholly conclusory and nonsensical as there is no logical reason why these competitors would conspire to engage in such anticompetitive conduct. (*See id.*, 36-38, 79) In addition, Plaintiff fails to allege injury to free online market as a whole; in fact, there are no allegations regarding the relevant market. Plaintiff avers that anticompetitive conduct damaged its ability to compete in the supposedly illegal real money online poker market, but fails to allege just how this was so. (*See* FAC ¶ ¶ 36-38, 64-65, 74-76, 79-83.) Further, as noted above, Plaintiff concedes that there are many companies who are successful in the free online poker arena, including the company "Zynga," demonstrating that its failure to compete is its own. (*Id.* ¶ 79.)

III. LEGAL ARGUMENT

A. Pleading Standard For Demurrer

The failure to plead ultimate facts in a complaint subjects the complaint to a demurrer for the "failure to state facts constituting the cause of action." Code Civ. Proc., § 430.10(e). The complaint must contain sufficient facts to apprise the defendant of the basis upon which the plaintiff is seeking relief. *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal. App. 4th 592, 608. A demurrer can be utilized where on the face of the complaint it is clear that plaintiff has failed to state a claim for relief or that the defendant has some defense that would bar recovery. *Guardian North Bay, Inc. v. Sup. Ct.* (2001) 94 Cal. App. 4th 963, 971-72. "Face of the complaint" includes matters shown in exhibits attached to the complaint and incorporated by reference. *Frantz v. Blackwell* (1987) 189 Cal. App. 3d 91, 94.[5]

[5] For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts properly pleaded (i.e., all ultimate facts alleged, but not contentions, deductions or conclusions of fact or law). However, the allegations are not accepted as true if they contradict or are inconsistent with facts judicially noticed by the court. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604; *Banerian v. O'Malley* (1974) 42 Cal. App. 3d 604, 611. Where, as here, the demurrer tests purely legal issues, leave to amend is properly denied. *See e.g. Lawrence v. Bank of America* (1985) 163 Cal. App. 3d 431, 436. The Code specifically authorizes the Court to consider, as ground for demurrer, any matter which the Court must or may judicially notice pursuant to Cal. Evid. Code §§ 451, 452. Cal. Code Civ. Proc. § 430.30(a).

To survive a Demurrer, a complaint cannot simply plead a legal conclusion. The bare allegation that a party breached its duty, or acted negligently, is a legal conclusion, rather than a factual allegation. *See, e.g., Sklar v. Franchise Tax Board* (1986) 185 Cal. App. 3d 616, 621 (allegations that conduct was "impermissible," "improper" and "arbitrary and capricious, contrary to law and an abuse of discretion," are legal conclusions). A demurrer tests whether allegations are plead with sufficiency, certainty, and particularity. *Banerian*, 42 Cal. App. 3d at 611-612. Where, as here, a complaint rests purely on legal conclusions, leave to amend is properly denied. *See e.g. Lawrence v. Bank of America* (1985) 163 Cal. App. 3d 431, 436.

B. Plaintiff Fails To State A Claim For Civil RICO

In its ill-conceived Civil RICO claim, Plaintiff attempts to glom onto an indictment issued against one of the individual Defendants in the Southern District of New York, and a related civil forfeiture action, despite the fact that the facts underlying the indictment, and the alleged conduct at issue in the indictment, have nothing whatsoever to do with Plaintiff or its claimed "business." Plaintiff's allegations fail.

