IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:06CR337CEJ(MLM)
	)	
GARY STEPHEN KAPLAN,	)	
	)	
Defendant.	)	

DEFENDANT GARY KAPLAN'S MOTION TO DISMISS THE WIRE ACT COUNTS (COUNTS 3 TO 12) OF THE SUPERSEDING INDICTMENT AND INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

The Government reads the Wire Act so broadly that its interpretation would ensnare a host of clearly legal conduct. Its unprecedented, broad reading of the statute is at odds with the statute's legislative history and the bedrock principle that penal statutes must be read narrowly.

The Wire Act, 18 U.S.C. § 1084, prohibits the use of wire communication facilities to make certain gambling-related transmissions. The Wire Act is limited to three specific types of transmissions: (1) "bets or wagers," (2) "information assisting in the placing of bets or wagers," and (3) transmissions "entitling the recipient to receive money or credit as a result of bets or wagers." 18 U.S.C. § 1084(a).[1] Construed narrowly, as it should be, the statute does not cover the transmissions alleged in counts 3 to 12 of the Superseding Indictment, and therefore the

[1] The Act reads: "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."

counts must be dismissed. Construed very broadly, as the Government would have it, the Wire Act would prohibit a wide range of transmissions, including transactions and communications that have never previously been viewed to fall under the Wire Act. Faced with a choice between the narrower and broader interpretations of the language of the Wire Act, this Court is obliged to select the narrower reading, which compels the conclusion that the conduct alleged in Counts 3 to 12 is not covered by the Wire Act.

Moreover, the allegations in counts 3 to 12 fail to provide Kaplan with adequate notice of the charges against him as required by the Constitution because the allegations lack the clarity and information necessary for Kaplan to understand the charges against him. The vague allegations in counts 3 to 12 make it impossible for Kaplan to defend himself or to guard against the possibility of double jeopardy at a future trial.

ARGUMENT

I. COUNTS 3 TO 12 DO NOT VIOLATE THE WIRE ACT.

A. The Government's Reading Of The Wire Act Is Overly Broad.

Under a proper reading of the statute, it is clear that the Wire Act does not apply to all transmissions that have even a tangential relation to wagering, and that limitations on the scope of the Wire Act do and must exist. This narrower reading of the Act is consistent with the requirement that criminal statutes should be construed narrowly—an ancient principle known as the rule of lenity. Indeed, "[t]he rule that penal laws are to be construed strictly is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). The rule of lenity holds that penal statutes should be strictly construed against the government and in favor of the defendant. *See* 3 SUTHERLAND STATUTORY CONSTRUCTION § 59:3 (5th ed. 2000);

see also, e.g., United States v. McCall, 439 F.3d 967 (8th Cir. 2006); *United States v. Chipps*, 410 F.3d 438 (8th Cir. 2005); *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980).

Under the rule of lenity, statutory language is to be given its ordinary meaning, but any reasonable doubt about the meaning is to be resolved in favor of the defendant. 3 SUTHERLAND STATUTORY CONSTRUCTION § 59:3 (collecting cases). The rule is considered a tie-breaker in favor of the defendant when there is an unresolved ambiguity. *United States v. White*, 888 F.2d 490, 497 (7th Cir. 1989). This ensures that defendants receive adequate notice, thereby serving the constitutional right to due process. *United States v. Montgomery*, 14 F.3d 1189 (7th Cir. 1994). Thus, before a person can be punished, his conduct must be plainly and unmistakably within the statute sought to be applied. 3 SUTHERLAND STATUTORY CONSTRUCTION § 59:3 (collecting cases).

The transmissions alleged in counts 3 to 12 of the Superseding Indictment are as follows:

- Counts 3,4 and 5: Instructions on opening a wagering account
- Counts 3,4,5,7 and 8: Instructions to send money to a third party
- Count 6: Confirmation of instructions to send money to a third party
- Count 9: Confirmation of account balance
- Counts 10 and 11: Transmission of a bet
- Count 12: Request for withdrawal of money from a wagering account

None of these alleged transmissions is a bet or wager on sporting events, information assisting in the placing of bets or wagers on sporting events, or transmissions entitling the recipient to money or credit that results from bets or wagers on sporting events within the narrow definition of transmissions prohibited under the Act. Therefore, each alleged transmission falls outside the scope of the Wire Act and counts 3 to 12 must be dismissed.

