UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:06CR337CEJ(MLM)
	)	
DAVID CARRUTHERS,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE CONCERNING DAVID CARRUTHERS' MOTION TO DISMISS COUNT I

This matter is before the court on David Carruthers' Motion to Dismiss Count I-RICO Conspiracy or Parts Thereof. [Doc. 269, 270] The government responded. [Doc. 282] Defendant replied. [Doc. 302] The government filed a supplemental response. [Doc. 303] As grounds for his Motion, defendant Carruthers states:

> 1. The government's RICO charge is subject to a number of infirmities.
>
> 2. The alleged violations of state and federal law which form the basis of the purported racketeering activities suffer from deficiencies as well.
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> 3. The government can not rely on defendants' actions in promoting and advertising with respect to BetOnSports because such actions are protected commercial speech under the First Amendment.
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> 4. The government's interpretation and application of Federal statutes to Internet gambling violates the Fifth Amendment due process clause and customary international law with respect to principals regarding jurisdiction to prescribe.

Defendant Carruthers' Motion, [Doc. 269] at 1.

Parts of defendant Carruthers' Motion are virtually identical to Motions to Dismiss the RICO Conspiracy filed by some of his co-defendants.[1] Pages 1-12 of defendant Carruthers' Memorandum in Support of his Motion cover the issues raised in the co-defendants' Motions. The court has this

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[1] Motions to Dismiss Count I were filed by Neil Scott Kaplan [Doc. 167], DME Global Marketing & Fulfillment [Doc. 241, 242], William H. Lenis [Doc. 244], Monica Lenis [Doc. 249], Tim Brown [Doc. 251], William Luis Lenis [Doc. 258, 260] and Manny G. Lenis [Doc. 262]. The government responded to these Motions. [Doc. 211 and 285] Neil Scott Kaplan replied. [Doc. 236]

date issued a Report & Recommendation dealing with the co-defendants' RICO Motions and this Report & Recommendation is incorporated by reference as if fully set out herein as to all of these issues. In addition, on pages 30-38 of defendant Carruthers' Memorandum in Support of his Motion to Dismiss he moves to dismiss on the grounds that the Indictment violates the World Trade Organization (WTO) Treaty. Some of defendant Carruthers' co-defendants filed substantially the same Motions to Dismiss on this ground.[2] The court has given additional time to brief this issue and will issue a Report & Recommendation dealing with the Motions to Dismiss based on the violations of the WTO Treaty and that Report & Recommendation will be incorporated by reference as if fully set out herein as to this issue.

This Report & Recommendation will take up the other grounds raised in defendant Carruthers' Motion to Dismiss Count I and his Memorandum in Support.

I. DEFICIENCIES IN THE ALLEGATIONS OF VIOLATIONS OF STATE AND FEDERAL LAW FORMING THE BASIS OF THE "RACKETEERING ACTIVITIES"

A. The Wire Wager Act

1. The Wire Wager Act as Limited or Not Limited to Sports Betting

The Indictment in this case includes, *inter alia*, allegations of violations of the Wire Wager Act, 18 U.S.C. § 1084 by the Kaplan Gambling Enterprise's offering casino-type Internet gambling as well as sports-related Internet gambling.[3]

The Wire Wager Act states in pertinent part:

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[2] Motions to Dismiss the Indictment as a Violation of the WTO Treaty were filed by William H. Lenis [Doc. 174], Monica Lenis [Doc. 179], Lori Beth Kaplan Multz [Doc. 225], Neil Scott Kaplan [Doc. 237], DME Global Marketing & Fulfillment [Doc. 243], Tim Brown [Doc. 252], William Luis Lenis [Doc. 261], Manny G. Lenis [Doc. 266]. The government responded to the WTO Motions. [Doc. 210 and 226] The court has allowed further briefing on this issue.

[3] For example, ¶24 of the Indictment states that BetOnSports "offered illegal Internet and telephone service gambling through sportsbooks, and online casino and 'proposition bets'". It states that all the wagering originating in the United States which occurred on "Enterprise web sites and telephone services was illegal under Federal law."

> (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.

