INDIAN &

FEDERAL GAMING LAW

Part 2

Wagering Subject Matter

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

As set forth above, the Federal Wire Act applies to *the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest*.

The District Court Opinion

132 F.Supp.2d 468,

United States District Court,E.D. Louisiana.

In re MASTERCARD INTERNATIONAL INC., INTERNET GAMBLING LITIGATION, and Visa International Service Association Internet Gambling Litigation
This Document Relates to All Actions
Nos. CIV. A. MDL1321, CIV. A. MDL1322.

Feb. 23, 2001.

Gamblers filed class action complaints on behalf of themselves and others similarly situated against certain credit card companies and issuing banks based on defendants' alleged illegal involvement with the internet gambling industry. Upon defendants' motions to dismiss Racketeer Influenced and Corrupt Organizations Act (RICO) claims, the District Court , Duval, J., held that: (1) gamblers failed to plead violation of state law as predicate act; (2) since Wire Act did not prohibit internet casino gambling or credit card companies' and issuing banks' association therewith, there could be no mail or wire fraud serving as

predicate acts under RICO; (3) gamblers failed to allege a RICO enterprise consisting of internet gambling casinos and defendant credit card companies and issuing banks; (4) gamblers failed to allege that defendant credit card companies and issuing banks satisfied the operation or management test for liability under RICO; and (5) gamblers could not pursue civil remedies under RICO due to their inability to plead proximate causation.

Motions granted.

ORDER AND REASONS

DUVAL, District Judge.
…
Presently before the Court are Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted and Rule 19 motions for joinder or dismissal for non-joinder filed by MasterCard International Inc. (record documents 19 & 20), Fleet Bank and Fleet Credit Card Services (record document 21), Visa International Services Association (record documents 17 & 18), and Travelers Bank (record document 16). These motions have been filed in accordance with the Court's multidistrict litigation management order entered June 14, 2000 and are limited to defendants' liability under federal law, namely the Racketeer Influenced and Corrupt Organizations Act ("RICO"), found at 18 U.S.C. § 1961 et seq. The Court heard oral argument on the motions on September 13, 2000 and has considered the pleadings, memoranda and relevant law and finds that the motions to dismiss shall be granted for the reasons that follow.

The Court will analyze the Rule 12(b)(6) motions as follows:
I. Background
II. Standard for Motion to Dismiss
III. The Racketeer Influenced and Corrupt Organizations Act ("RICO"), Generally
IV. Elements Common to All RICO claims
A. The Existence of a RICO Person
B. The Alleged Pattern of Racketeering Activity
1. Alleged Predicate Acts Under State Law
a. New Hampshire Law
b. Kansas Law
2. The Wire Act, 18 U.S.C. § 1084
3. Mail Fraud, 18 U.S.C. § 1341 and Wire Fraud, 18 U.S.C. § 1343
4. Other Federal Laws
5. Collection of Unlawful Debt
C. Enterprise
1. Generally
2. Existence Separate and Apart From the Pattern of Racketeering Activity
3. An Ongoing Organization with a Hierarchical or Consensual Decision Making Structure
V. Additional Elements Discrete to 18 U.S.C. § 1962(c)

A. Conduct
B. Person/Enterprise Distinctness
VI. Aiding and Abetting Liability under 18 U.S.C. § 1962(c)
VII. Standing to Assert a Civil RICO Claim under 18 U.S.C. § 1964 for Violations of 18 U.S.C. § 1962(c)

The Rule 12(b)(6) Motions

I. Background

The factual and legal allegations by plaintiffs in each of the two actions before the Court are nearly identical; therefore, the Court will set out the factual background in the form of a single narrative and indicate where the factual allegations or legal theories diverge. For purposes of this motion, the following are taken as true.

Larry Thompson ("Thompson") and Lawrence Bradley ("Bradley") (together referred to as "plaintiffs") filed class action complaints on behalf of themselves and others similarly situated against certain credit card companies and issuing banks for those entities alleged illegal involvement with the internet gambling industry. Named as defendants by Thompson are MasterCard International, Inc. ("MasterCard"), Fleet Bank and Fleet Credit Card Services ("Fleet"). Those named as defendants by Bradley are Visa International Service Association ("Visa") and Travelers Bank USA Corp ("Travelers").

Plaintiffs' class action complaints allege that defendants have violated several federal and state laws with respect to defendants' involvement with internet casinos. Plaintiffs argue that defendants' actions constitute a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act, found at 18 U.S.C. §§ 1961 -1968.

As the internet breaks down the geographic and temporal walls that once restricted the flow of information and commerce, plaintiffs argue that several illegitimate businesses have used the medium to further their illegal industries….
…
In support of these accusations, plaintiffs contend that the defendants' services support "the internet casinos... in foreign countries where their presence may be legal" but that they also "actively directed, participated in and aided and abetted [the casinos] bookmaking activities in the United States where they are not legal." Bradley Complaint at ¶ 39, Thompson Complaint at ¶ 35. Thompson supports this accusation by alleging that employees of MasterCard attended an on-line gaming seminar and gave an impromptu presentation explaining MasterCard's role in the internet gambling system. Thompson Complaint at ¶ 40. Bradley supports his claim by alleging that Visa had detailed procedures in place to handle internet gambling transactions. Bradley Complaint at ¶¶ 45-49. It is plaintiffs' contention that the credit card companies know the exact nature of each transaction processed through their international payment system and continue to allow internet gamblers to use their credit cards when defendants knew that internet gambling debts were allegedly illegal. Bradley Complaint at

¶¶ 41-42, Thompson Complaint at ¶¶ 36-37. Plaintiffs do not allege that the defendants received or transmitted any bets or that they have an ownership interest in the online casinos.

Plaintiffs bring their suits under 18 U.S.C. § 1964(c) arguing that the defendants have violated 18 U.S.C. § 1962(c) as well as state law. Plaintiffs support these causes of action with several claims that depend upon a finding that internet gambling is illegal under state and/or federal law, as well as causes of action for mail fraud and wire fraud. With these facts in mind the Court turns to the relevant legal standards.

II. Standard for Motion to Dismiss

…

III. RICO Generally

…

IV. Elements Common to All RICO Claims

…

B. Pattern of Racketeering Activity

As stated above, a prerequisite to the RICO action is that there be a pattern of racketeering activity…

In this case, plaintiffs' allegations arise under sections 1961(1)(A) and 1961(1)(B). Plaintiffs' (1)(A) allegations are that the defendants violated gambling laws that are chargeable under state law and punishable by imprisonment of more than one year. In plaintiff Thompson's case, he alleges violations of Kan. Stat. Ann. §§ 60-1704 , 21-4302 , 21-4304 and 21-3104. In plaintiff Bradley's case, he alleges violations of N.H.Rev.Stat. Ann. §§ 491:22 , 338:1 , 338:2 and 338:4. As to their claims under § 1961(1)(B) , plaintiffs claim violations of 18 U.S.C. § 1084(a) ("The Wire Act"); 18 U.S.C. § 1952 ("The Travel Act"); 18 U.S.C. § 1955 (Prohibition of Illegal Gambling Business); 18 U.S.C. § 1957 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity); and 18 U.S.C. § 1960 (Prohibition of Illegal Money Transmitting Business). There are currently no federal statutes addressing Internet gambling.

It is the defendants' argument that both plaintiffs failed to sufficiently allege a violation of any predicate act listed in the complaint. As such they argue that plaintiffs cannot satisfy a RICO prerequisite and that plaintiffs' case should be dismissed accordingly. Plaintiffs' response is that internet gambling violates the several federal and state statutes as alleged in the complaint. Thus, in order to establish that plaintiffs' have established a crucial RICO prerequisite, the Court turns to the alleged underlying offenses.

1. State Law Claims…

2. The Wire Act

When interpreting a statute, a court looks first to the language of the statute. Richardson v. United States, 526 U.S. 813, 818, 119 S.Ct. 1707, 1710, 143 L.Ed.2d 985 (1999). "Courts in applying criminal laws generally must follow the plain and unambiguous*480 meaning of the statutory language." Salinas v. United States, 522 U.S. 52, 57, 118 S.Ct. 469, 474, 139 L.Ed.2d 352 (1997). "[O]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language." Id.

The Wire Act, found at 18 U.S.C. § 1084 provides in pertinent part as follows,
(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under his title or imprisoned....
18 U.S.C. § 1084(a) (emphasis added). Section (b) of the statute carves out an exception to the rule, instructing that the Wire Act shall not "be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests" from a state or country where betting on the sporting event or contest is legal to another state or country where "such betting is legal." 18 U.S.C. § 1084(b) (emphasis added).

The defendants argue that plaintiffs' failure to allege sports gambling is a fatal defect with respect to their Wire Act claims, while plaintiffs strenuously argue that the Wire Act does not require sporting events or contests to be the object of gambling. However, a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest. Both the rule and the exception to the rule expressly qualify the nature of the gambling activity as that related to a "sporting event or contest." See 18 U.S.C. §§ 1084(a) & (b). A reading of the caselaw leads to the same conclusion. See United States v. Kaczowski, 114 F.Supp.2d 143, 153 (W.D.N.Y.2000) (Wire Act "prohibits use of a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest"); United States v. Sellers, 483 F.2d 37, 45 (5th Cir.1973)(overruled on other grounds in United States v. McKeever, 905 F.2d 829 (5th Cir.1990))("the statute deals with bookmakers)"; U.S. v. Marder, 474 F.2d 1192, 1194 (5th Cir.1973) (first element of statute satisfied when government proves wagering information "relative to sporting events").

As the plain language of the statute and case law interpreting the statute are clear, there is no need to look to the legislative history of the Act as argued by plaintiffs. See In re Abbott Laboratories, 51 F.3d 524, 528 (5th Cir.1995). However, even a summary glance at the recent legislative history of internet gambling legislation reinforces the Court's determination that internet gambling

on a game of chance is not prohibited conduct under 18 U.S.C. § 1084. Recent legislative attempts have sought to amend the Wire Act to encompass "contest[s] of chance or a future contingent event not under the control or influence of [the bettor]" while exempting from the reach of the statute data transmitted "for use in the new reporting of any activity, event or contest upon which bets or wagers are based." See S.474, 105th Congress (1997). Similar legislation was introduced the 106th Congress in the form of the "Internet Gambling Prohibition Act of 1999." See, S. 692, 106th Congress (1999). That act sought to amend Title 18 to prohibit the use of the internet to place a bet or wager upon "a contest of others, a sporting event, or a game of chance..." Id. As to the legislative intent at the time the Wire Act was enacted, the House Judiciary Committed Chairman explained that "this particular bill involves the transmission of wagers or bets and layoffs on horse *481 racing and other sporting events." See 107 Cong. Rec. 16533 (Aug. 21, 1961). Comparing the face of the Wire Act and the history surrounding its enactment with the recently proposed legislation, it becomes more certain that the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, sporting events or contests. Plaintiffs' argument flies in the face of the clear wording of the Wire Act and is more appropriately directed to the legislative branch than this Court.

In the context of a Rule 12(b)(6) motion, then, the Court must look to the allegations in the complaints to determine if "the complaint lacks an allegation regarding a required element necessary for relief." Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir.1995) citing 2A Moore's Federal Practice, ¶ 12.07[2.-5] at 12-91; Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). The parties make several allegations that they placed bets at internet casino sites. See e.g., Thompson complaint at ¶¶ 24, 25, 54, Bradley complaint at ¶¶ 24, 26. Plaintiffs fail to allege the identity of the games that they played, i.e. games of chance or sports related games. Pleading such matters is critical when their right to relief hinges upon the determination of whether Internet casino gambling is legal. That being said, the Court cannot simply assume that plaintiffs bet on sporting events or contests when they make no such allegation in their otherwise extremely thorough complaints.

The sole reference to "sports betting" is a conclusory allegation that the alleged enterprise engaged in sports betting. See Bradley petition at ¶ 88, Thompson petition at ¶ 77. However, nowhere does either plaintiff allege personal participation in sports gambling. Such an allegation is not enough to survive a motion to dismiss where there is no claim that plaintiffs themselves, or the defendants they have sued, participated in sports gambling. Since plaintiffs have failed to allege that they engaged in sports gambling, and internet gambling in connection with activities other than sports betting is not illegal under federal law, plaintiffs have no cause of action against the credit card companies or the banks under the Wire Act.

3. Mail and Wire Fraud

Plaintiffs also allege violations of the federal mail and wire fraud statutes…

…
Since the Court finds that the Wire Act does not prohibit internet casino gambling or defendants' association therewith, there can be no mail or wire fraud. Plaintiffs' fraud claims depend upon a finding that the gambling activities and debts were in violation of U.S. and state law and that the defendants therefore misrepresented the debts as legal, as explained in the previous sections. However, plaintiffs' attempt to advance this theory fails because the debts themselves are not illegal. Moreover, even if the debts were illegal, defendants' representations with respect to those debts do not provide a basis for a mail or wire fraud claim because "[i]t is the general rule that fraud cannot be cannot be predicated upon misrepresentations of law." See Meacham v. Halley, 103 F.2d 967, 971 (5th Cir.1939); see also Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40 (2d Cir.1991).

….

VI. Aiding and Abetting a § 1962(c) violation FN9

In a subheading of his complaint, plaintiff Bradley cites the applicable statute as § 1964(a). However, in his factual allegations plaintiff clearly refers to defendants' as aiders and abettors to a § 1962(c) violation. The Court will accordingly analyze plaintiffs' claim as one for aiding and abetting a § 1962(c) violation.

Plaintiffs also assert a cause of action premised on aiding and abetting liability. They state that "[b]ecause Defendants have formed an illegal Internet gambling enterprise, conducted and/or facilitated Internet casino betting and collected unlawful debt, they have participated as a principal within the meaning of 18 U.S.C. § 2 and are liable as an aider and abettor to the violation of 18 U.S.C. § 1962(c)." Bradley Complaint at ¶ 113; see also Thompson Complaint at ¶ 35.

This argument fails as plaintiffs' underlying § 1962(c) claim is meritless. Without a violation of the underlying substantive offense, there can be no aiding and abetting liability. That being said, it is doubtful that an aiding and abetting liability cause of action exists under § 1962(c).

…

Accordingly,

IT IS ORDERED that the motions to dismiss of MasterCard, Visa, Travelers and Fleet are GRANTED.