B. The Wire Act Only Prohibits Certain Transmissions Relating To Wagering *On Sporting Events And Contests*.

The Wire Act, 18 U.S.C. § 1084, was enacted to target illegal sports betting. *See, e.g.* 107 CONG. REC. H16533 (Aug. 21, 1963) (statement of. Rep. Celler) ("This particular bill involves the transmission of wagers or bets and layoffs on horseracing and other sporting events."). That the Act only applies to sports betting, and not to other types of gambling (such as casino-style gambling) has recently been affirmed in one of the few cases that comprehensively addresses the complicated issues surrounding internet gambling, the *Mastercard* litigation in the Fifth Circuit. In that litigation, both the district judge and the Fifth Circuit panel agreed that the Wire Act does not cover casino-style gambling, but is instead limited to sports betting only. *See In re Mastercard Int'l Inc.*, 132 F. Supp. 2d 468, 480 (E.D.La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002)[2] ("[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 Fifth Circuit further found that it was not enough for plaintiffs to show that the names of the internet-gambling sites in question indicated that they were sportsbooks; without specific allegations that the plaintiffs had engaged in sports betting, the plaintiffs failed to allege

[2] The *Mastercard* court found that this reading of the Wire Act was not only compelled by the plain language of the statute but was consistent with the relevant case law. 132 F. Supp. 2d at 480 (citing *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 by United States v. McKeever*, 905 F.2d 829 (5th Cir. 1990) ("the statute deals with bookmakers"); *United States v. Marder*, 474 F.2d 1192, 1194 (5th Cir. 1973) (first element of statute satisfied when government proves wagering information "relative to sporting events").

a violation of the Wire Act that could support a civil RICO claim. *See In re Mastercard Int'l Inc. Internet Gambling Litig.*, 313 F.3d at 263 n.21.

Thus, as the legislative history of the Wire Act makes clear, and as has been reinforced by the Fifth Circuit in *Mastercard*, the Wire Act only covers transmissions relating to sporting events or contests. Since the Government has failed properly to allege that the charged transmissions related to sports betting rather than some other kind of gambling, a violation of the Wire Act has not been alleged and counts 3 to 12 must be dismissed.

The Superseding Indictment alleges that the defendants and the companies they were allegedly associated with offered *both* sports betting *and* casino-style gambling.

- Paragraph 21 charges that the alleged gambling enterprise intended to make money "by maximizing the number of individuals in the United States who opened wagering accounts and *used those accounts to place illegal bets on sports and sporting events*" and "by maximizing the number of individuals residing in the United States who opened wagering accounts and *gambled on casino-type games*";

- Paragraph 25 states that "BETonSPORTS.com had a state-of-the-art network infrastructure, and offered Internet and telephone service gambling through *sportsbooks*, an *online casino*, and 'proposition' bets.";

- Paragraph 28 alleges "[t]he GAMBLING ENTERPRISE concealed the fact that the multiple web sites and telephone services through which it offered *sports and casino style gambling* were all owned and operated by the ENTERPRISE").

(emphasis added). Thus the indictment is clear that the websites in question allegedly offered not just sports betting, but also casino-style gambling. The Government must do much more than show that a transmission was sent to an internet site with the word "Sports" in its name. Since the Wire Act only applies to sports betting, not other types of gambling, the Government must demonstrate that the transmission in question (1) was a bet *on a sporting event or contest*, (2) contained information assisting in the placement of bets *on sporting events or contests*, or

(3) entitled the recipient to receive money or credit as a result of bets or wagers *on sporting events or contests*, or for information assisting in the placing of bets or wagers *on sporting events or contests*. None of the Wire Act counts in the Superseding Indictment sufficiently alleges a transmission relating to sports betting.

Counts 3 to 5 allege that calls were placed to companies with which the defendants were allegedly involved and that instructions "on opening a wagering count" were transmitted, as well as instructions to send money to individuals in Belize and Ecuador. Superseding Indictment ¶ 39. Counts 6 to 8 also allege that instructions to send money to individuals in Ecuador were transmitted, but they say nothing about opening wagering accounts. *Id*. None of these counts charges that the money at issue was placed as a bet on a sporting contest. Incorporated paragraphs 19, 27, and 32 mention sports betting, but there is no reason to think that a wagering account opened at a site that apparently offered both sports betting and casino-style betting (*see* Superseding Indictment ¶¶ 21, 25, 28) would be used exclusively for sports betting or even used for sports betting *at all*, rather than for casino-style betting. Under the rule of lenity, a transmission opening an account at a website that offers some activities that are unquestionably *not* prohibited by the Wire Act cannot itself violate the Wire Act. Accordingly, Counts 3 to 5 should be dismissed.