1. Substantive Elements of a RICO Claim

To state a RICO claim, a plaintiff must allege that the defendant (a) received income derived from a pattern of racketeering activity, and used the income to acquire or invest in an enterprise in interstate commerce; (b) acquired or maintained an interest in, or control of, an enterprise engaged in interstate commerce through a pattern of racketeering activity; (c) caused an enterprise engaged in interstate commerce, while employed by the enterprise, to conduct or participate in a pattern of racketeering activity; or (d) conspired to engage in any of these activities. 18 U.S.C. § 1962; *see also United States v. Turkette* (1981) 452 U.S. 576, 583. Here, Plaintiff fails to adequately plead a RICO enterprise or the requisite predicate. Racketeering activity is any act indictable under the provisions of 18 U.S.C. § 1961(1), referred to as "predicate acts" under the statue. *Forsyth*, 114 F.3d at 1481. A "pattern" requires the commission of at least two predicate acts of "racketeering activity" within a ten-year period. 18 U.S.C. § 1961(5). An "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

2. Plaintiff Lacks Standing to Bring the RICO Claim

Even if the facts alleged in the Complaint are deemed true as to Ferguson's alleged wrongful conduct as is the case for purposes of evaluating the pleadings herein, Plaintiff fails to aver how that conduct is the proximate cause of any harm to Plaintiff. RICO's civil remedy provision, section 1964(c), only provides standing to a person who is actually "injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). A plaintiff who brings a Civil RICO claim under section 1964(c) must thus "show that the injury was proximately caused by the conduct

and that he has suffered a concrete financial loss." *Morning Star Packing Co. v. SK Foods LP*, 2011 WL 4591069 at *4 (E.D. Cal. 2011). In evaluating a RICO proximate cause question, the Ninth Circuit has instructed courts to consider "three non-exhaustive factors": (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries. *Id.*

Applying these factors in the instant case, the only possible conclusion is that Plaintiff lacks standing to bring its claim as a matter of law. The gravamen of the Civil RICO claim is that some Defendants were allegedly engaging in illegal internet gambling and circumventing payment processing regulations applicable to such online activity by misleading financial institutions into processing credit card charges. (FAC ¶¶ 41, 57-60.) Plaintiff, however, does not allege that it was directly harmed by such conduct, but rather by the supposed resulting (and immensely attenuated) anticompetitive effects of such conduct. This type of claim is generally alleged in an antitrust action, not a Civil RICO action. (FAC ¶¶ 62-64.) Turning to the second and third factors, it is impossible to determine what, if any damages Plaintiff allegedly suffered because Plaintiff's relationship to the transactions at issue is so attenuated.

A court "must scrutinize the causal link between the RICO violation and the injury, identifying with precision both the nature of the violation and the cause of the injury to the plaintiff." *Canyon County v. Syngenta Seeds, Inc.*, (9th Cir. 2008) 519 F.3d 969, 981. Critically, harm to competition is not the type of direct harm that satisfies that causal link in RICO actions. *Anza v. Ideal Steel Supply Corp.*, (2006) 547 U.S. 451, 481. In *Anza*, the court held "[a] RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." *Id.* at 460. Such claims are far too attenuated to support a RICO claim. *Id.* at 458. Assuming *arguendo* that PokerStars and Full Tilt Poker actually dominated the former real money online poker business as alleged, such market dominance would obviously have been caused by many factors completely unrelated to the alleged payment processing

RICO violations. For example, Plaintiff claims that this dominance was achieved through funding television programs and that unnamed "investors" were less interested in Plaintiff as a result. (FAC ¶ 62.) Plaintiff fails, however, to set forth any facts that would even give rise to an inference tying the payment processing misconduct described in the FAC that supposedly supports the RICO claim to the investor's opinion of Plaintiff's business, which supposedly caused the resulting damages.[6] Further, any claim of injury suffered in the free play online poker market cannot possibly be the result of the Defendant's alleged RICO violations, since Plaintiff does not allege (and cannot allege) that the various claimed predicate acts had anything to do with Plaintiff's lawful free play operations. Indeed, given the extremely attenuated allegations of damage due to "anticompetitive-conduct," the fact that unrelated free play businesses are thriving such as Zynga (referenced in the FAC) destroys Plaintiff's claim.[7] (*See* FAC ¶ 79.)