18 U.S.C. § 1084(a).

Subsection(b) of the statute carves out an exception instructing that the Wire Wager 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, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

18 U.S.C. § 1084(b)

Defendant Carruthers argues that the plain language of the Wire Wager Act only applies to "any sporting event or contest." At least one district court has agreed with this interpretation: "...a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest." In Re Mastercard Intern., Inc. Internet Gambling Litigation, 132 F.Supp. 2d 468, 480 (E.D. La. 2001). The Fifth Circuit affirmed this position, agreeing with "the district court's statutory interpretation, its reading of relevant case law, its summary of the relevant legislative history and its conclusion." In re Mastercard Intern. Inc., 313 F.3d 257, 262-263 (5th Cir. 2002). The various cases cited by the Eastern District of Louisiana deal with bookmaking and affirm that § 1084 includes the charged activities.

This court respectfully disagrees with the Mastercard cases. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." Engine Manufacturers Ass'n. v. South Coast Air Quality Mgmt. District, 541 U.S. 246, 252 (2004) citing Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985). Although not a model of legislative drafting, the statute at issue was meant to include both sports betting and other types of betting or it would not have twice

specifically repeated the phrase "transmission of information assisting in the placing of bets or wagers" as applying only to "any sporting event or contest". This is the phrase used in subsection (a) and it is repeated in the exception carved out in subsection (b), that is, the transmission of information assisting in the placing of bets or wagers on any sporting event or contest where it is legal in both the sending and receiving jurisdictions. Subsection (b) does not except all bets and wagers where legal in both sending and receiving jurisdictions, only information assisting in placing of bets or wagers on sporting events where legal in both sending and receiving jurisdictions. When the "transmission of information assisting in the placing of bets or wagers" is applied to receiving money or credit therefrom, the sports gambling phrase is specifically omitted. We must therefore assume Congress intended that the phrase "bets or wagers on any sporting event" is different from other "bets or wagers".

The statute is couched in the disjunctive and creates two distinct offenses: (1) the use of a wire communication facility for the interstate or foreign transmission of (a) bets or wagers or (b) information assisting in the placing of bet or wagers on a sporting event or contest; or (2) the use of a wire communication which entitles the recipient to receive money or credit as a result of (a) bets or wagers or (b) information assisting in the placing of bets or wagers.

"Although judicial inquiry into the meaning of a statute ends when the words of a statute are clear and unambiguous...where, as here, a congressional enactment is subject to more than one reading, legislative history may be used to shed light on the unclear language." Pierpoint v. Barnes, 94 F.3d 813, 817 (2nd Cir. 1996), cert. denied, 520 U.S. 1209 (1997). Here, the meaning of § 1084 is not clear and the legislative history sheds light on congressional intent:

> The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking and like offenses and to aid in the suppression of organized gambling activities 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.

House Report No. 967, 87th Cong. 1st Sess. (1961). In addition, the Senate Committee on the Judiciary Report stated that the purpose of the Bill was "with respect to the transmission of bets,

wagers, and related information, to assist the several States in the enforcement of their laws pertaining to gambling and to aid in the suppression of organized gambling activities by restricting the use of wire communication facilities." Senate Report No. 588, 87th Cong., 1st Sess. July 24, 1961. These Reports indicate clearly that the Bill was intended to apply to gambling in general and not only to sports gambling.

Another rule of statutory construction also applies to the Wire Wager Act. If Congress had intended the Wire Wager Act to apply to sports betting alone, it could have said so - - but it did not. See Clark v. Arizona, ___U.S.___ 126 S.Ct. 2709, 2723 (2006)(usual rule of statutory construction is that the court should give effect to each clause and word of a statute); see also Hamdan v. Rumsfeld, ___U.S.___ 126 S.Ct. 2749, 2765-66 (2006) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Thus the exclusion of the words "on any sporting event or contest" from three of the prohibitions in subsection (a) of the statute and the specific inclusion of the words in the exception in subsection (b) of the statute mean that Congress intended just that: making illegal wire communications for bets or wagers and for entitlement to receive money or credit for bets or wagers and for entitlement to receive money or credit for information assisting in the placing of bets or wagers as separate and distinct from information assisting in the placing of bets or wagers on sporting events or contests.

In addition, subsection (d) deals with facilities being used "for the purpose of transmitting or receiving gambling information." It does not limit its application to sports betting but includes the transmission of all gambling information. This is consistent with subsection (a) and is further proof of Congressional intent.