Counts 9 to 12 suffer from similar defects. Counts 10 and 11 charge transmissions that allegedly "transmitted a bet," but it is unclear whether the charged bet was on a sporting event or on a casino-style game. These counts are the closest the Government comes to actually alleging conduct prohibited by the Wire Act, but even here it falls short, because this is precisely the type of conduct, i.e., placing a bet at a sportsbook website, that the Fifth Circuit

held was not an offense under the Wire Act without further proof that the bet was on a sporting event. *Mastercard*, 313 F.3d at 263 n.21.

Counts 9 and 13, which are transmissions confirming an account balance and withdrawing money from an account, respectively, do not clearly relate to any bet (as further discussed below), let alone a bet on a sporting event. They should therefore be dismissed.

C. The Phrase "Information Assisting In The Placing Of Bets Or Wagers" In The Wire Act Must, Under The Rule Of Lenity, Be Read Narrowly.

1. *Information cannot assist the placing of a bet or wager if no bet or wager is placed.*

The Eighth Circuit specifically addressed what "information assisting in the placing of bets or wagers" means under 18 U.S.C. § 1084(a) in *Truchinski v. United States*, 393 F.2d 627 (8th Cir. 1968). The court examined two separate counts alleging that gambling-related information had been transmitted and noted in the analysis of both that bets had actually been placed. In the first count, the bookmaker defendant gave the bettor the point spread and weather conditions for several football games in a telephone conversation. *Id.* at 629. The defendant argued that there was no evidence that the bettor used the information in placing his bets the following day. The Government argued "that inasmuch as bets were placed, the jury could properly conclude that the telephone conversation" furnished bettor with "information in order that he might place bets the following day." *Id.* at 631.

In the second count, the bookmaker transmitted information saying "there wasn't much doing that day, only two games going that day." *Id.* at 629. Defendant argued that there was no showing that the information assisted the bettor in placing a bet. *Id.* at 631. The court disagreed, but in support of its holding that the statement was enough for a jury to properly

conclude that defendant transmitted information assisting in the placing of bets or wagers, the court again noted "the fact that a bet was placed." *Id.*

The Eighth Circuit's reliance on the placing of a wager in its analysis of what information assists in the placing of a bet or wager is only logical. That a bet was placed conclusively demonstrates the purpose of the transmission. If a bet or wager is not placed relating to a transmission of information, that transmission has not "assisted in the placing of bets or wagers" within the meaning of the Wire Act.

Counts 3 to 9 and 12 do not allege that a wager was ever placed relating to the charged transmission of information, and therefore the transmissions are not "information assisting in the placing of bets or wagers" under the Wire Act. In fact, counts 3 to 5, which allege the transmission of instructions on opening a wagering account, *do not even allege that a wagering account was ever opened*. Similarly, in counts 3 to 8, which allege the transmission or confirmation of instructions to send money to a third party, it is not even alleged that money was ever sent to a third party. If accounts were never opened and money was never sent, the counts are that much farther away from the actual placing of a wager. Without the placing of a bet or wager, counts 3 to 9 and 12 are not "information assisting in the placing of a bet or wager" under the Wire Act.

2. *Information that tangentially assists in the placing of a bet or wager is not covered by the Wire Act.*

If all information that even tangentially assisted wagering fell within 18 U.S.C. § 1084(a), the Wire Act could be expanded almost endlessly, encompassing many types of legal

conduct.[3] Since the Eighth Circuit has held that "transmission" in the Wire Act covers both the sending and receiving of wagering information, *United States v. Reeder*, 614 F.2d 1179, 1184-85 (8th Cir. 1980), the Wire Act, if construed broadly, would cover many instances of clearly legal conduct, such as the following:

- A woman in Missouri plans a trip to gamble at the Wynn Casino in Las Vegas, Nevada. She reserves a hotel online so that she can spend the weekend gambling at the Wynn. Once arriving at the Wynn she begins placing wagers on sporting events. A broad reading of the Wire Act would cover the Wynn's receipt of the hotel reservation because it was a transmission of information that assisted the placing of a wager on a sporting event. The § 1084(b) exception does not apply because sports betting is not legal in Missouri.
- A man in Missouri plans a trip to the Bellagio Casino in Las Vegas, Nevada. He calls the Bellagio to make arrangements for his arrival and gives the casino his bank account number so they can wire funds to a Bellagio account in his name. The man arrives at the Bellagio and begins placing wagers on sporting events. A broad reading of the Wire Act would cover the Bellagio's receipt of the telephone call because it was a transmission of information that assisted in the placing of a wager on a sporting event. The § 1084(b) exception does not apply because wagering is not legal in Missouri.