3. Plaintiff Fails to Plead the Requisite Predicate Acts With Particularity

Plaintiff fails to plead the facts comprising the various predicate acts with particularity. All RICO claims involving fraud must be alleged with particularity.[8] *Lancaster Community Hospital v. Antelope Valley Hospital District* (9th Cir. 1991) 940 F.2d 397, 405. A plaintiff must allege the time, place, and manner of each predicate act, the nature of the scheme involved, and the role of each defendant in the scheme. *Id* at 405. Measured against this requirement, the FAC wholly fails to

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[6] Similarly, Plaintiff alleges that it was prevented from licensing its business to major television networks by virtue of Poker Stars' interactions with networks. However, Plaintiff concedes that Full Tilt (including Ferguson) was not involved. (FAC ¶ 36.) Essentially, Plaintiff conclusorly alleges a conspiracy in an attempt to tie Ferguson and others to Poker Stars' alleged conduct, which itself is totally attenuated from the alleged RICO violations. Not only are the causation allegations attenuated, but such bare-bones allegation are devoid of the factual allegations required to survive a Demurrer. *See, e.g., Sklar, supra*, at 621 (allegations that conduct was "impermissible," "improper" and "arbitrary and capricious, contrary to law and an abuse of discretion," are legal conclusions); *see also Banerian*, 42 Cal. App. 3d at 610-611.

[7] Moreover, there are obviously many variables involved in what makes one internet company more attractive than another. Players are driven to websites primarily by the quality of the particular websites at issue, the volume of players on a site, the ability to play against a pro associated with a site, the ability to play multiple games on a site at the same time, advertising, and many other factors. Plaintiff's FAC does not allege, as it must, any facts which would even suggest that the Cardroom website had any of these other critical factors working in its favor. Rather, it seems little more than a concept that others have already capitalized on.

[8] The California Supreme Court has consistently held that any claim for fraud must be pleaded with particularity. *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal. 3d 197. Pleadings that state bare legal conclusions are insufficient as a matter of law. *Id.* "Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy of liberal construction of the pleadings ... will not ordinarily be invoked to sustain a pleading defective in any material respect." *Id.*; *see also Lazar v. Superior Court of Los Angeles County* (1996) 12 Cal. 4th 631, 645.

allege the requisite facts comprising any of the RICO predicate acts as alleged against the moving Defendant. The FAC does not specify, for example, which defendants directed or authorized the alleged scheme to defraud. Nor does it allege which individuals actually made the misrepresentations or what roles, if any, Ferguson had in the scheme.

4. Plaintiff Fails to Plead Essential Elements of the Various Predicate Acts

Plaintiff fails to allege the essential elements of the predicate acts on which it has based its RICO claim (bank fraud, wire fraud and money laundering), either generally or as applied individually to Ferguson. For example, Plaintiff has not pled the element of intent. Plaintiff alleges generally that the purpose of the alleged RICO scheme was to ensure the continued flow of money through the banks and financial institutions. Plaintiff also avers that the defendant's success in ensuring that continued flow of money was what allowed him to establish market dominance over Plaintiff. However, because there are no allegations as to the Defendant's intent to cause the banks to suffer loss, the RICO claim fails.[9]

5. Plaintiff Fails to Plead a RICO Enterprise

Plaintiff's allegation that all of the defendants constitute an "enterprise" in the form of an association in fact is nonsensical. To sufficiently allege the existence of an associated-in-fact enterprise, a plaintiff must allege the existence of both "'an ongoing organization, formal or informal,' and 'evidence that the various associates function as a continuing unit.'" *Odom v. Microsoft Corp.* (9th Cir. 2007) 486 F.3d 541, 552 (en banc). "A RICO plaintiff must allege a structure for the making of decisions separate and apart from the alleged racketeering activities, because the existence of an enterprise at all times remains a separate element which must be proved." *Wagh v. Metris Direct, Inc.* (9th Cir.2003) 348 F.3d 1102, 1112 , overruled on other grounds, *Odom*, 486 F.3d at 551. Additionally, an associated-in-fact enterprise must have at least three structural features: "a purpose, relationships among those associated with the enterprise, and