Defendants cite proposed legislation which was not enacted to support their position. This is unconvincing and unreliable support as is the floor statement of Representative Celler cited by defendants. Representative Celler stated that "this bill [§ 1084] involved the transmission of wagers

or bets and layoffs on horse racing and other sporting events.", 107 Cong. Rec. 16533 (August 21, 1961)[4]. While this statement refers to horse racing and other sporting events, Representative Celler also stated that "this bill amends Title 18 of the United States Code with respect to the transmission of bets, wagers and related information." 107 Cong. Rec. 16533 (1961). He also said that the bill would "assist the States to stamp out this organized wholesale gambling, like bookmaking, by preventing the use of telephones and wires in the transmission of professional bets, wagers, and gambling information and payoffs." Id. Floor statements by members of Congress are given less weight than other type of legislative history because they generally represent the views of only the speaker and not the entire body. See Kenna v. United States District Court for Cent.Dist.Calif., 435 F.3d 1011, 1015 (9th Cir. 2006). "A committee report representing a collective statement by the drafters about the intended purpose of proposed legislation is considered a particularly good indicator of Congressional intent when it is otherwise difficult to ascertain." Pierpoint, 94 F.3d at 817.

In addition, new legislation which was enacted towards the end of 2006 supports the proposition that the statute applies to bets or wagers not limited to sports events in the prohibition on funding of unlawful Internet gambling through credit cards or wire transfers, 31 U.S.C. §§5361-5367. In this legislation "bet or wager" is defined:

> (1) Bet or Wager - - The term 'bet or wager' - - (A) means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome; ... [and] (D) includes any instructions or information pertaining to the establishment or movement of funds by the better or customer in, to or from an account with the business of betting or wagering. ...

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[4] Representative Celler, Chairman of the Committee on the Judiciary in the House of Representatives.

31 U.S.C. § 5362(1)(A) and (D). Based on this statute, it is clear that Congress considered non-sports wagering through the use of wire communications facilities to be illegal at the time this legislation was passed.

Based on the language of the statute, the legislative history and logical interpretation of the statute and other related legislation, the court finds that 18 U.S.C. § 1084 is not limited to sports betting but includes other kinds of gambling as well.

2. Remedy

This court finds that the Wire Wager Act is not limited to sports betting. However, if the District Court agrees with the Mastercard decisions, the next question is - - what is the appropriate remedy? Defendant Carruthers argues that Count I of the Indictment should be dismissed because to amend the Indictment would violate his right to due process. The government argues that the proper remedy is to strike references to non-sports bets from the Indictment.

> Although the general rule is that a court may not amend an indictment, an exception has been recognized where mere surplusage is eliminated ("merely a matter of form"), nothing is added to the indictment, and the remaining allegations state essential elements of an offense.

United States v. Nabors, 762 F.2d 642, 647 (8th Cir. 1985). See also United States v. Copple, 827 F.2d 1182, 1188 (8th Cir. 1987) ("When the indictment fully notifies the defendant of the charges to be met at trial and an amendment results only in a narrowing of criminal liability, the variance is not a Fifth Amendment violation."), cert. denied, 484 U.S. 1073 (1988); Dranow v. United States, 307 F.2d 545, 558 (8th Cir. 1962) ("All that is required is that the indictment fairly, factually inform the defendant of the character of the scheme as to which evidence will be adduced.")

There is no question that the majority of wagers accepted by the Kaplan Gambling Enterprise involved sports betting and the majority of references to illegal betting in the Indictment refer to sports betting. Defendant knows he must prepare a defense to violations of prohibitions against sports betting. If the references to other types of betting are removed from the Indictment,

defendant is not prejudiced in any way. He questions what evidence was presented to the Grand Jury arguing that in Counts 3-12 based on the Wire Wager Act, the government fails to distinguish whether each of the transmissions were sports related bets. He neglects to refer to ¶38 which is the general introductory paragraph referring to Counts 3-12 and after incorporating ¶¶18, 26 and 31, all of which deal with sports betting, describes the transactions in Counts 3-12 as "wagers on sporting events and contests."

> As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the Indictment, the right to a Grand Jury is not normally violated by the fact that the Indictment alleges more crimes or other means of committing the same crime.
> . . .
>
> In Salinger v. United States [272 U.S. 542 (1926)]...we explicitly held that where an indictment charges several offenses or the commission of one offense in several ways, the withdrawal from the jury's consideration of one offense or one alleged method of committing it does not constitute a forbidden amendment of the indictment.

United States v. Miller, 471 U.S. 130, 136, 145 (1985).

In the Miller opinion the Supreme Court explicitly overruled Ex Parte Bain, 121 U.S. 1, (1887):

> To the extent that Bain stands for the proposition that it constitutes an unconstitutional amendment to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it, that case has simply not survived. To avoid further confusion, we now explicitly reject that proposition.