It would be unreasonable to expand the Wire Act to the outer limits of its statutory language, reaching the conduct in these examples. Instead, the Act must be interpreted to reach a narrower subset of transmissions. The proper interpretation of "information assisting in the placing of bets or wagers" should only include transmissions that directly relate to the decision to place a particular bet or wager, such as the giving of odds on a particular sporting event.

The alleged transmission of instructions on opening a wagering account in counts 3 to 5 do not fall within a narrow construction of the Wire Act because the transmissions only tangentially relate to the placing of a wager on a sporting event. As discussed above, the

[3] The Wire Act does provide exceptions for transmissions relating to news reporting and 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," but provides no further exceptions. 18 U.S.C. § 1084(b).

indictment does not even allege accounts were opened based on the instructions. Even if an account is opened, a person may choose never to place a bet on a sporting event using that account.

Likewise, the transmissions and confirmation of instructions in counts 3 to 8 to send money to a third party do not relate to the placing of a bet or wager. Indeed, it is unclear from the indictment how this activity even relates to wagering activity. The relationship between such instructions and the actual placing of a wager, which has not even been alleged, is at best attenuated.

The transmission in count 9 to confirm an account balance also has a strained relationship with the placing of any bet or wager. A person may check an account balance and choose to liquidate and close the account. Such a transmission cannot be considered information assisting in the placing of a bet or wager.

The transmission in count 12 requests a withdrawal of money from a wagering account. Again, a request for a withdrawal bears no relationship to the placing of a future bet or wager. It is beyond speculation that a request for a withdrawal through some series of unidentified future events would eventually result in the placing of a bet or wager. Indeed an individual could establish a wagering account, never place a bet, and then withdraw the funds.

Thus, it is clear that under a properly narrow construction of the Wire Act, the transmissions in counts 3 to 12 are not "information assisting in the placing of bets or wagers."

D. There Are Limits On What Can Be Considered A Transmission That "Entitles The Recipient To Receive Money Or Credit As A Result Of Bets Or Wagers" Under The Wire Act.

The Wire Act does not cover all transmissions relating to the transfer of money or credit, but only those that entitle the recipient of the transmission to receive money or credit resulting

from bets or wagers. *See* 18 U.S.C. § 1084(a). It is well settled that words in a statute shall be given their normal and ordinary meaning. *Old Colony R. Co. v. Comm'r*, 284 U.S. 552, 560 (1932). The word "entitle" is associated with the giving of a right:

- "to furnish with a right <a ticket *entitling* me to free admission>" WEBSTER'S II NEW COLLEGE DICTIONARY 376 (1999).
- "to furnish with proper ground for seeking or claiming something <this ticket ~s the bearer to free admission>" WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 416 (1983).
- "to give a right or legal title to **:** qualify (one) for something **:** furnish with proper grounds for seeking or claiming something" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 758 (1993).
- "to give a right to demand or receive; as, his labor *entitles* him to his wages" WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 607 (2d ed. 1983).

For a transmission to "entitle" a recipient to money or credit, the transmission must establish a right in the recipient to money or credit. A transmission that merely *discusses or requests* a transfer of money or credit resulting from wagers does not create a right, and therefore falls outside the Wire Act.

There are two parties to a transmission: the sender and recipient. The Wire Act only covers transmissions that entitle the *recipient* to money or credit resulting from wagers. *See* 18 U.S.C. § 1084(a). For example, if a woman calls her bookmaker with whom she has previously placed wagers on sporting events and asks that he wire her $500, that transmission is not covered by the Wire Act because it does not entitle the recipient of the transmission, the bookmaker, to receive money or credit. On the other hand, if a bookmaker transmits a winning number or otherwise informs a bettor that she is entitled to a prize, the Wire Act is implicated.