The Court of Appeals Opinion

313 F.3d 257, (portions redacted)

United States Court of Appeals, Fifth Circuit.

In Re: MASTERCARD INTERNATIONAL INC. Internet Gambling Litigation.
…
Nov. 20, 2002.

Credit card holders filed class action complaints against credit card companies and issuing banks, alleging that they violated the Racketeer Influenced and Corrupt Organizations Act (RICO) by aiding and abetting illegal internet gambling. The United States District Court for the Eastern District of Louisiana , Stanwood R. Duval, Jr. , J., 132 F.Supp.2d 468, granted motions to dismiss, and plaintiffs appealed. The Court of Appeals , Dennis, Circuit Judge, held that plaintiffs failed to sufficiently allege that defendants engaged in a pattern of racketeering activity or the collection of unlawful debt, and thus dismissal for failure to state a claim was proper.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.
Before DeMOSS , STEWART and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:
In this lawsuit, Larry Thompson and Lawrence Bradley ("Thompson," "Bradley," or collectively "Plaintiffs") attempt to use the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § § 1961 -1968, to avoid debts they incurred when they used their credit cards to purchase "chips" with which they gambled at on-line casinos and to recover for injuries they allegedly sustained by reason of the RICO violations of MasterCard International, Visa International, and banks that issue MasterCard and Visa credit cards (collectively "Defendants"). FN1 The district court granted the Defendants' motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. We AFFIRM.

I.

Thompson and Bradley allege that the Defendants, along with unnamed Internet casinos, created and operate a "worldwide gambling enterprise" that facilitates illegal gambling on the Internet through the use of credit cards. Internet gambling works as follows. A gambler directs his browser to a casino website. There he is informed that he will receive a gambling "credit" for each dollar he deposits and is instructed to enter his billing information. He can use a credit card to purchase the credits.[1] His credit card is subsequently charged for his purchase of the credits. Once he has purchased the credits, he may place wagers. Losses are debited from, and winnings credited to, his account. Any net winnings a gambler might accrue are not credited to his card but are paid by alternate mechanisms, such as wire transfers.

[1] Gamblers can purchase the credits through online transactions or by authorizing a purchase via a telephone call. Gamblers also can purchase the credits via personal check or money order using the mails.

Under this arrangement, Thompson and Bradley contend, "[t]he availability of credit and the ability to gamble are inseparable."[2] The credit card companies facilitate the enterprise, they say, by authorizing the casinos to accept credit cards, by making credit available to gamblers, by encouraging the use of that credit through the placement of their logos on the websites, and by processing the "gambling debts" resulting from the extension of credit. The banks that issued the gamblers' credit cards participate in the enterprise, they say, by collecting those "gambling debts."

Thompson holds a MasterCard credit card issued by Fleet Bank (Rhode Island) NA. He used his credit card to purchase $1510 in gambling credits at two Internet gambling sites. Bradley holds a Visa credit card issued by Travelers Bank USA Corporation. He used his credit card to purchase $16,445 in gambling credits at seven Internet gambling sites. Thompson and Bradley each used his credits to place wagers. Thompson lost everything, and his subsequent credit card billing statements reflected purchases of $1510 at the casinos. Bradley's winning percentage was higher, but he fared worse in the end. He states his monthly credit card billing statements included $7048 in purchases at the casinos.

Thompson and Bradley filed class action complaints against the Defendants on behalf of themselves and others similarly situated. They state that the Defendants participated in and aided and abetted conduct that violated various federal and state criminal laws applicable to Internet gambling. Through their association with the Internet casinos, the Defendants allegedly "directed, guided, conducted, or participated, directly or indirectly, in the conduct of an enterprise through a pattern of racketeering and/or the unlawful collection of unlawful debt," in violation of 18 U.S.C. § 1962(c). They seek damages under RICO's civil remedies provision, claiming that they were injured by the Defendants' RICO violations. They also seek declaratory judgment that their gambling debts are unenforceable because they are illegal.

Upon motions by the Defendants, the district court dismissed the Plaintiffs' complaints. …

II.

We review a district court's grant of a Rule 12(b)(6) motion de novo, applying the same standard used below. "In so doing, we accept the facts alleged in the complaint as true and construe the allegations in the light most favorable to the plaintiffs." But "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."

III.

…

[2] The Plaintiffs state that 95% of Internet gambling business involves the use of credit cards.

> "A pattern of racketeering activity requires two or more predicate acts and a demonstration that the racketeering predicates are related and amount to or pose a threat of continued criminal activity." The predicate acts can be either state or federal crimes. Thompson and Bradley allege both types of predicate acts.
> …
> Thompson and Bradley both identify three substantive federal crimes as predicates-violation of the Wire Act, mail fraud, and wire fraud. The district court concluded that the Wire Act concerns gambling on sporting events or contests and that the Plaintiffs had failed to allege that they had engaged in internet sports gambling.[3] We agree with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion. The Plaintiffs may not rely on the Wire Act as a predicate offense here.
>
> The district court next articulated several reasons why the Plaintiffs may not rely on federal mail or wire fraud as predicates. Of these reasons, two are particularly compelling. First, Thompson and Bradley cannot show that the Defendants made a false or fraudulent misrepresentation. Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal. Hence, the Defendants could not have fraudulently represented the Plaintiffs' related debt as legal because it was, in fact, legal. We agree that "the allegations that the issuing banks represented the credit charges as legal debts is not a scheme to defraud." Second, Thompson and Bradley fail to allege that they relied upon the Defendants' representations in deciding to gamble. The district court correctly stated that although reliance is not an element of statutory mail or wire fraud, we have required its showing when mail or wire fraud is alleged as a RICO predicate. Accordingly, we conclude that Thompson and Bradley cannot rely on the federal mail or wire fraud statutes to show RICO predicate acts.
> …
> We need not analyze the validity or merit of Plaintiffs' claim based on aiding and abetting liability because (assuming it is valid) it necessarily falls along with the underlying RICO claim. Likewise, we need not consider the merits of the Defendants' motions to join the Internet casinos pursuant to Rule 19 of the Federal Rules of Civil Procedure. We agree with the district court that those motions are moot.
> …

For the foregoing reasons, we AFFIRM the judgment of the district court.

[3] In re MasterCard, 132 F.Supp.2d at 480 ("[A] plain reading of the statutory language [of the Wire Act] clearly requires that the object of the gambling be a sporting event or contest.").

The DOJ Interpretation

Statement of
John G. Malcolm
Deputy Assistant Attorney General

Criminal Division
United States Department of Justice

At
Special Briefing: Money Laundering and Payment Systems in Online Gambling
Sponsored
By World Online Gambling Law Report
London, England

It is a pleasure to speak to you today about some of the many issues involved with on-line gambling. Let me state at the outset that when I refer to on-line gambling, I am including within that definition gambling and gaming of all types, be it casino-type games or sporting events, and I am also including gambling by other technologies, such as through interactive television. For purposes of United States law, these distinctions are not as significant as they are under the laws of other countries.

As you all know, the number of Internet gambling sites has increased substantially in recent years. While there were approximately 700 Internet gambling sites in 1999, it is estimated that by 2003, there will be approximately 1,800 such sites generating around $4.2 billion. In addition to on-line casino-style gambling sites, there are also numerous off-shore sports books operating telephone betting services. These developments are of great concern to the United States Department of Justice, particularly because many of these operations are currently accepting bets from United States citizens, when we believe that it is illegal to do so. The United States has other concerns too, some of which I would like to talk about today.
…

In the United States, both federal and state laws apply to on-line gambling. Historically, the individual states were left to determine what forms of gambling could be offered within an individual state's borders and to regulate such gambling. Not surprisingly, different states have different laws about gambling. For example, the State of Nevada permits and regulates casinos and sports bookmaking operations; while the neighboring State of Utah, on the other hand, does not permit any gambling. This poses a particular problem in the on-line world because, as I previously stated, the person placing a bet may not be located in the same state or even the same country as the person receiving the bet.

The Department of Justice views a gambling transaction as occurring in both the jurisdiction where the bet is placed by the bettor and in the jurisdiction where the gambling business that receives the bet is located. Thus, if Internet gambling were regulated in the United States, it would be subject to, and would need to be in compliance with, fifty differing sets of gambling laws, which would pose certain unique problems.

While the prosecution of individual bettors and intra-state gambling crimes are largely left to the individual states, there are numerous federal gambling statutes that the Department of Justice has employed against large-scale gambling businesses that operate interstate or internationally.

One such statute is the so-called Wire Act, which is codified at Section 1084 of Title 18 of the United States Code. This statute makes it a crime, punishable up to two years in prison, to knowingly transmit in interstate or foreign commerce bets on any sporting event or contest. It is the Department of Justice's position that this prohibition applies to both sporting events and other forms of gambling, and that it also applies to those who send or receive bets in interstate or foreign commerce even if it is legal to place or receive such a bet in both the sending jurisdiction and the receiving jurisdiction. This view was upheld by the Second Circuit Court of Appeals in the recent successful federal prosecution of Jay Cohen, who was the President of World Sports Exchange, a company which was based in Antigua but which accepted bets via the telephone and the Internet from citizens in the United States, who was the President of World Sports Exchange, a company which was based in Antigua but which accepted bets via the telephone and the Internet from citizens in the United States.

Questions for Discussion

Does the Federal Wire Act prohibit offering sports wagering services across state lines?

Does the Federal Wire Act prohibit offering poker wagering services across state lines?

Does the Federal Wire Act prohibit offering slot machine wagering services across state lines?

Does the Federal Wire Act prohibit offering horse race wagering services across state lines?

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

United States District Court,
D. Utah,
Central Division.
UNITED STATES of America, Plaintiff,
v.
Baron LOMBARDO, et al., Defendants.
Case No. 2:07-CR-286 TS.
639 F.Supp.2d 1271

Dec. 13, 2007.

The Court heard oral argument regarding the matters on November 29, 2007. Having taken the matters under advisement, the Court now denies each of the motions to dismiss for the reasons set forth below.

I. THE INDICTMENT

As two of the motions to dismiss challenge the sufficiency of the Indictment, the Court begins with a detailed summary of the conduct alleged therein: The charges in the Indictment arise from an alleged criminal "Enterprise" created for the purpose of providing transaction processing services to illegal gambling websites. The Enterprise consisted of individual defendants Baron Lombardo, Richard Carson-Selman, Henry Bankey, Tina Hill, Count Lombardo, Frank Lombardo, and Kimberlie Lombardo, as well as entity defendants CurrenC Worldwide, LTD, Gateway Technologies, LLC, Hill Financial Services, Inc., and BETUS. Through the various entities, the Enterprise maintained a website called the "Gateway," which it used to facilitate payments made by bettors to various gambling websites. When bettors wished to gamble at one of the gambling websites serviced by the Enterprise, their payment information was forwarded by the gambling site to the Gateway for processing.

When a bettor opted to pay using a Visa or MasterCard credit card, the Gateway processed the bettor's credit card payment information by mis-classifying the charge in order to hide its gambling nature, thus duping banks into disbursing funds. The Enterprise paid money to at least one bank employee to ensure that mis-coded credit card charges were processed and paid.

When a bettor selected the "Western Union" payment option, he or she was instructed by the Enterprise to wire funds to a Western Union office in the Philippines where an agent of the Enterprise collected and then deposited the funds into bank accounts held by the Enterprise. The Enterprise then notified the referring website that the money had been received and the bettor was allowed by the website to gamble.

Gambling website operators were provided with constant access to information regarding the status of credit card payments and wire transfers via the Gateway. Money was held by the Enterprise in foreign banks and was transferred to the United States through payments to accounts,**[pg-1276]** entities, and individuals associated with the Enterprise. Some of the funds were also reposed in various trusts created by the Enterprise. The Enterprise charged the gambling website operators substantial per-transaction fees on all credit card payments and wire transfers processed through the Gateway, thus enriching the Enterprise.

Each of the Defendants played a role in the operations of the Enterprise. Baron Lombardo, Henry Bankey, and Richard Carson-Selman created a company by the name of CurrenC Worldwide, LTD, through which the Enterprise conducted much of the payment processing. Baron Lombardo controlled the movement of gambling funds through credit card transactions via Gateway Technologies, which operated and maintained the Gateway website. Richard Carson-Selman was responsible for selling the payment processing services to gambling websites. Tina Hill created Hill Financial to provide the accounting services necessary to move and track the gambling funds. Henry Bankey supervised the creation of this accounting system. Count Lombardo managed and maintained the equipment on which the Gateway website was operated. Kimberlie and Frank Lombardo managed the system through which the Western Union wire transfers were processed.

The objects of the conspiracy were as follows: "to make money illegally by helping Internet gambling [websites] conduct their illegal business"; "to transfer the proceeds of its illegal operations into and out of the United States; to conceal its operations from the legitimate credit card companies, banks and wire transfer services it used; to conceal its operations from law enforcement agencies; and to evade the payment of federal taxes due to the United States from the [c]onspirators, their employees and agents."

Count 1 of the Indictment also specifically alleges that "no later than 2000," Defendants knowingly and intentionally conspired to participate in and conduct the affairs of the Enterprise, affecting interstate and foreign commerce, through a pattern of racketeering activity consisting of violations of the following: Georgia Code Ann § 16-12-22, 28; 720 Ill. Comp. Stat. 5/28-1.1; Mo.Rev.Stat. § 572.030; 18 U.S.C. § 1084; 18 U.S.C. § 1344; and 18 U.S.C. § 1956. As part of the conspiracy, each of the Defendants agreed to commit at least two acts of racketeering activity. The Indictment also alleges multiple transmissions or money wires as overt acts.

The Indictment further charges Defendants with four counts of violating the **WireAct** (Counts 16-19) by using a wire communication facility "for the transmission in interstate or foreign commerce ... [of] information assisting in the placing of bets and wagers on sporting events and contests, and a wire communication which entitled the recipient to receive money and credit as a result of bets and wagers, and information assisting in the placing of bets and wagers," as per the statutory language of 18 U.S.C. § 1084(a).[EN7] The Indictment alleges that Defendants did these acts "in the course of aiding and abetting individuals engaged in the business of betting and wagering." [EN8] Paragraph 38 alleges four specific transmissions, each corresponding to a count in the Indictment, including their respective dates of transmission and places of origin and destination.

EN7.*Id.* at ¶ 38.