Miller, 471 U.S. at 144. In the present case, the withdrawal of any reference to betting other than sports betting narrows the scope of the offenses and does not constitute a forbidden amendment of the indictment. See e.g. United States v. Sutera, 933 F.2d 641, 645 (8th Cir. 1991) ("The laundering of proceeds from bookmaking activity is simply a narrower, but included, offense of laundering proceeds from any illegal gambling business.").

The primary consideration in the determination of whether the excision of non-sports wagering allegations would impermissibly change the Indictment and cause constitutionally prohibited variance between the charges returned by the Grand Jury and those to be considered by

the petit jury is whether the Indictment fully and fairly apprises the defendant of the charges he must meet at trial. United States v. Begnaud, 783 F.2d 144, 148 (8th Cir. 1986). (The primary consideration in evaluating a variance between the indictment and proof at trial is whether the indictment fully and fairly appraised the defendant of the charges he or she must meet at trial); See also Truchinski v. United States, 393 F.2d 627, 633 (8th Cir.) ("As long as there is some competent evidence to sustain the charges issued by the grand jury, an indictment should not be dismissed."), cert. denied, 393 U.S. 831 (1968). Therefore, if the District Court finds that 18 U.S.C. § 1084 is limited to sports betting, the appropriate remedy is to strike from the Indictment references dealing with violations of 18 U.S.C. § 1084 which involve non-sports betting.

B. State Law Violations as "Racketeering Activities"

Defendant makes two arguments regarding the charged violations of state law as not constituting racketeering activity.

First, defendant Carruthers claims that 18 U.S.C. § 1955 requires a "gambling business" to be in violation of an underlying state law in the state where the business is conducted in order to constitute a violation of the Illegal Gambling Business Act.[5] Defendant Carruthers cites United States v. Truesdale, 152 F.3d 443 (5th Cr. 1998) in support of his position.

However, Truesdale does not support defendant's argument. In Truesdale the court found only that the defendants did not violate the particular provision of the Texas bookmaking statute that was charged in the Indictment. The court found that defendants may have violated other

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[5] 18 U.S.C. § 1955 provides in pertinent part:
(a) whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined...
(b) as used in this section - -
(1) "Illegal gambling business" means a gambling business which -
(i) is a violation of the law of a State or political subdivision in which it is conducted;...
(2) "Gambling" includes but is not limited to pool selling, bookmaking, maintaining slot machines, roulette wheels or dice tables and conducting lotteries, policy, bolita or numbers games or selling chances therein...

provisions of Texas law but not the one charged. Truesdale, 152 F.3d at 447. As succinctly put by the Western District of New York court:

> United States v. Truesdale, 152 F.3d 443 (5th Cir. 1998), on which Defendants rely as holding that the transmission of a bet to a foreign country where gambling is permitted renders the bet legal regardless of whether gambling is legal in the state of the bet's origination is readily distinguishable. In Truesdale, the court reversed a denial of post-verdict judgment of acquittal on the ground that there was insufficient evidence to support the predicate state offense necessary to uphold the guilty verdict under 18 U.S.C. § 1955. Despite the existence of evidence supporting other predicate state gambling offenses, as no other such offense was alleged in the indictment, the case was not tried nor was the jury instructed on another uncharged theory and, thus, the court refused to affirm. Also, Truesdale, was an appeal following a trial and verdict which have not occurred in the instant case.

United States v. Kaczowski, 114 F.Supp. 2d 143, 154 (W.D. N.Y. 2000).

Secondly, defendant argues that the state statutes alleged in the Indictment cannot be racketeering activities because nothing illegal occurred in the named states, in other words, that state statutes cannot be applied extra-territorially. This argument was raised in United States v. Cohen, 260 F.3d 68 (2nd Cir. 2001), cert. denied, 536 U.S. 922 (2002), and the Second Circuit held that if betting is illegal in the state where the bet is placed and legal where the bet is accepted, it is nevertheless a violation of 18 U.S.C. § 1084. The court found the jury was properly instructed:

> If there was a telephone call or an Internet transmission between New York and [WSE] in Antigua, and if a person in New York said or signaled that he or she wanted to place a specified bet, and if a person on the Internet device or a telephone said or signaled that the bet was accepted, this was the transmission of a bet within the meaning of Section 1084. Congress clearly did not intend to have this statute be made inapplicable because the party in a foreign gambling business deemed or construed the transmission as only starting with an employee or an Internet mechanism located on the premises of the foreign country.