For a transmission that entitles a recipient to money or credit to be covered by the Wire Act, that money or credit must be the result of bets or wagers. *See* 18 U.S.C. § 1084(a). Money

that is placed on an account with a bookmaker, then withdrawn, does not qualify. Similarly, if a better puts $500 in an account, loses $300 on a sports wager, then withdraws the remaining $200 balance, the $200 withdrawal is not covered by the Wire Act.

The transmissions in counts 3 to 5 regarding instructions on opening a wagering account clearly do not entitle the recipient to money or credit. Instructions do not create any right in the recipient of the instructions.

The transmissions in counts 6 to 8 of instructions and a confirmation of instructions to send money to a third party also do not entitle the recipient of the transmission to money or credit. Although the indictment is unclear, it appears that the recipient of these instructions has the individual calling the 800 number. Instructions given to that caller telling him to send money to a third party does not entitle the caller to any money or credit.

Likewise, the confirmation of an account balance in count 9 does not create any right to money or credit. Confirming a balance does not entitle the account holder to money or credit in the account.

The transmission requesting a withdrawal of money from a wagering account in count 12 similarly does not entitle the recipient to any money or credit. The recipient of the request is the bookmaker, and surely a request for withdrawal does not entitle the bookmaker to any money or credit. Even if the account holder were somehow the recipient of the transmission, which he clearly is not, a withdrawal request does not create any right in the requestor to money or credit.

Since counts 3 to 9 and 12 do not allege transmissions entitling the recipient to money or credit resulting from bets or wagers, the counts must be dismissed.

II. THE INDICTMENT FAILS TO PROVIDE ADEQUATE NOTICE OF THE CHARGES IN COUNTS 3 TO 12.

A. An Indictment Must Provide Adequate Notice To Protect The Defendant's Constitutional Rights.

The concerns regarding the scope of the Wire Act must also be read in conjunction with the overarching requirement that an indictment provide adequate notice to satisfy the Constitution. The indictment must "provide adequate notice of the crime charged so as to enable the accused to properly prepare his defense." *United States v. Mooney*, 417 F.2d 936, 938 (8th Cir. 1969); *see also Hamling v. United States*, 418 U.S. 87, 117 (1974) (an indictment must "contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend").

The *meaningful* notice requirement is based upon the Sixth Amendment's guarantee that a defendant be informed of the government's accusations against him. *See United States v. Stuckey*, 220 F.3d 976, 981 (8th Cir. 2000) (explaining that the Sixth Amendment guarantees the defendant's right to adequate notice, that is, "to be informed of the nature and cause of the accusation"). If a particular fact is at the core of a criminal offense, an indictment that omits that fact is fatally defective. *Russell v. United States*, 369 U.S. 749, 764 (1962) ("Where guilt depends so crucially upon such a specific identification of fact, [the Supreme Court has] uniformly held that an indictment must do more than simply repeat the language of the criminal statute."); *see also Forgy v. Norris*, 64 F.3d 399, 402-03 (8th Cir. 1995) (reversing burglary conviction because the charging document failed to give defendant adequate notice of the crime charged); *United States v. Yefsky*, 994 F.2d 885, 893 (1st Cir. 1993) (indictment failed to give defendant adequate notice, because it did not articulate the plan used to defraud); *United States v. Curtis*, 506 F.2d 985, 992 (10th Cir. 1974) (reversing mail fraud convictions because

indictment failed clearly to state "the nature or character of the scheme or artifice relied upon, or the false pretenses, misrepresentations or promises forming a part of it").

The indictment must also be specific enough to protect the defendant's Fifth Amendment right to assert double jeopardy in subsequent cases. *See Mooney*, 417 F.2d at 938 (the indictment "must be so worded as to protect against possible threats of double jeopardy"); *Hewitt v. United States*, 110 F.2d 1, 6 (8th Cir. 1940) (the indictment must be "sufficiently specific to avoid the danger of [defendant] again being prosecuted for the same offense"). Consequently,

> It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, – it must descend to particulars."

Russell, 369 U.S. at 765 (quoting *United States v. Cruikshank*, 92 U.S. 542, 558 (1876)); *see also United States v. Zangger*, 848 F.2d 923, 925 (8th Cir. 1988) (stating that "[i]f an essential element of the charge has been omitted from the indictment, the omission is not cured by the bare citation of the charging statute" and holding indictment insufficient).