[9] Plaintiff fails to allege key facts establishing other elements of the predicate acts. For example, with respect to the wire fraud predicate act, the elements of a wire fraud are "(1) a scheme to defraud; (2) use of the wires in furtherance of the scheme; and (3) a specific intent to deceive or defraud." *U.S. v. Green*, (9th Cir. 2010) 592 F.3d 1057, 1064 . In the context of wire fraud, "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.'" *McNally v. U.S.* (1987) 483 U.S. 350, 358. The elements of mail fraud are similar.

longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938 (2009). Finally, as the Supreme Court has explained, proof of a pattern of racketeering activity "does not necessarily establish" proof of an enterprise. *Turkette*, 452 U.S. at 583. "The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Id.*

Plaintiff acknowledges that the two basic groups, Full Tilt Poker and PokerStars, are in actuality *competitors*. However, the FAC fails to allege facts explaining how or why these competitors would have formed a RICO enterprise. In addition, Plaintiff's allegations regarding the structure of the "RICO enterprise" are wholly insufficient. *See Eclectic Properties East, LLC., v. Marcus & Milli-chap Co.*, No. C-09-0511, 2010 WL 384736 at *4 (N.D. Cal. 2010) ; *Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir.2008) ("[s]imply performing services for the enterprise does not rise to the level of direction...."). Here, the FAC fails to include adequate allegations of a decision-making structure, hierarchy or organization for the enterprise (which is alleged to include all of the defendants). The bare bones allegations of the individual defendants' relationship to various companies is insufficient because the complaint describes neither the corporate entities' nor the individuals' relationship to the enterprise itself.[10]

C. Plaintiff Fails To Allege The California And Florida Antitrust Claims

The FAC contains two separate state-specific statutory claims for antitrust violations, one under Florida law (the Florida Antitrust Act, Fla. Stat. 542, et seq.), and one under California law (the Cartwright Act, Cal. Bus & Prof. Code § 16700 et seq.). While the FAC is exceedingly vague about the antitrust violations alleged against the Full Tilt Defendants, including Ferguson, these claims appear to be based on two separate sets of factual allegations. First, the FAC alleges that the Full Tilt Defendants entered into a horizontal, anticompetitive conspiracy with PokerStars. (FAC ¶ ¶

[10] Moreover, the Supreme Court has held that the phrase in the statute "to conduct or participate" means that each defendant, to be liable, must "participate in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 177, 185 (1993). In the instant case, however, Plaintiff fails to allege how Ferguson participated in the management or operation of the enterprise. The FAC does not include any allegations that support this key element of the claim. As noted above, the FAC fails to assign to particular Defendants specific acts alleged to have been part of the predicate acts for the RICO claim. In the absence of those allegations, and without any other allegations about how the defendants operated or managed the enterprise – as distinct from PokerStars and Full Tilt themselves – Plaintiff's RICO claim is wholly insufficient.

71, 80.) Second, it appears to allege that they engaged in an unlawful tying arrangement by linking the purchase of advertising time on networks to the licensing of software for use on those networks' websites. (FAC ¶ 70, 79.)

Both sets of allegations fail to state a claim under both Florida, and California antitrust laws. As a threshold matter, Plaintiff fails to allege either injury-in-fact or antitrust injury, both of which are required for a plaintiff to bring a private action under such antitrust laws. *See e.g. Korea Kumho Petrochemical Co. v. Flexsys Am. LP*, 370 Fed. Appx. 875, 876-877 (9th Cir. 2010). As the Court observed in *Hager v. Venice Hosp.,* 944 F.Supp. 1530 (M.D. Fla. 1996), a "private antitrust plaintiff must show that his or her injuries coincide with the public detriment tending to result from the alleged violation." *Id.* at 1537 (observing that "[a]ntitrust laws were intended to protect competition, not competitors.") Because plaintiff has not alleged injury to a lawful business, there is no injury-in-fact and no injury to lawful competition. [11]