Cohen, 260 F.3d at 74-75.

Defendant argues that Cohen does not apply because it involves § 1084 and not § 1955. Defendant distinguishes a "gambling business" from a "gambling activity" that is, the act of accepting a bet versus the act of placing a bet. This distinction is not necessarily contemplated by § 1084 which requires a person to be "engaged in the business of betting or wagering" and is not

limited only to those who place bets. The concept of a continuing offense under Federal law undercuts defendant's argument:

> Any offense against the United States begun in one district and completed in another, or committed in more than one district, may be...prosecuted in any district in which such offense was begun, continued or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be...prosecuted in any district from, through or into which such commerce, mail matter, or imported object or person moves.

18 U.S.C. § 3237(a).

The Eighth Circuit clearly views that "the business of betting or wagering" includes the continuing course of conduct including placing a bet, accepting a bet and other activities relating to the operation of a gambling business:

> The term "business" is to be applied according to its usual and ordinary meaning. An individual engages in the business of betting or wagering if he regularly performs a function which is an integral part of such business. ...A business enterprise usually involves a continuing course of conduct by persons associated together for a common purpose.

United States v. Scavo, 593 F.2d 837, 842-43 (8th Cir. 1979). In Scavo, the court distinguished between the phrase "conduct[ing]...an illegal gambling business" as used in § 1955 from the phrase "being engaged in the business of betting or wagering" as used in § 1084. The court held the former was intended to reach those persons "whose syndicated operations are so continuous and so substantial as to be of national concern." Scavo, 593 F.2d at 841 citing H.R. Rep. No. 1549, 91st Cong. 2d Sess. (1970). On the other hand, there is nothing in § 1084 to indicate Congress intended only to punish large-scale gambling businesses, rather the focus of § 1084 is the use of interstate communications facilities for gambling by persons engaged in the business of gambling. Id. at 841.

At the trial of this case it will be the government's burden to prove that gambling is illegal in each of the stated jurisdictions.[6] In addition, it will be the government's burden to show that the Kaplan Gambling Enterprise was a large-scale gambling business in order to bring it under the gambit of § 1955. If the gambling activity took place in a state in which it is illegal and the evidence establishes the other elements of § 1955, the operation of an illegal gambling business is proven regardless of whether acceptance of the bet is legal in the receiving jurisdiction.

II. ADVERTISING THE GAMBLING ENTERPRISE'S ACTIONS/PROTECTED COMMERCIAL SPEECH

In the Indictment the government alleges as overt acts in furtherance of the conspiracy certain "fraudulent radio advertisements" and "fraudulent television advertisements" which promoted the Enterprise's gambling services and stated the Enterprise's gambling telephone services and web cites were "legal and licensed." See Indictment ¶36(12) and (13). Defendant Carruthers argues that these advertisements are protected commercial speech under the First Amendment to the United States Constitution. Defendant cites Greater New Orleans Broadcasting Ass'n. v. United States, 527 U.S. 173 (1999) in support of his position. In Greater New Orleans, the Supreme Court held a ban on advertising of legal casino gambling was unconstitutional.

The parties agree that the Central Hudson test applied by Greater New Orleans is the one which should be applied in the instant case. In Central Hudson Gas & Electric Corp. v. Public Service Comm'n. of New York, 447 U.S. 557 (1980) the Supreme Court articulated a 4-part test for the protection of commercial speech: (1) whether the speech at issue concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the

[6] The Indictment identifies various state statutes of Missouri, Florida, New York, New Jersey, Washington and Illinois which serve as the state violations required to show a violation of 18 U.S.C. § 1955.

regulation directly advances the governmental interest asserted; and (4) whether the restriction is not more extensive than is necessary to serve that interest. Id. at 566.

Defendant does not articulate the specific regulation or restriction to which he refers as an unconstitutional ban on the Enterprise's advertising which would run afoul of tests (3) and (4). However, to whatever extent this court is called upon to determine whether the Enterprise's advertisements are commercial speech, the court will address the issue.

Central Hudson directs that "at the outset we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading." Id. In other words, "there can be no constitutional objection to suppression of commercial messages that do not accurately inform the public about lawful activity." Id. at 563. "The government may ban forms of **communication more likely to deceive the public than to inform it**...or **commercial speech related to illegal activity**. Id. at 563-64 (emphasis added; internal citations omitted).