EN8.*Id.*

Although not relevant to the pending motions, the Indictment also sets forth charges of bank fraud and money laundering.

[pg-1277] II. SUFFICIENCY OF THE INDICTMENT

The **WireAct** Motion and the RICO Motion challenge the sufficiency of the allegations in the Indictment concerning the alleged violations of the **WireAct** and the alleged RICO conspiracy. Federal Rule of Criminal Procedure 7(c)(1) requires that the Indictment "be a plain, concise, and definite written statement of the essential facts constituting the offense charged." This standard "embodies" the Tenth Circuit test for reviewing the sufficiency of an indictment: [EN9] "An indictment is sufficient if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense." [EN10] The sufficiency test is based solely on the allegations contained in the Indictment, each of which are assumed to be true.[EN11] "An indictment need only meet minimal constitutional standards, and [the court] determine[s] the sufficiency of an indictment by practical rather than technical considerations." [EN12]

"An indictment that sets forth the words of the statute generally is sufficient so long as the statute itself adequately states the elements of the offense." [EN13] However, "[w]here guilt depends so crucially upon ... a specific identification of fact ... an indictment must do more than simply repeat the language of the criminal statute." [EN14] Thus, the Supreme Court required an indictment for the offense of refusing to answer "any question pertinent to the subject under inquiry" before a committee or subcommittee of Congress to include a specific allegation regarding the subject under inquiry.[EN15] Yet, where the allegations set forth the statutory elements of an obscenity charge, implicitly carrying with it a legal definition, specific factual averments were unnecessary.[EN16]

A. The WireAct Motion

In the **WireAct** Motion, Defendants ask the Court to dismiss on sufficiency grounds Counts 16-19 of the Indictment, which charge them with violating 18 U.S.C. § 1084(a). Section 1084(a) of the **WireAct** punishes the transmission of certain wagers and information related thereto as follows:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.[EN17]

[pg-1278]Section 1084(b) makes two notable exceptions to this prohibition:

> Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.[EN18]

In order to prove a § 1084(a) violation, the government must show that (1) "the defendant regularly devoted time, attention and labor to betting or wagering for profit," (2) "the defendant used a wire communication facility: (a) to place bets or wagers on any sporting event or contest; or (b) to provide information to assist with the placing of bets or wagers; or (c) to inform someone that he or she had won a bet or wager and was entitled to payment or credit," and (3) "the transmission was made from one state to another state or foreign country." [EN19]

Defendants challenge the sufficiency of the **WireAct** allegations solely with respect to the second element above, arguing as follows: (1) that § 1084 reaches wire communications concerning betting or wagering on sporting events or contests only, and not on other games of chance such as those employed by online casinos; (2) that the language regarding the use of wire communications for "information assisting in the placing of bets or wagers" prohibits only those communications that lead to the placement of an actual bet or wager; and (3) that the language concerning communications that "entitle[ ] the recipient to receive money or credit as a result of bets or wagers" does not prohibit communications that merely discuss or request a transfer of money or credit. From these contentions, Defendants argue that the Indictment fails to allege a violation of the **WireAct** because the government did not set forth specific facts regarding bets or wagers actually placed on sporting events or contests or a specific communication entitling a recipient to the payment of money or credit from such bets or wagers.

Defendants also argue that the allegations in the Indictment are unconstitutionally vague, failing to provide them with meaningful notice as to the charges against them in violation of the Sixth Amendment. However, as the Tenth Circuit analysis regarding the sufficiency of an indictment encompasses both the Rule 7(c)(1) test and the constitutional requirements, the Court will analyze Defendants' constitutional concerns within this framework, as outlined above.

Sporting Events or Contests

First, Defendants assert that the **WireAct** applies to wire communications related to betting or wagering on sporting events or contests alone. The **WireAct** was enacted in 1961, long before the rise of the Internet as a potential marketplace for gambling. Most prosecutions under § 1084(a) have involved the practice of bookmaking, or taking bets on sporting events over the telephone. The advent of the Internet has resulted in the availability of casino-like gambling online, squarely presenting the question of whether § 1084(a) applies to wire communications related to this type of gambling. Very few courts have directly

considered this question.

[pg-1279] Before engaging in analysis of this issue, the Court notes that even if § 1084(a) does not reach bets or wagers unrelated to sports, Counts 16-19 would not need to be dismissed in their entirety, but only insofar as the alleged wire communications relate to non-sports betting or wagering. [EN20] Paragraph 38 of the Indictment alleges that Defendants did knowingly use and cause the use of a wire communication facility, for the transmission ... [of] information assisting in the placing of bets and wagers on sporting events and contests, and a wire communication which entitled the recipient to receive money and credit as a result of bets and wagers, and "information assisting in the placing of bets and wagers."
Notably, the Indictment does not allege the transmission of actual bets or wagers on sporting events or contests, but rather the transmission of "information assisting in the placing of bets and wagers on sporting events and contests."

By tracking the language of the Statute and specifically including the term "sporting events," the Indictment adequately alleges a violation of § 1084(a) based on the transmission of communications related to bets or wagers on a sporting event or contest. If the language of the statute is interpreted as applying to communications related to bets or wagers on sporting events or contests alone, the inclusion in the Indictment of the language of the statute would signal the same. Moreover, the indictment specifically uses the "sporting event" language to allege this element of the offense. The statutory language and the specific wire communications, including the dates and points of origin and destination of their transmission, alleged in Paragraph 38 give Defendants adequate notice that they must defend a charge of violating the **WireAct** based solely on the specified transmissions. Likewise, these allegations would clearly form the basis upon which Defendants could assert a double jeopardy defense in a future prosecution based on the listed transmissions.

Thus, the Indictment sufficiently alleges a violation of the **WireAct** stemming from the transmission of wire communications related to sports betting. Nonetheless, the Court deems it appropriate, both for purposes of the **WireAct** Motion and in anticipation of trial, to decide now whether § 1084(a) applies to wire communications related to non-sports bets or wagers.

The Fifth Circuit has determined that § 1084(a) only prohibits transmissions related to bets or wagers on sporting events or contests. [EN21] In the case of *In re MasterCard International Inc., Internet Gambling Litigation,* the United States District Court for the Eastern District of Louisiana considered a civil RICO claim against several credit card companies and issuing banks, alleging, among other predicate acts, that the credit card companies violated the **WireAct** by allowing the use of credit cards to fund gambling transactions at gambling websites.[EN22] The plaintiffs had collectively lost thousands of dollars by gambling at online gambling websites using their credit cards.[EN23] The court rejected the plaintiffs' assertion that the **WireAct** "does not require sporting events or contests to be the object of gambling" based on the court's "plain reading of the statutory language," highlighting that both the rule in § 1084(a) and the exceptions in **[pg-1280]**§ 1084(b) "expressly qualify the nature of the gambling activity as that related to a 'sporting event or contest.' " [EN24] Several cases were cited by the court for the proposition that "[a] reading of the caselaw leads to the same conclusion," which opinions seem to assume that § 1084(a) applies only to sports betting, although they did not specifically address whether it could be applied to communications related to non-sports betting.[EN25] The court also relied on then-pending legislation that would have modified the **WireAct** to reach forms of gambling unrelated to sports, finding that the perceived need to amend the **WireAct's** language to cover such gambling was indicative of its absence in the statute's current form.[EN26] Lastly, the court pointed to a floor statement offered by the House Judiciary Committee Chairman regarding the **WireAct**: "this particular bill involves the transmission of wagers or bets and layoffs on horse racing and other sporting events." [EN27]

A Fifth Circuit panel summarily affirmed the district court's analysis, stating only that it "agree[d] with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion." [EN28] Interestingly, the court noted that the civil plaintiffs in the *MasterCard* case, who were essentially seeking to avoid their gambling debts, were not exactly sympathetic and should not be allowed "to avoid meeting obligations they voluntarily took on" as "they got exactly what they bargained for." [EN29]

At least one court has determined that § 1084(a) applies to wire communications related to online gambling in the form of "virtual slots, blackjack, or roulette." [EN30] In *New York v. World Interactive Gaming Corporation,* the Attorney General of New York sought, among other things, to enjoin an online casino based in Antigua from "running any aspect of their Internet gambling business within the State of New York." [EN31] The action was brought pursuant to a New York law allowing "the Attorney General to bring a special proceeding against a person or business committing repeated or persistent fraudulent or illegal acts" under either New York or Federal law. [EN32] The **WireAct** was among the federal laws of which the casino was accused of violating. Without directly considering the "sporting event or contest" language of § 1084(a), the court held that "[b]y hosting this casino and exchanging betting information with the user, an illegal communication in violation of the

WireAct ... has occurred." [EN33] In so doing the court pointed to legislative history found in the House Report concerning the **WireAct** which states:

> The purpose of the bill is to assist various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, *and like* ***[pg-1281]*** *offenses* and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.[EN34]

Having carefully examined the language of the statute as well as the cases above, the Court concludes that § 1084(a) is not confined entirely to wire communications related to sports betting or wagering. The statute proscribes using a wire communication facility (1) "for the transmission ... of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest"; or (2) "for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers"; or (3) "for information assisting in the placing of bets or wagers." The phrase "sporting event or contest" modifies only the first of these three uses of a wire communication facility. Giving effect to the presumably intentional [EN35] exclusion of the "sporting event or contest" qualifier from the second and third prohibited uses indicates that at least part of § 1084(a) applies to forms of gambling that are unrelated to sporting events.

This interpretation aligns with the Tenth Circuit's *Criminal Pattern Jury Instructions,* which do not attach the "sporting event or contest" qualifier to either providing information assisting in the placing of bets or wagers or informing someone of his or her entitlement to money or credit resulting from bets or wagers. Moreover, § 1084(d) requires a common carrier, upon notice, to cease from operating any facility that is or will be used "for the purpose of transmitting or receiving gambling information," unqualified by any relation to a sporting event or contest. This largely negates the fact that the exceptions in § 1084(b) refer to betting on sporting events or contests alone.

Admittedly, the language of the statute limits the prohibition on the transmission of actual bets or wagers to those on sporting events or contests. This could lead to the conclusion, as it apparently did in the *MasterCard* case, that when the phrase "bets or wagers" is used in the second and third prohibited uses, it is actually referring to the "bets or wagers on any sporting event or contest" language found in the first prohibited use. However, this conclusion would essentially require the Court to find that the failure to include the phrase "sporting events or contests" in the second and third prohibited uses was an inadvertent mistake of Congress.

The absence of the "sporting event or contest" qualifier in the second and third prohibitions is conspicuous, especially as the first prohibition, which includes the qualifier, is directly before the second and third prohibitions in the statute. This is particularly weighty in light of the legislative history of the **WireAct**, which indicates the intent of Congress to facilitate enforcement of state gambling laws related to "gambling, bookmaking, and like offenses." Moreover, the exact phrase "information assisting in the placing of bets or wagers" is used twice in § 1084(a)-first, as part of the first prohibited use, and second, as the entirety of the third prohibited use. It is simply unpalatable to the Court to attribute no meaning to Congress's use of the same phrase in two different parts of the statute where the first use is modified by the phrase "sporting event or contest" and the second use is **[pg-1282]** not. Accordingly, the Court concludes that the second and third prohibited uses of a wire communication facility under § 1084(a) do not require that the bets or wagers to which those uses relate be limited to bets or wagers placed on sporting events or contests alone.

[8] Defendants assert that the **WireAct** is at least ambiguous as to whether it reaches communications related to non-sports betting and that the rule of lenity requires a court to "interpret [an ambiguous criminal statute] in favor of the defendant." [EN36] However, the rule of lenity applies only where the statute includes "a grievous ambiguity or uncertainty in [its] language and structure.' " [EN37] As the Court finds that the plain language of § 1084(a) concerning the second and third prohibited uses is unambiguously broad enough to encompass use of a wire communications facility for transmissions related to non-sports betting or wagering, the rule of lenity has no application to its interpretation.

Information Assisting in the Placing of Bets or Wagers

Next Defendants claim that the phrase "information assisting in the placing of bets or wagers" should be interpreted to encompass only communications that result in the actual placement of a bet or wager, and that because the government has not alleged any specific bets in Counts 16-19, the Court should dismiss them. In making this assertion, Defendants rely entirely on the case of *Truchinski v. United States* from the Eighth Circuit. [EN38] In that case, the court found that a statement made by the defendant over the telephone that "there wasn't much doing that day, only two games going that day" was information assisting

in the placing of bets or wagers when "[c]onsidering the method of operation of those generally engaged in the taking of bets, the frequency with which the [bettor] would place bets with the [defendant], plus the fact that the bet was placed." [EN39] Although the *Truchinski* case did look to the fact that a bet was placed in determining whether the statement regarding the games on which to bet was "information assisting in the placing of bets or wagers," the court did not affirmatively hold that proof of an actual bet or wager arising from the information in the communication is a necessary element of a § 1084(a) violation such that it must be alleged in an indictment.

Although the statute seems to contemplate that the "information" assist in the placement of an actual bet or wager, none of the cases cited by the parties stands for the proposition that the government must allege specific bets in the Indictment that were assisted by information in the alleged wire communication. Rather, the language of the statute set forth in the Indictment adequately alleges that the specific wire communications listed in Counts 16-19-each of which includes its date, origin, and destination-contained information "assisting in the placing of bets or wagers." Whether the alleged transmissions actually contained information assisting in the placing of a bet or wager is a question of fact to be made by the jury after receiving proper instruction from the Court on the applicable law. Accordingly, the Court holds that the Indictment need not allege a specific bet or wager the placement of which was assisted by the information in the alleged wire communication.

[pg-1283]*Communications That Entitle the Recipient to Receive Money or Credit*

Lastly, Defendants contend that the language in § 1084(a) prohibiting transmissions of wire communications that "entitle[ ] the recipient to receive money or credit as a result of bets or wagers" does not include communications merely discussing or requesting a transfer of money or credit resulting from wagers. Defendants also point out that this language is limited to communications that entitle the *recipient* to money or credit. The government asserts that the statute clearly includes communications that "entitle" the recipient to "credit" as well as money, and should therefore reach promises to pay and not just entitlements comparable to negotiated instruments.