1. The Law Underlying Both Antitrust Statutes Is Substantially The Same

As applied to this action, both the Florida Antitrust Act and the Cartwright Act proscribe identical anticompetitive conduct, and both look to the Federal Sherman and Clayton Acts to interpret the statutes. With respect to Florida law, "the Florida Legislature has indicated that its intent is for courts that are construing the Florida Antitrust Act to give "due consideration and great weight ... to the interpretations of the federal courts relating to comparable federal antitrust statutes." See § 542.32, Fla. Stat. (2005). Therefore, courts "look to federal cases to elucidate what is an agreement in restraint of trade and what proof constitutes a conspiracy." *Parts Depot Co. v. Fla. Auto Supply, Inc.* (Fla. 4th DCA 1996) 669 So.2d 321, 324 . With respect to California law, "[a] long line of cases has concluded that the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law. Consequently, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act." *Marin County Bd. Of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 925. California courts also rely on federal cases interpreting

[11] Moreover, both claims fail as a matter of substantive antitrust law. Plaintiff's allegation of a conspiracy is devoid of any but the most conclusory allegations of an agreement between Full Tilt and PokerStars. Plaintiff's insinuation of an unlawful tying arrangement fails to meet the most basic requirements of such a claim, including the requirement that the Full Tilt Defendants conditioned the sale of one product or service on the purchase of another.

the Clayton Act. *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 35 n.5. Accordingly, it is appropriate to address plaintiff's claims under the two states' antitrust laws together and to rely on federal antitrust law for guidance.[12]

2. Plaintiff Has Not Alleged An Injury To Business or Property

a. Plaintiff concedes the alleged conduct did not harm a lawful business

Both the Florida Antitrust Act and the Cartwright Act, like the Clayton Act, extend a private right action only to a plaintiff that has been injured in its "business or property." 15 U.S.C. § 15(a); Fla Stat. § 542.22; Cal. Bus. & Prof. Code § 16750. The injury in question must have been to a lawful business. "Courts have long recognized that "an action under the antitrust laws will not lie where the business conducted by the plaintiff, and alleged to have been restrained by the defendant, was itself unlawful." *Modesto Irrigation Dist. v. Pacific Gas and Elec. Co.,*(N.D. Cal. 2004) 309 F. Supp. 2d 1156, 1170 .[13] "This is so, courts have reasoned, because a party cannot prove a cognizable antitrust injury when it itself engaged in unlawful conduct ex ante." *Modesto Irrigation Dist.*, 309 F.Supp at 1170; *Vinci v. Waste Mgmt., Inc.* (9th Cir.1996) 80 F.3d 1372, 1376 (plaintiff who is neither a competitor nor a legitimate consumer in the relevant market cannot claim to have suffered cognizable antitrust injury); *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.,*(3d Cir.1997) 113 F.3d 405, 415 . Here, Plaintiff alleges that its real money online poker business sustained injury as a result of the Defendants' anticompetitive conduct. At the same time, however, Plaintiff also claims that business is illegal because it supposedly constitutes illegal online gambling.[14] (FAC, ¶¶ 59-61, 68.) Plaintiff's theory is untenable because it has not alleged a

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[12] Under the law of both California and Florida, the basic elements of the antitrust claim are (1) the formation and operation of the anticompetitive conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. *See, e.g., Quelimane Co. v. Stewart Title Guaranty Co.* (1988) 19 Cal.4th 26, 47, 77; *see also* Section 542.32, Fla. Stat.; *St. Petersburg yacht Charters v. Morgan Yacht, Inc.* (Fla. 2d Dist. 1984) 457 So. 2d 1028, 1037.