It is immediately clear that Greater New Orleans is distinguishable from the instant case because in Greater New Orleans the advertising promoted a legal activity, specifically, promotional ads for casinos which were legal in Louisiana and Mississippi.[7] The defendant argues that in this case, gambling web sites are legal in Antigua, Barbuda and Costa Rica where they are conducted.[8] Defendant further argues that BetOnSports was fully licensed there and was incorporated as its principal place of business there. The advertisements state that Internet gambling was "legal and licensed." The government contends that Internet gambling is illegal in each of the states cited in

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[7] At issue in Greater New Orleans was whether 18 U.S.C. § 1304 and the corresponding FCC regulations prohibiting radio and television advertising of, generally, any lottery, gift enterprise or similar scheme, offering prizes dependent in whole or in part upon lot or chance etc. were unconstitutional. However, casino wagering was legal in Louisiana and Mississippi and the ads merely urged gamblers to go to those states' casinos to wager.

[8] The court has already discussed *supra* the concept of placing a bet in a state where it is illegal and transmitting it off-shore where gambling is legal nevertheless constitutes illegal gambling activity.

the Indictment and that the reference to "legal and licensed" was clearly misleading. The court finds the government's argument persuasive. To hold otherwise would effectively permit any activity licensed in a foreign jurisdiction to be legal in the United States without reference to local law. Antiguan, Barbudan or Costa Rican laws cannot supercede United States laws. In this case, the Kaplan Gambling Enterprise's ads urged the viewer to go to his home computer or telephone, open an account and place a bet because - - as the ad said - - it was perfectly legal and licensed. BetOnSports PLC was not licensed anywhere in the United States, the solicited conduct was illegal and could not be made legal by any action of the viewers.

Defendant Carruthers argues that the ads contain the disclaimer "void where prohibited" thus making the ads not misleading. As noted above, the government may ban communications more likely to deceive the public than to inform it. Central Hudson, 477 U.S. at 563. The court finds that the "void where prohibited" tag line, which was contained in only some of the Enterprise's ads, make the ads more misleading rather than less so. It clearly gave the impression that Internet gambling was legal in at least some jurisdictions in the United States.

In conclusion the court finds that the Enterprise's advertisements do not qualify as commercial speech protected by the First Amendment under the Central Hudson test because the ads did not inform the public about lawful activity and they were misleading.

III. EXERCISE OF JURISDICTION IN THIS CASE AS VIOLATIVE OF (A) THE CONSTITUTION AND (B) CUSTOMARY INTERNATIONAL LAW

A. The Fifth Amendment Due Process Clause

Defendant Carruthers argues that just as the Due Process clause of the Fourteenth Amendment limits the extra-territorial reach of state law, citing Phillips Petroleum Co. v. Shutts,

472 U.S. 797, 806-814 (1985),[9] the Due Process clause of the Fifth Amendment should serve the same function with respect to the extra-territorial reach of federal law.[10] On the theory that the heart of due process protection is notice to a defendant that his conduct could result in criminal liability, defendant Carruthers, a foreign national, argues that because the activities of the business he managed (BetOnSports) were located outside the United States he had no way of knowing he could run afoul of United States criminal laws.

First, as set out above, the conduct at issue occurred inside the United States. Second, even if his status as a foreign national could somehow exempt him from the maxim "ignorance of the law is no excuse," his due process claim still fails. Admittedly the Supreme Court has carved out exceptions to the maxim. See Bryan v. United States, 524 U.S. 184, 194-95 (1998) (acknowledging that exceptions apply to the "venerable maxim" regarding violations of highly technical statutes such as certain tax laws and structuring cash transactions to avoid a reporting requirement but noting the inapplicability of any exception where the jury found the defendant had actual knowledge that his conduct was unlawful). See also Cheek v. United States, 498 U.S. 192, 202 (1991) ("If the government proves actual knowledge [by the defendant] of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component..."); United States v. Hutzell, 217 F.3d 966, 968 (8th Cir. 2000) (Due Process clause of the Fourteenth Amendment is not violated if defendant's lack of awareness of a prohibition is objectively unreasonable), cert. denied, 532 U.S. 944 (2001).

The government has responded to defendant Carruthers' due process argument by stating that at trial the government will present statements of defendant which prove his actual knowledge of the United States' prohibition of Internet gambling:

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[9] The Phillips Petroleum case distinguishes between the due process protection owed to absent class action plaintiffs from the protections due absent defendants. Its holdings deal mainly with what is required to give due process protections to absent class action plaintiffs.