Regardless of the reach of the word "entitles" as found in the statute, nothing in the cases cited by the parties requires the government to allege a specific entitlement resulting from a specific bet or wager. The allegation that one or more of the specific wire communications listed in Paragraph 38 of the Indictment are "wire communication[s] which entitled the recipient to receive money and credit as a result of bets and wagers," which tracks the language of § 1084(a), sufficiently apprises Defendants of this element of a **WireAct** violation and that they will have to defend a charge of violating the **WireAct** arising therefrom. Any haggling over the proper interpretation of "entitles" is appropriately decided upon the submission of proposed jury instructions.

In sum, the Indictment properly sets forth the **WireAct** elements challenged by Defendants using the language of the statute and listing the specific wire communications, including their respective dates, origins, and destinations. Certainly the Indictment could have been more specific; however, it sufficiently notifies Defendants that they are charged with a violation of § 1084(a) stemming from the specific wire communications listed therein. This will also allow Defendants to assert a double jeopardy defense in a future prosecution based on the listed communications. Therefore, the Court will deny the **WireAct** Motion.

B. The RICO Motion

In the RICO motion, Defendants challenge the sufficiency of Count 1 of the Indictment, which charges each of the Defendants with a violation of 18 U.S.C. § 1962(d), or RICO conspiracy. Section 1962(d) requires the government to prove "that the defendant: (1) by knowing about and agreeing to facilitate the commission of two or more acts (2) constituting a pattern (3) of racketeering activity (4) participates in (5) an enterprise (6) the activities of which affect interstate or foreign commerce." [EN40]

Defendants challenge the sufficiency of the RICO conspiracy charge only with respect to the "enterprise" and "pattern of racketeering activity" elements, claiming that the Indictment fails to properly allege them. The government addresses the merits of these claims in the alternative, but initially asserts that the RICO Motion is an inappropriate challenge to the sufficiency of the government's evidence, rather than the sufficiency of the Indictment. Although the level of detail with which Defendants would require the government to set forth the allegations in the Indictment is generally not required, the Court finds that the RICO Motion appropriately challenges the sufficiency of the allegations in the Indictment. However, as set forth below, the Court concludes that the Indictment is sufficient on its face and therefore will deny the RICO Motion.

[pg-1284]*The "Enterprise" Element*

In order to prove the existence of a RICO enterprise, the government must show: (1) "the existence of an ongoing organization with a decision making framework or mechanism for controlling the group," (2) that "the various associates function as a continuing unit," and (3) that "the enterprise exists separate and apart from the pattern of racketeering activity." EN41

The "ongoing organization" requirement is established by a showing that "some sort of structure exists within the group for the making of decisions, whether it be hierarchical or consensual." EN42 The government may prove a "continuing unit" with evidence that each member of the enterprise "played a role in the [enterprise] that is both consistent with [its] organizational structure and furthered [its] activities." EN43

The separate existence requirement arises from the language of the statute itself, which requires that a RICO conspiracy violation be based on the existence of an enterprise *and* its planned pattern of racketeering activity.EN44 To prove separate existence, "it is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offences." EN45 "The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement." EN46

Defendants argue that Count 1 of the Indictment should be dismissed because the government has not alleged specific facts outlining the structure and continuity of the Enterprise, and that the Enterprise, as alleged, has no existence separate from the predicate racketeering activities. On the contrary, the government contends that the structure and continuity of the Enterprise are not essential elements of a RICO conspiracy claim and therefore need not be affirmatively alleged, and that the Enterprise alleged in the Indictment has a separate existence from the predicate acts.

The Indictment in this case sufficiently alleges the first two elements of an enterprise by referring to the term's definition in 18 U.S.C. § 1961(4) and further explaining that the Enterprise "constituted an ongoing organization, whose members functioned as a continuing unit, for the common purpose of achieving the objectives of the enterprise." EN47 This language alone likely satisfies any need for the government to allege the "ongoing organization" and "continuing unit" requirements of the "enterprise" element. EN48 In this regard,**[pg-1285]** it appears that Defendants have substituted the requirements for proof at trial in place of the minimal constitutional standards for sufficiency of the Indictment.

Nonetheless, the Indictment also carefully identifies each of the Defendants as members of the Enterprise and alleges their individual roles therein as follows: EN49 Baron Lombardo controlled the movement of gambling funds through credit card transactions via Gateway Technologies, which operated and maintained the Gateway website; Richard Carson-Selman was responsible to sell the payment processing services to the gambling websites; Tina Hill created and operated Hill Financial to provide the accounting services necessary to move and track the gambling funds; Henry Bankey supervised the creation of the accounting system; Count Lombardo managed and maintained the equipment on which the Gateway site was operated; and Kimberlie and Frank Lombardo managed the system through which the Western Union money wires were processed.

The Indictment also alleges the objects of the conspiracy: "to make money illegally by helping Internet gambling [websites] conduct their illegal business"; "to transfer the proceeds of its illegal operations into and out of the United States; to conceal its operations from the legitimate credit card companies, banks and wire transfer services it used; to conceal its operations from law enforcement agencies; and to evade the payment of federal taxes due to the United States from the [c]onspirators, their employees and agents." EN50

Although a much closer question, the Indictment also sets forth enough facts that, taken as true, would establish an enterprise separate from the alleged predicate acts. As the "enterprise" element is crucial to the statutory concept of RICO, the separate existence requirement merits some factual allegation beyond the mere tracking of the words of the statute or caselaw. As set forth above, the Indictment has provided this detail. In this case, Defendants organized multiple companies with significant infrastructure, including a technology company capable of "operating and maintaining a web site," as well as a functioning accounting firm.EN51 Additionally, the enterprise held bank accounts both within and without the United States and established a number of trusts.EN52 This substantial infrastructure, although not unrelated to the predicate offenses, existed apart from the actual commission of the predicate acts and was capable of being put to alternative legal and illegal uses separate from the alleged pattern of racketeering activity. For example, this infrastructure could have been used to process payments for legitimate service operations or retail merchants, such as an online bookstore. The enterprise presided daily over this infrastructure, using it to facilitate the commission of the predicate acts on an on-going basis "[b]eginning no later than sometime in 2000." EN53 Although this complex infrastructure was necessary for the commission of the alleged racketeering acts, it existed and was

capable of functioning beyond the perpetration of the predicate acts.

The Pattern of Racketeering Activity Element

Defendants argue that the government has failed to sufficiently allege the predicate acts that make up the "pattern of racketeering activity element" of a ***1286** RICO conspiracy. Specifically, Defendants point out that in Paragraph 24 of the Indictment the government refers to the underlying predicate acts only by statutory citation, which, according to defendants, "reache[s] new heights of vagueness."

A pattern of racketeering activity must consist of "at least two predicate acts ... committed within ten years of another" that "are (1) related and (2) that ... amount to or pose a threat of continued criminal activity." [EN54] However, when the indictment alleges a RICO conspiracy charge under § 1962(d), as opposed to a substantive RICO charge under § 1962(c), it need not allege specific predicate acts committed by Defendants.[EN55] This is so because the essence of the punishable offense under § 1962(d) is the agreement and not the underlying racketeering activity.[EN56] As stated by the Seventh Circuit:

> If the government were required to identify, in indictments charging violation only of section 1962(d), specific predicate acts in which the defendant was involved, then a 1962(d) charge would have all of the elements necessary for a substantive RICO charge. Section 1962(d) would thus become a nullity, as it would criminalize no conduct not already covered by sections 1962(a) through (c). Such a result, quite obviously, would violate the statutory scheme in which conspiracy to engage in the conduct described in sections 1962(a) through (c) is itself a separate crime. [EN57]

Although the government must go beyond a generalized statement such as "the defendant engaged in various acts of bribery," "an indictment need only charge-after identifying a proper enterprise and the defendant's association with that enterprise-that the defendant knowingly joined a conspiracy the objective of which was to operate that enterprise through an identified pattern of racketeering activity." [EN58]

In this case, as Defendants are charged with only RICO conspiracy under § 1962(d) and not a substantive violation of RICO, the Indictment need not allege the predicate acts with the level of specificity as would be required in a separate substantive count for such acts. Here the government carefully listed the statutes under which the predicate acts are alleged. The government also descends to further detail in Paragraphs 25 through 34, which directly follow the heading "Manner, Method, and Means of the Racketeering Conspiracy." In this section, the government discusses in detail the alleged "scheme" whereby the payment information of gamblers who wished to pay for online gambling using credit cards was forwarded to the Gateway where it was processed using incorrect classifications in order to disguise the gambling nature of the credit card charges. The Indictment further discusses the manner in which money wires to the Philippines were used to disguise gambling payments. It also alleges use of a system of banks and trusts through which the money was hidden and/or transferred to the gambling websites. The indictment clearly sets forth sufficient detail to properly allege a pattern of racketeering acts.

Therefore, as the Court finds that the Indictment sufficiently alleges the elements***1287** of a RICO conspiracy under § 1962(d) challenged by Defendants, it will deny the RICO Motion.

III. THE GATS MOTION

In the GATS Motion, Defendants ask the Court to dismiss the **WireAct** counts and the RICO count, insofar as it is based on the **WireAct** as a predicate act, arguing that recent decisions of the dispute resolution arm of the World Trade Organization bar prosecution of Defendants for facilitating online gambling protected under the General Agreement on Trade in Services ("GATS").

As a member of the WTO, the United States has agreed to multiple treaties, including GATS. Pursuant to GATS, the United States has made a series of commitments to allow foreign providers of services access to certain domestic markets. The United States has also agreed to the system of dispute resolution outlined in an agreement called the Dispute Settlement Understanding, which provides for the establishment of a panel to hear disputes and render reports, which are reviewable on appeal by the WTO's Appellate Body. The decisions of the Appellate Body become final unless the WTO Dispute Settlement Board reaches consensus otherwise.

Congress formally approved GATS in the Uruguay Round Agreements Act ("URAA") in 1994.[EN59] In the URAA, Congress

addressed the "relationship of [the Uruguay Round Agreements] to United States law" and directed that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." [EN60] Additionally, the URAA makes clear that "[n]o person other than the United States ... shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement." [EN61]

Congress statutorily adopted a Statement of Administrative Action in the URAA, which is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application." [EN62] The Statement clarifies a number of important issues regarding the interplay between domestic law and GATS, as well as the effect of decisions issued by WTO dispute resolution bodies.

A section of the Statement dealing with United States sovereignty states:

> The WTO will have no power to change U.S. law. If there is a conflict between U.S. law and any of the Uruguay Round agreements, section 102(a) of the implementing bill makes clear that U.S. law will take precedence.... Moreover, as explained in greater detail in this Statement in connection with the Dispute Settlement Understanding, WTO dispute settlement panels will not have any power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.[EN63]

A section of the Statement dealing with dispute resolution under the WTO states:

> It is important to note that the new WTO dispute settlement system does not give panels any power to order the ***1288** United States or other countries to change their laws. If a panel finds that a country has not lived up to its commitments, all a panel may do is recommend that the country begin observing its obligations. It is then up to the disputing countries to decide how they will settle their differences.[EN64]
> ....
> Reports issued by panels or the Appellate Body under the [Dispute Settlement Understanding] have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy.... If a report recommends that the United States change a federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.[EN65]

In April of 2005, the Appellate Body of the WTO issued a decision regarding a dispute between Antigua and the United States in which Antigua claimed that the United States was in violation of its GATS commitments by making it unlawful for foreign providers to supply gambling and betting services to consumers within the United States.[EN66] The Appellate Body upheld a panel decision finding that the United States had committed to allow foreign suppliers to access the United States market for gambling and betting services and that the **WireAct**, and other federal laws regulating online gambling, violates the commitments of the United States under GATS.[EN67]

In their GATS Motion, Defendants contend that by carrying on this prosecution, the United States is in direct violation of its international obligations and that the **WireAct** charges should therefore be dismissed because (1) the *Charming Betsy* cannon of construction and the principle of international comity dictate that the Court interpret the **WireAct** and the URAA so as to not violate these obligations; and (2) the WTO's Appellate Body decision in the Antigua gambling case is self-executing and therefore binding upon this Court.

A. The Charming Betsy Canon and International Comity

Arising from the statements of Chief Justice John Marshall in the case of *Murray v. Schooner Charming Betsy,*[EN68] the *Charming Betsy* cannon of construction has come to stand for the proposition that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." [EN69] However,

> the " *Charming Betsy* canon comes into play only where Congress's intent is ambiguous." "If a statute makes plain Congress's intent ... then Article III courts, which can overrule Congressional enactments only when such enactments conflict with the

> Constitution, must enforce the intent of Congress irrespective of whether the statute conforms to customary international law." EN70

Likewise, the principle of international comity, when applied as a rule of statutory ***1289** construction, "has no application where Congress has indicated otherwise." EN71

Defendants assert that this Court "may and must," under the *Charming Betsy* cannon and the principle of international comity, interpret the **WireAct** to have neither extraterritorial reach nor application to online gambling. They also contend that the *Charming Betsy* cannon is an alternative ground to the **WireAct** Motion's contention that § 1084(a) should be interpreted to apply only to sports betting. Lastly, Defendants argue that the URAA itself should be interpreted narrowly so as not to conflict with the commitments of the United States under GATS.

The clear language of both the **WireAct** and the URAA entirely preclude any application of either the *Charming Betsy* cannon or the broader principle of international comity in this case. As an initial matter, the Indictment does not seek to apply the **WireAct** to actions beyond the borders of the United States. Rather, the alleged conduct of Defendants was carried out within the United States. Specifically, each of the alleged wire communications either originated or terminated in the United States. However, even if extraterritorial conduct was at issue, the plain language of the **WireAct** specifically contemplates such an application: "[w]hosoever ... knowingly uses a wire communication facility for the transmission in interstate or *foreign* commerce of bets or wagers or information assisting in the placing or bets or wagers on a sporting event or contest ... shall be fined under this title or imprisoned...." EN72

With regard to the **WireAct's** application to online gambling, at least two courts have already held that the **WireAct** applies to this form of gambling.EN73 Moreover, the **WireAct** itself, although enacted long before the advent of the Internet, clearly contemplates any form of electronic transmission via wire:

> The term 'wire communication facility' means any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writing, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission. EN74

Defendants' contention that the *Charming Betsy* cannon supports a narrow reading of § 1084(a), which reading would apply the prohibition on wire communications to only those communications related to sports betting, is misplaced. Although the proffered interpretation would certainly help Defendants in this case, in order to avoid a conflict with the obligations of the United States under GATS, as interpreted in the Antigua case, the **WireAct** could have no international application with regard to any form of online gambling, including sports-related gambling.