[13] *See also RealNetworks, Inc. v. DVD Copy Control Ass'n*, C 08-4548, 2010 WL 145098, at *6 (N.D.Cal. Jan.8, 2010); *Datel Holdings LTD. v. Microsoft Corp.*, 2010 WL 3910344, *4 (N.D.Cal.,2010); *Broker's Title v. Main*, 806 F.2d 257 (4th Cir. 1986) (since plaintiff had no right to engage in business in question, it suffered no antitrust injury when defendants conspired not to deal with it); *Sullivan v. National Football League*, 34 F.3d 1091, 1110 (1st Cir. 1994), as amended on denial of reh'g, (Oct. 26, 1994) (plaintiff would not suffer antitrust injury if it had no legal right to engage in the conduct that defendant restrained); *Alpha School Bus Co., Inc. v. Wagner*, 2004 WL 1368804, *4 (N.D. Ill. 2004) (plaintiff "would have no cause of action to recover for its own illegal activities").

[14] As noted, the Defendant vehemently disputes Plaintiff's arguments regarding the Full Tilt Poker real money online poker website. The Defendant vehemently disputes, *inter alia*, that online poker constitutes gambling, that online

cognizable injury to its "business or property," under California or Florida law.

b. Plaintiff's allegation of injury is conclusory and implausible

Plaintiff fails to allege how the conduct at issue could possibly have affected price or output in the free play online poker market. Stripped of its surplusage, Plaintiff's argument is that the allegedly "illegal" real money websites siphoned off potential free play players from the free play market and Plaintiff could not grow its free money business as a result. Plaintiff's allegations are demonstrably false, something which can be gleaned from an examination of its FAC. For example, Paragraph 79 references the free play online poker company "Zynga." Launched in 2007, Zynga is perhaps the poster child for the viability of the free online poker market; indeed, Zynga is the largest online poker site in the entire world, with 35 million monthly active users. (*See* Request for Judicial Notice.) It is played on major media websites such as Facebook, Google, Tagged and can be played through applications on the iPhone and Android systems. (*See id.*) The game is available in 18 languages around the world. (*Id.*) Zynga has achieved this exalted status despite the fact that it does not offer online poker for real money. Indeed, the company hosts live poker tournaments. For example, in March 2011, Zynga Poker hosted PokerCon, a live poker tournament at the Palms Casino in Las Vegas. Accordingly, Plaintiff cannot allege facts that would establish that Ferguson and the other Full Tilt Poker Defendants somehow adversely affected the free play online poker market by siphoning off customers, or by entering into agreements with media outlets. [15]

3. Plaintiff Fails to Allege An Antitrust Injury

Plaintiff cannot allege facts to support the allegation that it's supposed "exclusion" from the online poker market affected or was intended to affect the price or supply of goods in the free online poker market. In addition to alleging an injury to business or property causally linked to an antitrust violation, an antitrust plaintiff must also show antitrust injury, i.e. "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, (1990)4 95 U.S. 328, 334; *In re Flash Memory*

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poker is otherwise illegal, that any payment processing laws were violated, or that anything about the Full Tilt Poker business was illegal.

[15] A quick Google search for "free online poker" lists several dozen websites offering free online poker just like Plaintiff's. Clearly the free online poker market is thriving and has not been harmed.

Antitrust Litigation,(N.D.Cal.2009) 643 F.Supp.2d 1133. A plaintiff can recover only if the loss "stems from a competition-reducing aspect or effect of the defendant's behavior." *Atlantic Richfield,* 495 U.S. at 344. It is not enough to allege that the plaintiff was injured; rather, there must be an allegation of harm to competition in general. *Roberts's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc.*, (9th Cir.1984) 732 F.2d 1403, 1408; *Manufacturing Research Corp. v. Greenlee Tool Co.*, (11th Cir.1982) 693 F.2d 1037, 1043. This is because the "[a]ntitrust laws are for the protection of competition, not primarily for the protection of individual competitors." *St. Petersburg Yacht Charters v. Morgan Yacht, Inc.*, (Fla. 2d DCA 1984) 457 So.2d 1028, 1047.[16]