[10] Defendant Carruthers admits that neither the Supreme Court nor Federal Circuit Courts have squarely addressed the issue of whether the Due Process Clause of the Fifth Amendment limits the extra-territorial application of federal law.

> At trial, the United States will present the statements of defendant as proof of his knowledge of the U.S. prohibition on Internet gambling. For example, on June 4, 2004, at the NCLGS [National Counsel of Legislators from Gambling States] Summer Meeting Compulsive Gambling Workshop, the defendant said he would be very happy if Internet sports betting *were* legal in the U.S. because BetOnSports.com would be onshore in a heartbeat, ready to pay taxes to the United States government. Also, on April 7, 2006 CBS broadcasted a story entitled "The Biggest Game." During this interview, the defendant stated: "If I was doing this in the U.S., it would be illegal but I'm not. I'm doing it here in Costa Rica." As the defendant had actual knowledge of the U.S. anti-Internet gambling law, he cannot claim lack of notice and due process.

Government's Response to Defendant Carruthers' Motion [Doc. 282] at 10-11.

At trial, the government will have to meet its burden of proof on the issue of defendant Carruthers' actual knowledge of the United States' anti-Internet gambling law. However, there are no grounds for dismissal of the Indictment at this time on defendant's claim of lack of notice or a violation of the Due Process clause of the Fifth Amendment.

B. Customary International Law

Defendant Carruthers bases his claim that the Indictment contravenes international law on the premise that he is being prosecuted for conduct that occurred wholly outside the United States where such conduct is legal.[11] Defendant's premise is faulty. This prosecution is based on conduct occurring within the United States where Internet gambling is illegal.

The situs of a criminal prosecution is based on the location of the crime. As noted (and quoted) above, 18 U.S.C. § 3237 states:

> Any offense against the United States begun in one district and completed in another, or committed in more than one district, may be...prosecuted in any district in which such offense was begun, continued or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be...prosecuted in any district from, through or into which such commerce, mail matter, or imported object or person moves.

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[11] Defendant Carruthers describes the six bases of federal jurisdiction and argues why each is inapplicable to this case. See defendant Carruthers' Memorandum in Support [Doc. 270] at 25-28. The government has premised its jurisdiction only on "territorial jurisdiction" which defendant acknowledges is based on the place where the offense is committed. Id. at 26, n. 2.

18 U.S.C. § 3237(a).

Defendant argues that "the operative acts of receiving bets and transmitting information to United States citizens took place outside of the United States." Defendant Carruthers' Memorandum in Support [Doc. 270] at 26, n.2. However, this statement is incomplete based on both the concept of continuing jurisdiction, 18 U.S.C. § 3237, and case law. For example, in United States v. Kaczowski, 114 F.Supp. 2d 143, 154 (W.D. N.Y. 2000), defendants tried to take advantage of the "safe harbor" provision of 18 U.S.C. § 1084(b) by arguing that bets and wagers were accepted offshore in a country in which gambling is legal and thus the § 1084 counts should be dismissed. The court found that to escape prosecution under § 1084(b) the betting activity must be legal in *both* jurisdictions for the exception to apply and cited

> United States v. McDonough, 835 F.2d 1103, 1104 (5th Cir. 1988) (holding federal ban on interstate wire transmission of bets on sporting events from Texas where such gambling was illegal to another state violated 18 U.S. § 1084 regardless of whether gambling was legal in the other state, citing Martin v. United States, 389 F.2d 895 (5th Cir. 1968), cert. denied, 391 U.S. 919, 88 S.Ct. 1808, 20 L.Ed. 2d 656 (1968)); World Interactive Gaming Corp., *supra* at *5 (holding gambling conducted over the Internet with bets placed in New York, where gambling is illegal, and received in Antigua, where gambling is legal, violates 18 U.S.C. § 1084).

Kaczowski, 115 F.Supp. at 153-54. The Kaczowski court held that because bookmaking was illegal in New York, the fact that acceptance of bets and providing "line" information was legal in the Dominican Republic was irrelevant and the Indictment stated a violation of law.

In People Ex Rel Vacco v. World Interactive Gaming Corp., 714 N.Y.S. 844, 851 (N.Y. Sup. 1999) the New York Supreme Court held that if a gambler is physically present in New York when a bet is placed, then New York is the location where the gambling occurred. At issue in the case was whether bets placed over the Internet by gamblers who were physically in New York (where gambling is illegal) to a gambling enterprise located in Antigua (where gambling is legal) constituted gambling in violation of the New York Penal Code. The court stated "[i]t is irrelevant that gambling is legal in Antigua. The act of entering the bet and transmitting the information from New York...is adequate to constitute gambling activity within New York State." Id. at 851.