Finally, concerning Defendants' proffered URAA interpretation, Congress explicitly stated that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." EN75 Furthermore, the ***1290** Statement indicates that this statutory statement "clarifies that no provision of a Uruguay Round agreement will be given effect under domestic law if it is inconsistent with federal law, including provisions of federal law enacted or amended by the [URAA]." EN76 On its face, the URAA precludes precisely the argument raised by Defendants.

B. The Appellate Body Decision

Defendants assert that the Appellate Body's Antigua decision is self-executing and that they may therefore rely on it to seek the dismissal of the allegations in the Indictment related to the **WireAct**. However, "WTO decisions are 'not binding on the United States, much less this court.' " EN77 As indicated in the Statement of Administrative Action:

> Reports issued by panels or the Appellate Body under the DSU have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy. They are no different in this respect than those issued by GATT panels since 1947. If a report recommends that the United States change a federal law to bring it into conformity with a Uruguay Round agreement, it is for the Congress to decide whether any such change will be made.EN78

Additionally, the URAA expressly forecloses "any cause of action or defense under any of the Uruguay Round Agreements"

to persons other than the United States.[EN79] Defendants have no standing to assert a defense based on the obligations of the United States under GATS. A failure on the part of the United States to comply with a decision of the Appellate Body may give rise to WTO sanctions against the United States under GATS. However, whether to accept those sanctions, modify federal law, or renegotiate its GATS commitments [EN80] is a matter committed to the discretion of Congress. It is the Court's role to apply federal law to the case at hand as found in the **WireAct**. Any provision of GATS to the contrary "shall have [no] effect." [EN81] Therefore the Court will deny the GATS Motion.

IV. CONCLUSION

For the reasons set forth above, it is hereby

ORDERED that Defendants' Motion to Dismiss **WireAct** Counts (Counts 16-19) [Docket No. 80] is DENIED. It is further

ORDERED that Defendants' Motion to Dismiss Count One (RICO Conspiracy) [Docket No. 78] is DENIED. It is further

ORDERED that Defendants' Motion to Dismiss Based on Treaty Obligations and ***1291** Domestic and International Law (Counts 1, 16-19) [Docket No. 79] is DENIED.

D.Utah,2007.
U.S. v. Lombardo
639 F.Supp.2d 1271

EN7.*Id.* at ¶ 38.
EN8.*Id.*
EN9.*United States v. Darrell,* 828 F.2d 644, 647 (10th Cir.1987).
EN10.*United States v. Todd,* 446 F.3d 1062, 1067 (10th Cir.2006) (quoting *United States v. Dashney,* 117 F.3d 1197, 1205 (10th Cir.1997)).
EN11.*Id.*
EN12.*Dashney,* 117 F.3d at 1205.
EN13.*Darrell,* 828 F.2d at 647 (citing *Hamling v. United States,* 418 U.S. 87, 117, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)).
EN14.*Hamling,* 418 U.S. at 118, 94 S.Ct. 2887.
EN15.*Russell v. United States,* 369 U.S. 749, 754-55, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).
EN16.*Hamling,* 418 U.S. at 117-19, 94 S.Ct. 2887.
EN17.18 U.S.C. § 1084(a).
EN18.18 U.S.C. § 1084(b).
EN19. Criminal Pattern Jury Instruction Committee of the United States Court of Appeals for the Tenth Circuit, *Criminal Pattern Jury Instructions* 2.51 (2005).
EN20.*See United States v. Miller,* 471 U.S. 130, 136, 144, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985).
EN21.*In re MasterCard Int'l Inc., Internet Gambling Litig.,* 132 F.Supp.2d 468, 480-81 (E.D.La.2001), *aff'd,*313 F.3d 257 (5th Cir.2002).

EN22.*Id.* at 473-75, 478.
EN23.*Id.* at 474-75.
EN24.*Id.* at 480.
EN25.*See id.* (citing *United States v. Kaczowski,* 114 F.Supp.2d 143, 153 (W.D.N.Y.2000); *United States v. Sellers,* 483 F.2d 37, 45 (5th Cir.1973), *overruled on other grounds by United States v. McKeever,* 905 F.2d 829 (5th Cir.1990); *United States v. Marder,* 474 F.2d 1192, 1194 (5th Cir.1973)).
EN26.*Id.*
EN27.*Id.* at 480-81 (quoting 107 Cong. Rec. 16533 (Aug. 21, 1961)).
EN28.*In re MasterCard Int'l Inc. Internet Gambling Litig.,* 313 F.3d 257, 262 (5th Cir.2002).
EN29.*Id.* at 264.
EN30.*N.Y. v. World Interactive Gaming Corp.,* 185 Misc.2d 852, 714 N.Y.S.2d 844, 848, 850-52 (N.Y.Sup.Ct.1999).
EN31.*Id.* at 847-48.
EN32.*Id.* at 848.
EN33.*Id.* at 852.

EN34.*Id.* at 851 (citing H.R.Rep. No. 967 (1961) *as reprinted in* 1961 U.S.C.C.A.N. 2631, 2631) (emphasis added).
EN35.*See Hamdan v. Rumsfeld,* 548 U.S. 557, 126 S.Ct. 2749, 2765-66, 165 L.Ed.2d 723 (2006).
EN36.*United States v. Michel,* 446 F.3d 1122, 1135 (10th Cir.2006).
EN37.*Id.* (quoting *United States v. Onheiber,* 173 F.3d 1254, 1256 (10th Cir.1999)).
EN38.393 F.2d 627 (8th Cir.1968).
EN39.*Id.* at 631.
EN40.*United States v. Smith,* 413 F.3d 1253, 1266 (10th Cir.2005).
EN41.*Id.* at 1266-67 (quoting *United States v. Sanders,* 928 F.2d 940, 943-44 (10th Cir.1991)) (internal quotation marks omitted). In *Smith,* the Tenth Circuit adopted the test found in the case of *United States v. Riccobene,* 709 F.2d 214 (3d Cir.1983), *abrogation on other grounds recognized by United States v. Vastola,* 989 F.2d 1318, 1330 (3d Cir.1993).
EN42.*Riccobene,* 709 F.2d at 222.
EN43.*Smith,* 413 F.3d at 1267.
EN44.*See United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).
EN45.*Smith,* 413 F.3d at 1267 (quoting *Riccobene,* 709 F.2d at 223-24) (internal quotation marks omitted).
EN46.*Riccobene,* 709 F.2d at 224.
EN47. Indictment ¶ 21 (Docket No. 1).
EN48.*See United States v. Diaz,* 2006 WL 1833193, at *3-4 (N.D.Cal. Jun. 30, 2006) (unpublished order).
EN49. Indictment ¶¶ 5-11, 13-17, 21 (Docket No. 1).
EN50.*Id.* at ¶ 4.
EN51.*Id.* at ¶¶ 13-15.
EN52.*Id.* at ¶¶ 18-19.
EN53.*Id.* at ¶ 21.
EN54.*Smith,* 413 F.3d at 1269 (quoting *H.J., Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)) (internal quotation marks omitted).
EN55.*United States v. Glecier,* 923 F.2d 496, 500-01 (7th Cir.1991); *see also United States v. Crockett,* 979 F.2d 1204, 1209-10 (7th Cir.1992).
EN56.*Glecier,* 923 F.2d at 501.
EN57.*Id.*
EN58.*Id.* at 500-01.
EN59.19 U.S.C. § 3511(a), (d)(14).
EN60.19 U.S.C. § 3512(a)(1).
EN61.19 U.S.C. § 3512(c)(1)(A).
EN62.19 U.S.C. § 3512(d).
EN63.*The Uruguay Round Agreements Act: Statement of Administrative Action,* H.R. No. 103-316 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4042 [hereinafter *Statement*].
EN64.*Id.* at 4300.
EN65.*Id.* at 4318.
EN66. Appellate Body Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services,* ¶ 1 WT/DS285/R (April 7, 2005).
EN67.*Id.* at ¶¶ 5, 373.
EN68.6 U.S. (2 Cranch) 64, 2 L.Ed. 208 (1804).
EN69.Restatement (Third) of Foreign Relations Law of the United States § 114 (1987).
EN70.*Guaylupo-Moya v. Gonzales,* 423 F.3d 121, 135-36 (2d Cir.2005) (quoting *United States v. Yousef,* 327 F.3d 56, 93 (2d Cir.2003)) (citation omitted).
EN71.*In re Maxwell Commc'n Corp.,* 93 F.3d 1036, 1047 (2d Cir.1996).
EN72.18 U.S.C. § 1084(a).
EN73.*See United States v. Cohen,* 260 F.3d 68 (2d Cir.2001); *United States v. Corrar,* 2007 WL 196862 (N.D.Ga. Jan. 22, 2007).
EN74.18 U.S.C. § 1081.
EN75.19 U.S.C. § 3512(a)(1).
EN76.*Statement, supra* note 63, at 4050.
EN77.*Corus Staal BV v. Dep't of Commerce,* 395 F.3d 1343, 1348 (Fed.Cir.2005) (quoting *Timken Co. v. United States,* 354 F.3d 1334, 1344 (Fed.Cir.2004)).
EN78.*Statement, supra* note 63, at 4318.
EN79.19 U.S.C. § 3512(c)(1)(A).
EN80. The United States has apparently elected the last option: "In light of these developments in the WTO dispute,

the United States has decided to make use of the established WTO procedures to correct its schedule in order to reflect the original U.S. intent-that is, to exclude gambling from the scope of the U.S. commitments under the GATS." Press Release, Office of United States Trade Representative, Statement of Deputy United States Trade Representative John K. Veroneau Regarding U.S. Actions under GATS Article XXI (May 5, 2007), *available at* http:// www. ustr. gov/ Document_ Library/ Press_ Releases/ Section_ Index. html.
EN81.*See*19 U.S.C. § 3512(a)(1).

The DOJ Letter to Nevada

U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

August 23, 2002

Mr. Dennis K. Neilander, Chairman
Nevada Gaming Control Board
P.O. Box 8003
Carson City, Nevada 89706

Dear Chairman Neilander:

Your office recently spoke to Mr. Matthew Martens, who is the Criminal Division's Chief of Staff to the Assistant Attorney General, regarding the application of federal law to Internet gambling and the article on Internet gambling in Nevada that was prepared by Mr. Jeffrey R. Rodefer, who is an Assistant Chief Deputy Attorney General for the Nevada Attorney General's Office. The Criminal Division was recently informed by the Department of Justice's Office of Intergovernmental Affairs that your office is also requesting a written response.

As a general rule, the Department of Justice is limited by statute to providing legal advice within the federal government and the Criminal Division does not issue advisory opinions with respect to the legality of specific gambling operations. This allows the Department to defer the resolution of legal questions until it is confronted with a concrete situation requiring action in a judicial forum.

We may, however, provide general guidance as to relevant statutory provisions that are applicable to Internet gambling. As set forth in prior Congressional testimony, the Department of Justice believes that federal law prohibits gambling over the Internet, including casino-style gambling. While several federal statutes are applicable to Internet gambling, the main statutes are Sections 1084, 1952, and 1955, of Title 18, United States Code. As stated in Mr. Rodefer's article, Section 1084 of Title 18, United States Code, prohibits one in the business of betting or wagering from knowingly using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers. Section 1952 of Title 18, United States Code, prohibits traveling in interstate or foreign commerce, or using the mails, or using a facility in interstate or foreign commerce with intent to distribute the proceeds of an unlawful activity or otherwise promoting, managing, establishing, carrying on, or facilitating the promotion, management, establishment, or carrying on, of any unlawful activity and thereafter performing or attempting to perform such act. The term "unlawful activity" is defined in Section 1952(b) to mean "any business enterprise involving gambling . . . in violation of the laws of the State in which they are committed or of the United States.". Section 1955 of Title 18, United States Code, prohibits illegal gambling businesses, which involve 1) a violation of state law, 2) five or more persons who conduct, finance, manage,

supervise, direct, or own all or part of such business, and 3) a business that has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2000 in any single day . In additional to criminal convictions, Section 1955 can be used to seek civil forfeiture of gambling proceeds. See United States v. $734,578.82 in United States Currency, 286 F.3d 641 (3d Cir. 2002). Moreover, the federal money laundering statutes are applicable to unlawful Internet gambling businesses. Additionally, it is the Department's view that the gambling activity occurs both in the jurisdiction where the bettor is located and the state or foreign country where the gambling business is located.

I trust that this is responsive to your inquiry. Please do not hesitate to contact us if we can be of any further assistance in this or any other matter.

Sincerely,

Michael Chertoff
Assistant Attorney General

The Plea Agreement of Mr. Anurag Dikshit

United States Attorney
Southern District of New York

FOR IMMEDIATE RELEASE
DECEMBER 16, 2008

CONTACT: **U.S. ATTORNEY'S OFFICE**
YUSILL SCRIBNER
REBEKAH CARMICHAEL
JANICE OH
PUBLIC INFORMATION OFFICE
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PARTYGAMING FOUNDER PLEADS GUILTY IN INTERNET GAMBLING CASE AND AGREES TO $300 MILLION FORFEITURE

LEV L. DASSIN, the Acting United States Attorney for the Southern District of New York, and MARK J. MERSHON, Assistant Director-in-Charge of the Federal Bureau of Investigation ("FBI"), announced that ANURAG DIKSHIT -- a founder and former officer and director of PartyGaming PLC, an internet gambling business -- pleaded guilty today before United States District Judge JED S. RAKOFF to charges that he used the wires to transmit in interstate and foreign commerce bets and wagering information. As alleged in the documents filed and statements made during DIKSHIT's plea allocution in Manhattan federal court, and as set forth in DIKSHIT's plea agreement with the Government:

From about 1997 through October 2006, PartyGaming PLC, a Gibraltar corporation, and its predecessor and affiliated corporate entities (collectively "PartyGaming"), operated an Internet gambling business which offered casino and poker games, among other games of chance, to customers who wished to gamble online. During that time a substantial majority of PartyGaming's online gambling customers -- who accounted for approximately 85% of PartyGaming's revenue in 2005 -- were located in the United States, including the Southern District of New York. ANURAG DIKSHIT developed a proprietary software platform for PartyGaming and directed PartyGaming's computer operations from approximately 1998 through October 2006. From 1999 through October 2006, DIKSHIT was a principal shareholder of PartyGaming and, at various times, served as a PartyGaming corporate officer and director.