Here, Plaintiff has not alleged and cannot allege facts to establish that the real money or free online poker markets were in any way injured, or even intended to be injured, by the alleged anticompetitive conduct set forth in the FAC. To that end, it cannot be overemphasized that "[t]he antitrust laws are not intended to support artificially firms that cannot effectively compete on their own. It is only when the market is being distorted by anticompetitive conduct that the antitrust laws should be invoked." *Seagood Trading Corp. v. Jerrico, Inc.*, (11th Cir.1991) 924 F.2d 1555, 1573. There is no allegation that prices were increased or output reduced. The relevant allegations are solely about the effect of the conduct on Plaintiff's particular ability to compete in these markets. But the individualized damages that Plaintiff claims to have suffered are not the type of damages that can support an antitrust claim. *See e.g. Hager.*, 944 F.Supp. at 1537.

4. Plaintiff Fails To Adequately Allege An Antitrust Conspiracy

"An antitrust claim must plead the formation and operation of the conspiracy and the illegal acts done in furtherance of the conspiracy." *Freeman v. San Diego Ass'n of Realtors* (1999) 77 Cal. App. 4th 171, 189. "A conspiracy is a joint undertaking having an unlawful purpose, arising out of agreement, and usually extending over a period of time." *Standard Oil Co. v. Moore,* 251 F.2d 188, 223 n.3 (9th Cir. 1957); *see also G.H.I.I. v. MTS, Inc.* (1983) 147 Cal. App. 3d 256, 266. "It is a

[16] Stated another way, plaintiffs cannot use the antitrust laws to transform a generic business tort case into an antitrust claim. *Greenberg v. Mt. Sinai Medical Center*, (Fla. 3rd DCA 1993) 629 So.2d 252, 257 . Therefore, it is not enough for a plaintiff to simply allege that defendants unlawfully conspired to engage in a per se illegal boycott against him, and he sustained economic injury as a result of that illegal boycott. Rather, a plaintiff must allege that defendants' activities have the effect of stifling competition in general. *Id.*

combination of two or more persons by concerted action to accomplish a crime or unlawful purpose."[17] *G.H.I.I.*, 147 Cal. App. 3d at 266 (citing *Rutledge*, 327 F.Supp. at 1773-74.)[18]

The FAC is largely a series of allegations about unilateral conduct by competitors PokerStars and Full Tilt. No facts are alleged as to the formation or purpose of the purported conspiracy between Full Tilt and Poker Stars, other than repeated conclusory allegations of "conspiracy and "joint" activity. Such allegations are clearly insufficient. *Marsh*, *supra*, at 492-493. In addition, any agreement to restrain trade between Full Tilt and Poker Stars would be inherently implausible.

5. Plaintiff Has Not Alleged An Unlawful Tying Arrangement

A tying arrangement is "an agreement by a party to sell *one* product [the tying product] but only on the condition that the buyer *also purchases a different (or tied) product*, or at least agrees that he will not purchase that product from any other supplier." *N. Pac. Ry. Co. v. U.S.*, (1958) 356 U.S. 1, 5-6. Here, there is no allegation that Defendant Ferguson himself sought to sell two products (or services) to any media company, only an allegation that Full Tilt generally sought to require sellers of airtime to buy something from the Full Tilt Defendants in exchange for Full Tilt's purchase of airtime. This arrangement is not anticompetitive tying as a matter of law. *See, e.g., 49er Chevrolet, Inc. v. Gen. Motors Corp.* (9th Cir. 1986) 803 F.2d 1463, 1469 (requirement imposed by seller that the buyer sell something to the seller is not anticompetitive tying).[19]

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[17] The law is the same under the Florida antitrust statute, which follows Federal antitrust law. Section 542.18, Florida Statutes (1991) provides that "[e]very contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." The section is patterned after section 1 of the Sherman Antitrust Act, and has as its purpose "to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition." § 542.16, Fla.Stat. (1991); *Hackett v. Metropolitan Gen'l Hospital* (1982) 422 So.2d 986, 988.