In United States v. Cohen, 260 F.3d 68 (2nd Cir. 2001) the defendant again tried to use the "safe harbor" provision of 18 U.S.C. § 1084(b) which provides a safe harbor from transmissions where betting is legal in both the place of origin and the destination of the transmission. See *supra* at 9. The court held that because betting was illegal in New York, Cohen could not avail himself of the safe harbor provision. The court discussed what constituted a bet *per se* and approved the trial court's instruction:

> If there was a telephone call and an Internet transmission between New York and [WSE] in Antigua, and if a person in New York said or signaled that he or she wanted to place a specified bet, and if a person on an Internet device or a telephone said or signaled that the bet was accepted, this was the transmission of a bet within the meaning of Section 1084. Congress clearly did not intend to have this Statute be made inapplicable because the party in a foreign gambling business deemed or construed the transmission as only starting with an employee or an Internet mechanism located on the premises in the foreign country.

Cohen, 260 F.3d at 74-75. Under the reasoning of all these cases it is clear that defendant Carruthers' argument that the exercise of jurisdiction in this case violates customary international law principles regarding extra-territorial legislation is without merit.

IV. THE OBLIGATIONS OWED TO THE UNITED KINGDOM UNDER THE 1815 CONVENTION ON COMMERCE AND NAVIGATION

Defendant Carruthers argues the court lacks jurisdiction over him because he was wrongfully arrested in violation of the obligations owed to the United Kingdom under the 1815 Convention on Commerce and Navigation.[12] Defendant Carruthers was arrested en route from London to Costa Rica for business purposes while his plane had a layover in Dallas, Texas. Defendant quotes a passage from Article I of the 1815 Convention which provides for the free

[12] The government cites this treaty as A Convention to Regulate the Commerce Between the Territories of the United States and of his Britanick Majesty, 1815 WL 1442 (US Treaty).

passage of citizens between the United Kingdom and the United States for the purpose of furthering their commerce. Defendant Carruthers' Memorandum in Support [Doc. 270] at 29. The Treaty states that the exercise of the liberties granted are "subject always to the laws and statutes of the two countries, respectively." Defendant claims his arrest was illegal because his "passage through the United States was not in violation of any United States law." Id. However, defendant Carruthers was arrested pursuant to a lawful warrant issued by a court of competent jurisdiction on the Indictment returned by the Grand Jury in this case. His arrest was not illegal and this argument is without merit.

IV. WORLD TRADE ORGANIZATION TREATY

Defendant also argues that the Indictment in this case should be dismissed because it is in violation of the provisions of the World Trade Organization Treaty. As noted above, numerous other defendants have filed Motions to Dismiss based on the World Trade Organization Treaty and this court has given additional time to brief this issue. See n. 2 *supra*. The court will reserve its recommendation on this ground of defendant Carruthers' Motion and take it up in a separate Report and Recommendation together with the Motions of the other defendants.

V. CONCLUSION

None of the arguments raised by defendant Carruthers constitutes sufficient legal grounds to dismiss the Indictment in this case. The court reiterates that the Report and Recommendation (R&R) dealing with the Motions to Dismiss filed by defendant's co-defendants which raise the issues raised by defendant Carruthers at pages 1-12 of his Memorandum in Support is incorporated by reference as if fully set out herein. Therefore the undersigned will recommend the Motion be denied as to all the issues discussed in both that R&R and this R&R. It is further reiterated that the

court will take up the issue raised by defendant Carruthers and the other defendants concerning the World Trade Organization Treaty in a separate Report and Recommendation.

Accordingly,

IT IS HEREBY RECOMMENDED that defendant Carruthers' Motion to Dismiss Count I - - RICO Conspiracy or Parts Thereof be **DENIED** as qualified and limited immediately above. [Doc. 269]

The parties are advised that they have eleven (11) days in which to file written objections to this report and recommendation pursuant to 28 U.S.C. §636(b)(1), unless an extension of time for good cause is obtained, and that failure to file timely objections may result in a waiver of the right to appeal questions of fact. See Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990).

/s/Mary Ann L. Medler
MARY ANN L. MEDLER
UNITED STATES MAGISTRATE JUDGE

Dated this 7th day of May, 2007.