DIKSHIT pleaded guilty to one count of using the wires to transmit bets and wagering information in interstate commerce. DIKSHIT, 37, faces a maximum sentence of 2 years in prison and a fine of $250,000, or twice the gross gain or loss from the offense.

In addition, DIKSHIT admitted to forfeiture allegations requiring him to forfeit $300 million, and agreed with the Government to pay $100 million at the time of the signing of his plea agreement; another $100 million within 3 months of the date of his guilty plea; and the final $100 millon prior to the defendant's sentencing or September 30, 2009, whichever is earlier. DIKSHIT has already paid the first $100 million installment of this forfeiture.

Sentencing is scheduled for December 16, 2010 before Judge RAKOFF.

Mr. DASSIN praised the investigative work of the FBI in this case.

Assistant United States Attorneys JONATHAN B. NEW, ARLO DEVLIN-BROWN, and SHARON COHEN LEVIN are in charge of the prosecution.

08-331 ###

In December, 2010, a court accepted Mr. Dikshit's plea and he was sentenced to one year probation in addition to the payment of the agreed forfeitures.

The Letter from Senators Kyl and Reid

United States Senate
WASHINGTON, DC 20510

July 14, 2011

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Attorney General Holder:

As you know, several weeks ago, the U.S. Attorney in the Southern District of New York indicted various individuals associated with online poker sites for violations of various laws. Additional indictments were unveiled in Baltimore at the end of May.

These indictments came after many years in which the entities operated Internet poker websites to Americans in an open and notorious way with apparently no repercussions from law enforcement. Leading up to the indictments, this lack of activity by law enforcement led to a significant and growing perception that operating Internet poker and other Internet gambling did not violate U.S. laws, or at least that the Department of Justice thought that the case was uncertain enough that it chose not to pursue enforcement actions. In turn, this perception allowed this activity to spread substantially, so that at least 1,700 foreign sites continue to offer Internet gambling to U.S. players. We think it is important that the Department of Justice pursue aggressively and consistently those offering illegal Internet gambling in the United States.

In addition, we have two further concerns: the spread of efforts to legalize intra-state Internet gambling and the spread of efforts to offer such intra-state Internet gambling through state-sponsored lotteries.

We believe that the Department of Justice's longstanding position has been that all forms of Internet gambling are illegal — including intra-state Internet gambling, because activity over the Internet inherently crosses state lines, implicating federal anti-gambling laws such as the Wire Act. Yet efforts are underway in about a dozen states to legalize some form of intra-state Internet gambling. In many cases, Internet gambling advocates in those states cite the silence of the Department of Justice in the face of these efforts as acquiescence. In fact, we have heard that at a major conference in May, several officials from various state lotteries boasted that they have obtained the Department of Justice's effective consent by writing letters of their plans that stated that if no objection was received they would proceed with their Internet gambling plans — and no objection has been received despite many months or years.

This is troubling. We respectfully request that you reiterate the Department's longstanding position that federal law prohibits gambling over the Internet, including intra-state gambling (e.g., lotteries). Conversely, if for some reason the Department is reconsidering its longstanding position, then we respectfully request that you consult with Congress before finalizing a new position that would open the floodgates to Internet gambling.

Finally, we would like to work with you to strengthen the penalties for those who violate the law and to see what modifications would be helpful to the Department to enhance its ability to fight Internet gambling.

Sincerely,

HARRY REID
U.S. Senator

JON KYL
U.S. Senator

WHETHER PROPOSALS BY ILLINOIS AND NEW YORK TO USE THE INTERNET AND OUT-OF-STATE TRANSACTION PROCESSORS TO SELL LOTTERY TICKETS TO IN-STATE ADULTS VIOLATE THE WIRE ACT

Interstate transmissions of wire communications that do not relate to a "sporting event or contest" fall outside the reach of the Wire Act.

Because the proposed New York and Illinois lottery proposals do not involve wagering on sporting events or contests, the Wire Act does not prohibit them.

September 20, 2011

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

You have asked for our opinion regarding the lawfulness of proposals by Illinois and New York to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults. *See* Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Lanny A. Breuer, Assistant Attorney General, Criminal Division (July 12, 2010) ("Crim. Mem."); Memorandum for Jonathan Goldman Cedarbaum, Acting Assistant Attorney General, Office of Legal Counsel, from Lanny A. Breuer, Assistant Attorney General, Criminal Division (Oct. 8, 2010) ("Crim. Supp. Mem."). You have explained that, in the Criminal Division's view, the Wire Act, 18 U.S.C. § 1084 (2006), may prohibit States from conducting in-state lottery transactions via the Internet if the transmissions over the Internet during the transaction cross State lines, and may also limit States' abilities to transmit lottery data to out-of-state transaction processors. You further observe, however, that so interpreted, the Wire Act may conflict with the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. §§ 5361-5367 (2006), because UIGEA appears to permit intermediate out-of-state routing of electronic data associated with lawful lottery transactions that otherwise occur in-state. In light of this apparent conflict, you have asked whether the Wire Act and UIGEA prohibit a state-run lottery from using the Internet to sell tickets to in-state adults where the transmission using the Internet crosses state lines, and whether these statutes prohibit a state lottery from transmitting lottery data associated with in-state ticket sales to an out-of-state transaction processor either during or after the purchasing process.

Having considered the Criminal Division's views, as well as letters from New York and Illinois to the Criminal Division that were attached to your opinion request,[1] we conclude that interstate transmissions of wire communications that do not relate to a "sporting event or contest," 18 U.S.C. § 1084(a), fall outside of the reach of the Wire Act. Because the proposed New York and Illinois lottery proposals do not involve wagering on sporting events or contests,

[1] *See* Letter for Portia Roberson, Director, Office of Intergovernmental Affairs, from William J. Murray, Deputy Director and General Counsel, New York Lottery (Dec. 4, 2009) ("N.Y. Letter"); Letter for Eric H. Holder, Jr., Attorney General of the United States, from Pat Quinn, Governor, State of Illinois (Dec. 11, 2009) ("Ill. Letter"); Letter for Bruce Ohr, Chief, Organized Crime and Racketeering Section, Criminal Division, from John W. McCaffrey, General Counsel, Illinois Department of Revenue (Mar. 10, 2010); Department of Revenue and Illinois Lottery, State of Illinois Internet Lottery Pilot Program (Mar. 10, 2010) ("Ill. White Paper").

the Wire Act does not, in our view, prohibit them. Given this conclusion, we have not found it necessary to address the Wire Act's interaction with UIGEA, or to analyze UIGEA in any other respect.

I.

In December 2009, officials from the New York State Division of the Lottery and the Office of the Governor of the State of Illinois sought the Criminal Division's views regarding their plans to use the Internet and out-of-state transaction processors to sell lottery tickets to adults within their states. *See* Crim. Mem. at 1; Ill. Letter; N.Y. Letter. According to its letter to the Criminal Division, New York is finalizing construction of a new computerized system that will control the sale of lottery tickets to in-state customers. Most of the tickets will be printed at retail locations and delivered to customers over the counter, but some will be "virtual tickets electronically delivered over the Internet to computers or mobile phones located inside the State of New York." N.Y. Letter at 1. New York also notes that all transaction data in the new system will be routed from the customer's location in New York to the lottery's data centers in New York and Texas through networks controlled in Maryland and Nevada. *Id.* Illinois, for its part, plans to implement a pilot program to sell lottery tickets to adults over the Internet, with sales restricted by geolocation technology to "transactions initiated and received or otherwise made exclusively within the State of Illinois." Ill. Letter at 2 (citation and internal quotation marks omitted). Illinois characterizes its program as "an intrastate lottery, despite the fact that packets of data may intermediately be routed across state lines over the Internet." Ill. White Paper at 12 (italics omitted). Both States argue in their submissions to the Criminal Division that the Wire Act is inapplicable because it does not cover communications related to non-sports wagering, and that their proposed lotteries are lawful under UIGEA. *Id.* at 11-12; N.Y. Letter at 3.

In the Criminal Division's view, both the New York and Illinois Internet lottery proposals may violate the Wire Act. Crim. Mem. at 3. The Criminal Division notes that "[t]he Department has uniformly taken the position that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling." *Id.* at 3; *see also* Crim. Supp. Mem. at 1-2. The Division also explains that "the Department has consistently argued under the Wire Act that, even if the wire communication originates and terminates in the same state, the law's interstate commerce requirement is nevertheless satisfied if the wire crossed state lines at any point in the process." Crim. Mem. at 3; *see also* Crim. Supp. Mem. at 2. Taken together, these interpretations of the Wire Act "lead[] to the conclusion that the [Act] prohibits" states from "utiliz[ing] the Internet to transact bets or wagers," even if those bets or wagers originate and terminate within the state. Crim. Supp. Mem. at 2.

The Criminal Division further notes, however, that reading the Wire Act in this manner creates tension with UIGEA, which appears to permit out-of-state routing of data associated with in-state lottery transactions. Crim. Mem. at 4-5. UIGEA prohibits any person engaged in the business of betting or wagering from accepting any credit or funds from another person in connection with the latter's participation in "unlawful Internet gambling." 31 U.S.C. § 5363; *see* Crim. Mem. at 3. Under UIGEA, "unlawful Internet gambling" means "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet" in a jurisdiction where applicable federal or state law makes such a bet illegal. 31 U.S.C. § 5362(10)(A). Critically, however, UIGEA specifies that "unlawful Internet

gambling" does not include bets "initiated and received or otherwise made exclusively within a single State," *id.* § 5362(10)(B), and expressly provides that "[t]he intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made," *id.* § 5362(10)(E).

The Criminal Division is thus concerned that the Wire Act may criminalize conduct that UIGEA suggests is lawful. On the one hand, the Criminal Division believes that the New York and Illinois lottery plans violate the Wire Act because they will involve Internet transmissions that cross state lines or the transmission of lottery data to out-of-state transaction processors. Crim. Mem. at 4; Crim. Supp. Mem. at 2. On the other hand, the Division acknowledges that state-run intrastate lotteries are lawful and that UIGEA specifically provides that the kind of "intermediate routing" of lottery transaction data contemplated by New York and Illinois cannot in itself render a lottery transaction interstate. Crim. Supp. Mem. at 2; Crim. Mem. at 4-5. The Criminal Division further notes that the conclusion that the Wire Act prohibits state lotteries from making in-state sales over the Internet creates "a potential oddity of circumstances" in which "the use of interstate commerce," rather than simply supplying a jurisdictional hook for conduct that is already wrongful, would transform otherwise lawful activity—state-run in-state lottery transactions—into wrongful conduct under the Wire Act. Crim. Supp. Mem. at 2.[2]

In light of this tension, the Criminal Division asked this Office to provide an opinion addressing whether the Wire Act and UIGEA prohibit state-run lotteries from using the Internet to sell tickets to in-state adults (a) where the transmission over the Internet crosses state lines, or (b) where the lottery transmits lottery data across state lines to an out-of-state transaction processor. Crim. Mem. at 5; Crim. Supp. Mem. at 1.

II.

The Criminal Division's conclusion that the New York and Illinois lottery proposals may be unlawful rests on the premise that the Wire Act prohibits interstate wire transmissions of gambling-related communications that do not involve "any sporting event or contest." *See* Crim. Mem. at 3; Crim. Supp. Mem. at 2. As noted above, both Illinois and New York dispute this premise, contending that the Wire Act prohibits only transmissions concerning sports-related wagering. *See* Ill. White Paper at 11-12; N.Y. Letter at 3; *see also In re Mastercard Int'l, Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001) ("[A] plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest."), *aff'd*, 313 F.3d 257 (5th Cir. 2002). The sparse case law on this issue is divided. *Compare, e.g., Mastercard*, 313 F.3d at 262-63 (holding that the Wire Act does not extend to non-sports wagering), *with United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah. 2007) (taking the opposite view), *and* Report and Recommendation of United States Magistrate Judge Regarding Gary Kaplan's Motion to Dismiss Counts 3-12, at 4-6, *United States v. Kaplan*, No. 06-CR-337CEJ (E.D. Mo. Mar. 20, 2008) (same).[3] We conclude that the Criminal

[2] State-run lotteries are exempt from many federal anti-gambling prohibitions. *See, e.g.*, 18 U.S.C. §§ 1307, 1953(b)(4) (2006).

[3] A New York court also found that subsection 1084(a) applied to gambling in the form of "virtual slots, blackjack, or roulette," but did so without analyzing the meaning of the "sporting event or contest" qualification. *See New York v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 847, 851-52 (N.Y. Sup. Ct. 1999).

Division's premise is incorrect and that the Wire Act prohibits only the transmission of communications related to bets or wagers on sporting events or contests.

> The relevant portion of the Wire Act, subsection 1084(a), provides:
>
> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1084(a) (codifying Pub. L. No. 87-216, § 2, 75 Stat. 491 (1961)).[4]

This provision contains two broad clauses. The first bars anyone engaged in the business of betting or wagering from knowingly using a wire communication facility "for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest." *Id.* The second bars any such person from knowingly using a wire communication facility to transmit communications that entitle the recipient to "receive money or credit" either "as a result of bets or wagers" or "for information assisting in the placing of bets or wagers." *Id.*[5]

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[4] The Wire Act defines "wire communication facility" as "any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission." 18 U.S.C. § 1081 (2006).