[18] "California requires a 'high degree of particularity' in the pleading of Cartwright Act violations, therefore generalized allegations of antitrust violations are usually insufficient." *Marsh v. Anesthesia Service Medical Group, Inc.* (2011) 200 Cal. App. 4th 480, 492-493. The absence of factual allegations of specific conduct in furtherance of the conspiracy to eliminate or reduce competition makes the complaint legally insufficient. *Freeman, supra*, at 196; *see also G.H.I.I, supra*, at 266. "[I]t is well settled that a complaint for antitrust violations which fails to allege such concerted action by separate entities maintaining separate and independent interests is subject to demurrer." *Id* at 266.

[19] In general, a tying claim requires a showing that (i) two separate products or services are involved, (ii) the sale or agreement to sell one product or service is conditioned on the purchase of another, (iii) the seller has sufficient economic power in the market for the tying product to enable it to restrain trade in the market for the tied product, and (iv) a not insubstantial amount of interstate commerce in the tied product is affected. *See, e.g., Fortner Enters. v. U.S. Steel Corp.*, (1969) 394 U.S. 495, 498-99; *Digidyne Corp. v. Data Gen. Corp.*, (9th Cir. 1984) 734 F.2d 1336, 1338.

Plaintiff's claim falls far short of the pleading required to establish any of these elements: First, Plaintiff's tying claim fails because the FAC does not allege a relevant product market for either the tying product or the tied product. *Tanaka v. Univ. of S. Cal.*, (9th Cir. 2001) 252 F.3d 1059, 1063 (failure to identify a relevant market is a proper ground for dismissing antitrust claim). Second, there is no allegation that Ferguson sought to sell two products (or services) to

6. Plaintiff Fails To Allege Facts Specific To Individual Defendant Ferguson

Plaintiff has not alleged facts specific to individual Defendant Ferguson's specific participation in the alleged anticompetitive conduct. Plaintiff must allege facts specific to Ferguson.

IV. CONCLUSION

For all the reasons set forth above, Chris Ferguson's Demurrer to Plaintiff's FAC must be sustained and without leave to amend.

Dated: August 15, 2012

LAW OFFICES OF IAN J. IMRICH

By: _____
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CHRIS FERGUSON

any media company. This arrangement is not anticompetitive tying as a matter of law. *See, e.g., 49er Chevrolet, Inc. v. Gen. Motors Corp.*, (9th Cir. 1986) 803 F.2d 1463, 1469 (requirement imposed by seller that the buyer sell something to the seller is not anticompetitive tying). Third, there are no allegations of sufficient market power. "In all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product. *Illinois Tool Works v. Independent Ink, Inc.*, (2006) 547 U.S. 28, 3446. "And to prove [market power], it must first be properly alleged." *Rick-Mik*, 532 F.3d at 971-72. Finally, the FAC fails to allege a market for the tied product, let alone that commerce has been restrained. *See, e.g., E&L Consulting v. Doman Indus.*, (2d Cir. 2006) 472 F.3d 23, 32.

PROOF OF SERVICE

I, Valerie Elias, declare:

I am a citizen of the United State and employed in Los Angeles, California. I am over the age of eighteen years and not a party to the within-entitled action. My office address is 10866 Wilshire Blvd., Suite 1240, Los Angeles, CA 90024. On August 15, 2012 I served a copy of the within document(s): **NOTICE OF DEMURRER AND DEMURRER OF DEFENDANT CHRIS FERGUSON, TO PLAINTIFF'S FIRST AMENDED COMPLAINT; PROPOSED ORDER SUSTAININT DEMURRER**

X by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration is executed on August 15, 2012 at Los Angeles, California.

Valerie Elias