[5] The Criminal Division reads this second clause of subsection 1084(a) as if it were two separate clauses: the first prohibiting the use of a wire communication facility "for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers," and the second prohibiting the use of a wire communication facility "for information assisting in the placing of bets or wagers." *See* Crim. Mem. at 3; Crim. Supp. Mem. at 1 n.1. We do not find this reading convincing. Under that reading, the latter clause would prohibit the "use[] [of] a wire communication facility . . . for information assisting in the placing of bets or wagers," but it is unclear what, if anything, "us[ing]" a wire communication facility "for information" would mean. This difficulty could be remedied by reading the phrase "the transmission of" into the statute. However, doing so would both add words to the text and make the last clause in subsection 1084(a)—prohibiting use of a wire facility "for [the transmission of] information assisting in the placing of bets or wagers"—overlap with the first part of subsection 1084(a), which prohibits using wire communications for "the transmission . . . of . . . information assisting in the placing of bets or wagers on any sporting event or contest." This redundancy counsels against the Criminal Division's reading. *See, e.g.*, *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (invoking "rule against superfluities"). We believe the second half of subsection 1084(a) is better read as a single prohibition barring "the transmission of a wire communication which entitles the recipient *to receive money or credit* [*either*] as a result of bets or wagers[] *or* for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a) (emphasis added). This reading avoids the illogic and redundancy of the first reading. It is also supported by the Wire Act's legislative history, which characterizes the second half of subsection 1084(a) as a provision that would prohibit "the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering," S. Rep. No. 87-588, at 2 (1961)—*not* as a set of two provisions that both would prohibit the transmission of wire communications entitling the recipients to receive money or credit as a result of bets or wagers *and* broadly bar the transmission of information assisting in the placing of bets or wagers. *See* H.R. Rep. No. 87-967, at 2 (1961) (subsection (a) "also prohibits the transmission of a wire communication which entitled the recipient to receive

Our question is whether the term "on any sporting event or contest" modifies each instance of "bets or wagers" in subsection 1084(a) or only the instance it directly follows. The second part of the first clause clearly prohibits a person who is engaged in the business of betting or wagering from knowingly using a wire communication facility to transmit "information assisting in the placing of bets or wagers on any sporting event or contest" in interstate or foreign commerce. *Id.* § 1084(a). It is less clear that the "sporting event or contest" limitation also applies to the first part of the first clause, prohibiting the use of a wire communication facility to transmit "bets or wagers" in interstate or foreign commerce, or to the second clause, prohibiting the transmission of a wire communication "which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers." *Id.* For the reasons set forth below, we conclude that both provisions are limited to bets or wagers on or wagering communications related to sporting events or contests. We begin by discussing the first part of the first clause, and then turn to the second clause.

A.

In our view, it is more natural to treat the phrase "on any sporting event or contest" in subsection 1084(a)'s first clause as modifying both "the transmission in interstate or foreign commerce of bets or wagers" and "information assisting in the placing of bets or wagers," rather than as modifying the latter phrase alone. The text itself can be read either way—it does not, for example, contain a comma after the first reference to "bets or wagers," which would have rendered our proposed reading significantly less plausible. By the same token, the text does not contain commas after *each* reference to "bets or wagers," which would have rendered our proposed reading that much more certain. *See* 18 U.S.C. § 1084(a) ("Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest . . . .").

Reading "on any sporting event or contest" to modify "the transmission . . . of bets or wagers" produces the more logical result. The text could be read to forbid the interstate or foreign transmission of bets and wagers of all kinds, including non-sports bets and wagers, while forbidding the transmission of information to assist only sports-related bets and wagers. But it is difficult to discern why Congress, having forbidden the transmission of *all* kinds of bets or wagers, would have wanted to prohibit only the transmission of information assisting in bets or wagers concerning sports, thereby effectively permitting covered persons to transmit information assisting in the placing of a large class of bets or wagers whose transmission was expressly forbidden by the clause's first part. *See id.*; *see also id.* § 1084(b) (providing exceptions for news reporting, and for transmissions of wagering information from one state where betting is legal to another state where betting is legal, both expressly relating to "sporting events or contests"). The more reasonable inference is that Congress intended the Wire Act's prohibitions to be parallel in scope, prohibiting the use of wire communication facilities to transmit both bets or wagers *and* betting or wagering information on sporting events or contests. Given that this interpretation is an equally plausible reading of the text and makes better sense of the statutory

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money or credit as a result of a bet or wager or for information assisting in the placing of bets or wagers"), *reprinted in* 1961 U.S.C.C.A.N. 2631, 2632.

scheme, we believe it is the better reading of the first clause. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) ("[O]ur construction . . . must, to the extent possible, ensure that the statutory scheme is coherent and consistent.").

The legislative history of subsection 1084(a) supports this conclusion. As originally proposed, subsection 1084(a) would have imposed criminal penalties on anyone who "leases, furnishes, or maintains any wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of *bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest* . . . ." S. 1656, 87th Cong. § 2 (1961) (as introduced) (emphasis added). The commas around the phrase "or information assisting in the placing of bets or wagers" make clear that the phrase "on any sporting event or contest" modifies both "bets or wagers" and "information assisting in the placing of bets or wagers."

In redrafting subsection 1084(a), the Senate Judiciary Committee altered the provision's first clause, changing the class of covered persons and removing the commas after both references to "wagers," and added a second clause prohibiting transmissions relating to "money or credit" (which we discuss below in section II.B). The Senate Judiciary Committee Report noted that the purpose of this amendment was to limit the subsection's reach to persons engaged in the gambling business, and to expand its reach to include "money or credit" communications:

> The second amendment changes the language of the bill, as introduced (which prohibited the leasing, furnishing, or maintaining of wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of bets or wagers), to prohibit the use of wire communication facility by persons engaged in the business of betting or wagering, in the belief that the individual user, engaged in the business of betting or wagering, is the person at whom the proposed legislation should be directed; and has further amended the bill to prohibit the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering which is designed to close another avenue utilized by gamblers for the conduct of their business.

S. Rep. No. 87-588, at 2 (1961). Nothing in the legislative history of this amendment suggests that, in deleting the commas around "or information assisting in the placing of bets or wagers" and adding subsection 1084(a)'s second clause, Congress intended to expand dramatically the scope of prohibited transmissions from "bets or wagers . . . on any sporting event or contest" to *all* "bets or wagers," or to introduce a counterintuitive disparity between the scope of the statute's prohibition on the transmission of bets or wagers and the scope of its prohibition on the transmission of information assisting in the placing of bets or wagers. *See also* 107 Cong. Rec. 13,901 (1961) (Explanation of S. 1656, Prohibiting Transmission of Bets by Wire Communications, submitted for the record by Sen. Eastland, Chairman, S. Judiciary Comm.) (describing Senate Judiciary Committee's two major amendments to S. 1656 without mentioning an expansion of prohibited wagering to reach non-sports wagering); *cf. Report of Proceedings: Hearing Before the S. Comm. on the Judiciary, Exec. Sess.*, 87th Cong. 55 (1961) ("Senate Judiciary Comm. Exec. Session") (statement of Byron R. White, Deputy Att'y Gen.) (the bill, as amended, "is aimed now at those who use the wire communication facility for the

transmission of bets or wagers in connection with a sporting event").[6] Given that such changes would have significantly altered the scope of the statute, we think this absence of comment in the legislative history is significant. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes.").

B.

We likewise conclude that the phrase "on any sporting event or contest" modifies subsection 1084(a)'s second clause, which prohibits "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a). The qualifying phrase "on any sporting event or contest" does not appear in this clause. But in our view, the references to "bets or wagers" in the second clause are best read as shorthand references to the "bets or wagers on any sporting event or contest" described in the first clause.

Although Congress could have made such an intent even clearer by writing "*such* bets or wagers" in the second clause, the text itself is consistent with our interpretation. And the interpretation gains support from the fact that the phrase "in interstate and foreign commerce" is likewise omitted from the second clause, even though Congress presumably intended *all* the prohibitions in the Wire Act, including those in the second clause, to be limited to interstate or foreign (as opposed to intrastate) wire communications. *See* Crim. Mem. at 3 (to violate the Wire Act, the wire communication must "cross[] state lines"); *see also, e.g.*, H.R. Rep. No. 87-967, at 1-2 ("The purpose of the bill is to . . . aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information *in interstate and foreign commerce*.") (emphasis added), *reprinted in* 1961 U.S.C.C.A.N. at 2631. This omission suggests that Congress used shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause.

Reading the entire subsection, including its second clause, as limited to sports-related betting also makes functional sense of the statute. *Cf. Corley v. United States*, 129 S. Ct. 1558, 1567 n.5 (2009) (construing the statute as a whole to avoid "the absurd results of a literal reading"). On this reading, all of subsection 1084(a)'s prohibitions serve the same end, forbidding wagering, information, and winnings transmissions of the same scope: No person may send a wire communication that places a bet on a sporting event or entitles the sender to

[6] The legislative history indicates that the Department of Justice played a significant role in drafting S. 1656 as part of the Attorney General's program to fight organized crime and syndicated gambling. *See, e.g.*, S. Rep. No. 87-588, at 3 (noting that S. 1656 was introduced by the committee chairman on the recommendation of the Attorney General); *The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665 Before the S. Comm. on the Judiciary*, 87th Cong. 12 (1961) ("Senate Hearings") (statement of Robert F. Kennedy, Att'y Gen.) ("We have drafted this statute carefully to protect the freedom of the press."), *quoted in* S. Rep. No. 87-588, at 3; Senate Judiciary Comm. Exec. Session at 54-55 (statement of Byron R. White, Deputy Att'y Gen.) (describing amendments to S. 1656 negotiated by the Justice Department); *Legislation Relating to Organized Crime: Hearings on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 87th Cong. 5 (1961) ("House Hearings") (statement of Rep. McCulloch) (referring to "the legislative proposals of the Kennedy administration").

receive money or credit as a result of a sports-related bet, and no person may send a wire communication that shares information assisting in the placing of a sports-related bet or entitles the sender to money or credit for sharing information that assisted in the placing of a sports-related bet.

Reading subsection 1084(a) to contain some prohibitions that apply solely to sports-related gambling activities and other prohibitions that apply to all gambling activities, in contrast, would create a counterintuitive patchwork of prohibitions. If the provision's second clause is read to apply to *all* bets or wagers, subsection 1084(a) as a whole would prohibit using a wire communication facility to place bets or to provide betting information only when sports wagering is involved, but would prohibit using a wire communication facility to transmit *any and all* money or credit communications involving wagering, whether sports-related or not. We think it is unlikely that Congress would have intended to permit wire transmissions of non-sports bets and wagers, but prohibit wire transmissions through which the recipients of those communications would become entitled to receive money or credit as a result of those bets. We think it similarly unlikely that Congress would have intended to allow the transmission of information assisting in the placing of bets or wagers on non-sporting events, but then prohibit transmissions entitling the recipient to receive money or credit for the provision of information assisting in the placing of those lawfully-transmitted bets.

The legislative history of subsection 1084(a) supports our reading of the text. *Cf. Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope.") (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989)); *cf. Green*, 490 U.S. at 527 (Scalia, J., concurring) (finding it "entirely appropriate to consult all public materials, including the background of [Federal] Rule [of Evidence] 609(a)(1) and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of, and thus to justify a departure from the ordinary meaning of the word 'defendant' in the Rule"). To begin, when Congress revised the Wire Act during the legislative process to add the second clause, it indicated (as noted above) that its purpose in doing so was to "further amend[] the bill to prohibit the transmission of wire communications which entitle the recipient to receive money as the result of betting or wagering[,] which is designed to close another avenue utilized by gamblers for the conduct of their business." S. Rep. No. 87-588, at 2. There is no indication that Congress intended the prohibition on money or credit transmissions to sweep substantially more broadly than the underlying prohibitions on betting, wagering, and information communications, let alone any discussion of any rationale behind such a counterintuitive scheme. *Cf. Am. Trucking*, 531 U.S. at 468.

More broadly, the Wire Act's legislative history reveals that Congress's overriding goal in the Act was to stop the use of wire communications for sports gambling in particular. Congress was principally focused on off-track betting on horse races, but also expressed concern about other sports-related events or contests, such as baseball, basketball, football, and boxing. The House Judiciary Committee Report, for example, explains:

> Testimony before your Committee on the Judiciary revealed that modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communication facilities. For example, at present, the immediate receipt of information as to results of a horserace permits a bettor to place a wager on a successive race. Likewise, bookmakers are dependent upon telephone service for the placing of bets and for layoff betting on all sporting events. The availability of wire communication facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that a particular sporting event begins.

H.R. Rep. No. 87-967 at 2, *reprinted in* 1961 U.S.C.C.A.N. at 2631-32 (reprinted report entitled "Sporting Events—Transmission of Bets, Wagers, and Related Information"); *see also* 107 Cong. Rec. 16,533 (1961) (statement of Rep. Celler, Chairman, H. Judiciary Comm.) ("This particular bill involves the transmission of wagers or bets and layoffs on horseracing and other sporting events."); House Hearings at 24-26 (statement of Robert F. Kennedy, Att'y Gen.) (describing horse racing bookmaking operations and the importance to the bookmaker of rapid inbound and outbound communications); House Hearings at 236-38 (statement of Frank D. O'Connor, District Attorney, Long Island City, N.Y.) (describing the operation of the Delaware Sports Service, a wire service that enables bookies and gambling syndicates to lay off horse race bets with other bookies, reduce odds on a horse, and even cheat by taking bets after a race has finished).

Legislative history from the Senate similarly suggests that Congress's motive in enacting the Wire Act was to combat sports-related betting. The Explanation of S. 1656, Prohibiting Transmission of Bets by Wire Communications, provided by Chairman Eastland during the Senate debate, describes the problem addressed by the legislation this way:

> Information essential to gambling must be readily and quickly available. Illegal bookmaking depends upon races at about 20 major racetracks throughout the country, only a few of which are in operation at any one time. Since the bookmaker needs many bets in order to operate a successful book, he needs replays, including money on each race. Bettors will bet on successive races only if they know quickly the results of the prior race and the bookmaker cannot accept bets without the knowledge of the results of each race. Thus, information so quickly received as to be almost simultaneous, prior to, during, and immediately after each race with regard to starting horse, scratches of entries, probable winners, betting odds, results and the prices paid, is essential to both the illegal bookmaker and his customers.

107 Cong. Rec. 13,901 (1961); *see also* S. Rep. No. 87-588, at 4 (quoting Letter for Vice President, U.S. Senate, from Robert F. Kennedy, Att'y Gen. (Apr. 6, 1961)); Senate Hearings at 12 (statement of Robert F. Kennedy, Att'y Gen.) ("The people who will be affected [by S. 1656] are the bookmakers and the layoff men, who need incoming and outgoing wire communications in order to operate.").

Although Congress was most concerned about horse racing, testimony during the hearings also highlighted the increasing importance of rapid wire communications to "large-scale betting operations" involving other professional and amateur sporting events, such as baseball, basketball, football, and boxing. House Hearings at 25 (statement of Robert F. Kennedy, Att'y Gen.). The Attorney General testified, for instance, that recent disclosures revealed that gamblers had bribed college basketball players to shave points on games, and that up-to-the-minute information regarding "the latest 'line' on the contest," "late injuries to key players," and the like was critical to bookmakers. *Id.*; *accord* Senate Hearings at 6 (statement of Robert F. Kennedy, Att'y Gen.); *see also* House Hearings at 272 (statement of Nathan Skolnik, N.Y. Comm'n of Investigation) (bookmakers handling illegal baseball, basketball, football, hockey, and boxing wagering need wire communications to obtain "the line," to make layoff bets, and to receive race results); *id.* at 298-99 (statement of Dan F. Hazen, Assistant Vice President, W. Union Tel. Co.) (discussing baseball-sports ticker installations refused or removed by Western Union because of illegal use). This focus on sports-related betting makes sense, as the record before Congress indicated that sports bookmaking was the principal gambling activity for which crime syndicates were using wire communications at the time. *See* Charles P. Ciaccio, Jr., *Internet Gambling: Recent Developments and State of the Law*, 25 Berkeley Tech. L.J. 529, 537 (2010); *see also* Senate Hearings at 277-78 (testimony of Herbert Miller, Assistant Attorney General, Criminal Division).[7]

Our conclusion that subsection 1084(a) is limited to sports betting finds additional support in the fact that, on the same day Congress enacted the Wire Act, it also passed another statute in which it expressly addressed types of gambling other than sports

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[7] As noted above, the Justice Department played a key role in drafting S. 1656, and it understood the bill to reach only the use of wire communications for sports-related wagering and communications. The colloquy between Mr. Miller and Senator Kefauver, chairman of a committee that held hearings to investigate organized crime and gambling in the 1950s, underscores that Congress was well aware of that understanding:

> SENATOR KEFAUVER. The bill [S. 1656] on page 2 seems to be limited to sporting events or contests. Why do you not apply the bill to any kind of gambling activities, numbers rackets, and so forth?
>
> MR. MILLER. Primarily for this reason, Senator: The type of gambling that a telephone is indispensable to is wagers on a sporting event or contest. Now, as a practical matter, your numbers game does not require the utilization of communications facilities.
>
> . . . .
>
> SENATOR KEFAUVER. I can see that telephones would be used in sporting contests, and it is used quite substantially in the numbers games, too.
>
> How about laying off bets by the use of telephones and laying off bets in bigtime gambling? Does that not happen sometimes?
>
> MR. MILLER. We can see that this statute will cover it. Oh, you mean gambling on other than a sporting event or contest?
>
> SENATOR KEFAUVER. Yes.
>
> MR. MILLER. This bill, of course, would not cover that because it is limited to sporting events or contests.

Senate Hearings at 277-78.

gambling, including gambling known as the "numbers racket," which involved lottery-style games. In addressing these forms of gambling, Congress used terms wholly different from those employed in the Wire Act. For example, the Interstate Transportation of Wagering Paraphernalia Act, Pub. L. No. 87-218, 75 Stat. 492 (1961) (codified at 18 U.S.C. § 1953), specifically prohibits the interstate transportation of wagering paraphernalia, including materials used in lottery-style games such as numbers, policy, and bolita.[8] Subject to exemptions, the statute provides, in part:

> Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined under this title or imprisoned for not more than five years or both.

18 U.S.C. § 1953(a) (2006). The legislative history indicates that the reference to "a numbers, policy, bolita, or similar game" under subpart (c) of this provision was intended to cover lotteries. *See* H.R. Rep. No. 87-968, at 2 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2634, 2635; *see also* House Hearings at 29-30 (1961) (statement of Robert F. Kennedy, Att'y Gen.) (highlighting the need for legislation prohibiting the interstate transportation of wagering paraphernalia to help suppress "lottery traffic" and to close loopholes created by judicial decisions).

Congress thus expressly distinguished these lottery games from "bookmaking" or "wagering pools with respect to a sporting event," and made explicit that the Interstate Transportation of Wagering Paraphernalia Act applied to all three forms of gambling. 18 U.S.C. § 1953(a).[9] Congress's decision to expressly regulate lottery-style games in addition to sports-related gambling in that statute, but not in the contemporaneous Wire Act, further suggests that Congress did not intend to reach non-sports wagering in the Wire Act. *See Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 124 (1998) (construing one federal statute in light of another congressional enactment the same year).[10]

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[8] As Assistant Attorney General Herbert Miller explained, "numbers, policy, and bolita[] are similar types of lotteries wherein an individual purchases a ticket with a number." House Hearings at 350; *see generally* National Institute of Law Enforcement and Criminal Justice, United States Department of Justice, *The Development of the Law of Gambling: 1776-1976*, at 748-52 (1977) (describing the numbers game and lotteries).

[9] The Supreme Court later held that 18 U.S.C. § 1953 barred the interstate transportation of records, papers, and writings in connection with a sweepstake race operated by the state of New Hampshire. *United States v. Fabrizio*, 385 U.S. 263, 266-70 (1966). In 1975, Congress amended the statute to exempt "equipment, tickets, or materials used or designed for use within a State in a lottery conducted by that State acting under authority of State law," Pub. L. No. 93-583, § 3, 88 Stat. 1916 (1975) (codified at 18 U.S.C. § 1953(b)(4)), and established a new provision, 18 U.S.C. § 1307, exempting state-conducted lotteries from statutory restrictions governing lotteries in 18 U.S.C. §§ 1301-1304, Pub. L. No. 93-583, § 1, 88 Stat. 1916 (1975). No similar exemption for state lotteries was added to the Wire Act.

[10] The legislative history of the Wire Act does contain numerous references to "gambling information." However, in context, this term is best read as a reference to the specific kinds of gambling information covered by the statute being discussed, not evidence of an independent intent to include other kinds of gambling information

In sum, the text of the Wire Act and the relevant legislative materials support our conclusion that the Act's prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce.[11]

III.

What remains for resolution is only whether the lotteries proposed by New York and Illinois involve "sporting event[s] or contest[s]" within the meaning of the Wire Act. We conclude that they do not. The ordinary meaning of the phrase "sporting event or contest" does not encompass lotteries. As noted above, a statute enacted the same day as the Wire Act expressly distinguished sports betting from other forms of gambling, including lotteries. *See supra* pp. 10-11 (discussing § 1953(e)). Other federal statutes regulating lotteries make the same distinction. *See* 18 U.S.C. § 1307(d) (2006) ("'Lottery' does not include the placing or accepting of bets or wagers on sporting events or contests.").[12] Nothing in the materials supplied by the

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within the scope of the statute—let alone an intent to include that other kind of information *only* with respect to money or credit communications. *See, e.g.*, H.R. Rep. No. 87-967, at 3 (citing the exemption in subsection 1084(b) for the transmission of "gambling information" from "a State where the placing of bets and wagers on a sporting event is legal, to a State where betting on that particular event is legal," even though subsection 1084(b) does not refer to "gambling information"), *reprinted in* 1961 U.S.C.C.A.N. at 2632; House Hearings at 353-54 (referring, in discussing H.R. 7039, 87th Cong. (1961), to "[o]ur purpose [being] to prohibit the interstate transmission of gambling information which is essential to the gambling fraternity," even though H.R. 7039 did not refer to "gambling information" but would have prohibited the transmission of wagers and wagering information only with respect to a "sporting event or contest").

We further note that the Wire Act itself uses the term "gambling information" in subsection 1084(d). *See* 18 U.S.C. § 1084(d) ("When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving *gambling information* in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber . . . .") (emphasis added). We express no opinion about the scope of that term as it is used in that statutory provision.

[11] We also considered the possibility that, in the Wire Act's reference to "any sporting event or contest," 18 U.S.C. § 1084(a), the word "sporting" modifies only "event" and not "contest," such that the provision would bar the wire transmission of "wagers on any sporting event or [any] contest." This interpretation would give independent meaning to "event" and "contest," but it would also create redundancy of its own. If Congress had intended to cover *any* contest, it is unclear why it would have needed to mention sporting events separately. Moreover, as discussed above, the legislative history of the Wire Act makes clear that Congress was focused on preventing the use of wire communications for sports gambling in particular. And, legislative proposals from the 1950s in which the phrase "any sporting event or contest" originated further confirm that Congress intended to reach only "sporting contests." A key debate at that time concerned whether to regulate "any sporting event or contest" or "any horse or dog racing event or contest." *See, e.g.*, S. Rep. No. 81-1752, at 3, 22, 28 (1950) (explaining committee amendment to bill narrowing the definition of "gambling information" from covering "any sporting event or contest" to "any horse or dog racing event or contest"); *compare* S. 3358, 81st Cong. § 2(b) (1950) (as introduced), *with* S. 3358, 81st Cong. § 2(b) (1950) (as reported by the Interstate and Foreign Commerce Committee). If Congress had intended the Wire Act's predecessors to reach *any* "contest," however, the debate over which adjectival phrase to apply to "event" would have been meaningless.

[12] In addition, the Professional and Amateur Sports Protection Act ("PASPA") prohibits a governmental entity from sponsoring, operating, or authorizing by law "a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or

Criminal Division suggests that the New York or Illinois lottery plans involve sports wagering, rather than garden-variety lotteries. Accordingly, we conclude that the proposed lotteries are not within the prohibitions of the Wire Act.

Given that the Wire Act does not reach interstate transmissions of wire communications that do not relate to a "sporting event or contest," and that the state-run lotteries proposed by New York and Illinois do not involve sporting events or contests, we conclude that the Wire Act does not prohibit the lotteries described in these proposals. In light of that conclusion, we need not consider how to reconcile the Wire Act with UIGEA, because the Wire Act does not apply in this situation. Accordingly, we express no view about the proper interpretation or scope of UIGEA.

/s/

VIRGINIA A. SEITZ
Assistant Attorney General

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professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games." 28 U.S.C. § 3702 (2006). While the statute grandfathers some established state gambling schemes, a new state lottery falling within the Act's prohibitions would not be exempt. *Id.* § 3704; *see, e.g.*, *OFC Comm Baseball v. Markell*, 579 F.3d 293, 300-04 (3d Cir. 2009) (PASPA preempted aspects of Delaware statute permitting wagering on athletic contests, which were not saved by any of the statutory exceptions).

THE RESPONSE – RAWA

As you know, the U.S. Department of Justice (the "DOJ") issued an opinion regarding its interpretation of the Federal Wire Act ("FWA") in December 2011. In that opinion, the DOJ clearly stated that the FWA applied only to sports wagering and not other forms of wagering. This was a change in interpretation of the FWA, but not in the enforcement of the FWA.

Prior to 2011, there were no prosecutions under the FWA for activities other than bookmaking or sports wagering. This, despite the assertions of the DOJ that the FWA applied to all forms of wagering. The materials regarding the FWA contain the old statements of the DOJ. Such statements also include statements by the DOJ that interstate horse racing, even the activities permitted by the Interstate Horse Racing Act, violate the Federal Wire Act.

The 2011 DOJ opinion was released during the evening of December 23, 2011 and was a bit of a holiday surprise. The DOJ did not address the issues raised in the Lobardo opinion (also in your FWA materials). It did cite prior prosecution history, the 5th Circuit Court of Appeals opinion in In re Mastercard along with legislative history to arrive at the conclusion that the FWA is intended to solely apply to sports wagering.

While many in the gaming industry applauded the 2011 DOJ opinion, some were appalled. In particular, the CEO and Chairman of the Las Vegas Sands, Sheldon Adelson, has been vocal about opposing the new DOJ interpretation of the FWA. In taking the lead against the DOJ interpretation, a bill to "Restore America's Wire Act" was drafted and introduced into Congress in the 114th congress and the bill died without ever reaching the floor of either chamber of the federal legislature. .

When reviewing these versions of the RAWA bills, you should mark up a version of 18 USC 1084 to see the true impact it will have on federal gaming law.

114TH CONGRESS

H. R. 707

To restore long-standing United States policy that the Wire Act prohibits all forms of Internet gambling, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 4, 2015

Mr. CHAFFETZ (for himself, Ms. GABBARD, Mr. SMITH of Texas, Mr. FRANKS of Arizona, Mr. KING of Iowa, Mr. DENT, Mr. HOLDING, and Mr. FORBES) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To restore long-standing United States policy that the Wire Act prohibits all forms of Internet gambling, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Restoration of America's Wire Act''.

SEC. 2. WIRE ACT CLARIFICATION.

Section 1084 of title 18, United States Code, is amended—

(1)in subsection (a)—

(A) by striking ''bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest,'' and inserting ''any bet or wager, or information assisting in the placing of any bet or wager,'';
(B) by striking ''result of bets or wagers'' and inserting ''result of any bet or wager''; and
(C) by striking ''placing of bets or wagers'' and inserting ''placing of any bet or wager''; and

(2) by striking subsection (e) and inserting the following:

(e) As used in this section—

(1) the term 'bet or wager' does not include 15 any activities set forth in section 5362(1)(E) of title 31;

(2) the term 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory, or possession of the United States;

(3) the term 'uses a wire communication facility for the transmission in interstate or foreign commerce of any bet or wager' includes any transmission over the Internet carried interstate or in foreign commerce, incidentally or otherwise; and

(4) the term 'wire communication' has the meaning given the term in section of the Communications Act of 1934 (47 U.S.C. 153).

SEC. 3. RULE OF CONSTRUCTION.

Nothing in this Act, or the amendments made by this Act, shall be construed—

(1) to preempt any State law prohibiting gambling; or

(2) to alter, limit, or extend—

(A) the relationship between the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.) and other Federal laws in effect on the date of enactment of this Act;

(B) the ability of a State licensed lottery retailer to make in-person, computer-generated retail lottery sales under applicable Federal and State laws in effect on the date of the enactment of this Act; or

(C) the relationship between Federal laws and State charitable gaming laws in effect on the date of the enactment of this Act.

18 U.S.C. §1084 Transmission of wagering information; penalties

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

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section

shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

~~(e) As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.~~

e) As used in this section—

(1) the term 'bet or wager' does not include 15 any activities set forth in section 5362(1)(E) of title 31;

(2) the term 'State' means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory, or possession of the United States;

(3) the term 'uses a wire communication facility for the transmission in interstate or foreign commerce of any bet or wager' includes any transmission over the Internet carried interstate or in foreign commerce, incidentally or otherwise; and

(4) the term 'wire communication' has the meaning given the term in section of the Communications Act of 1934 (47 U.S.C. 153).