The constitutional requirement of specificity also ensures that the defendant is tried only on evidence approved by the grand jury. *Stirone v. United States*, 361 U.S. 212, 217 (1960). The rationale here is clear. First, a vague indictment permits the prosecution to disregard the findings of the grand jury and roam free at trial fitting the charges to the evidence as it emerges. "A cryptic form of indictment" that fails to identify the essential elements and facts of an offense "requires the defendant to go to trial with the chief issue undefined." *Russell*, 369 U.S. at 766. "It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by

surmise or conjecture." *Id.* *United States v. Opsta*, 659 F.2d 848, 850 (8th Cir. 1981) (holding that where the language of "the statute alone does not set forth all the essential elements of the offense, the indictment is insufficient which simply tracks the language of the statute" and dismissing indictment because the grand jury may not have considered all the elements); *United States v. Camp*, 541 F.2d 737, 740 (8th Cir. 1976) (stating that "[o]nly the words of the indictment give evidence of whether the grand jury considered and included within the offense charged the essential element[s]" and finding indictment insufficient despite citation to the statute).

B. The Allegations In Counts 3 To 12 Fail To Provide Adequate Notice.

Counts 3 to 12 do not provide enough particularity for Kaplan to understand the allegations against him, making it impossible to defend against the allegations. Therefore, counts 3 to 12 violate the Constitution and must be dismissed.

It is unclear whether any of the transmissions in counts 3 to 12 relate to wagering on sporting events or contests. Considering that the Wire Act only covers transmissions relating to sports wagering, but the indictment alleges that defendants were engaged in both sports betting and casino-style games, it is imperative that Kaplan understand the nature of the alleged gambling activity with greater particularity.

It is also unclear whether the transmissions in counts 3 to 9 and 12 relate to the placing of a bet or wager of any kind. These counts do not involve the transmission of a wager, so to come under the Wire Act they must be information assisting a wager or a transmission entitling the recipient to money resulting from a wager. If no wagers were placed relating to the transmissions in counts 3 to 9 and 12, there is nothing to assist and there is no resulting money

to be entitled to. Without knowing whether wagers were actually placed, Kaplan cannot defend himself against these allegations.

Finally, it is also unclear how the instructions in counts 3 to 8 to send money to a third party relate to wagering activity. The Wire Act only prohibits certain transmissions relating to wagering on sporting events or contests. The Defendant is unable to defend himself against these charges because it is unclear how they even relate to wagering activity.

The allegations in counts 3 to 12 are vague and confusing to the point that Kaplan cannot understand the charges against him and is therefore unable to defend himself properly against the charges. These counts violate the constitutional requirement that a defendant be given adequate notice of the charges against him and must be dismissed.

Respectfully submitted,

/s/ Dick DeGuerin
DeGUERIN, DICKSON & HENNESSY
1018 Preston, 7th Floor
Houston, TX 77002
(713) 223-5959
(713) 223-9231 (Fax)
Federal I.D. No. 6204

/s/ Chris Flood
FLOOD & FLOOD
914 Preston at Main, Suite 800
Houston, TX 77002
(713) 223-8877
(713) 223-8879 (Fax)
Federal I.D. No. 9929

/s/ Samuel Buffone
ROPES & GRAY
One Metro Center
700 12th Street, N.W. Suite 900
Washington, DC 20005
(202) 508-4657

(202) 508-4650 (Fax)
S. Buffone Bar No. 161828
R. Malone. Bar No. 483172
Samuel.buffone@ropesgray.com
Ryan.Malone@ropesgray.com

/s/ Barry Short
LEWIS RICE & FINGERSH
Barry Short, Bar No. 4358
Evan Z. Reid, Bar No. 93822
500 N. Broadway, Suite 2000
St. Louis, MO 63102
(314) 444-7600
(314) 241-6056 (Fax)
bshort@lewisrice.com
ereid@lewisrice.com

Attorneys for Gary Stephen Kaplan

Victoria B. Eiger
Nathan Z. Dershowitz
DERSHOWITZ, EIGER & ADELSON, P.C.
220 Fifth Avenue, Suite 300
New York, New York 10001
Tel: (212) 889-4009

Alan M. Dershowitz
1575 Massachusetts Avenue
Cambridge, MA 02138
Tel: (617) 496-2187

Of Counsel

CERTIFICATE OF SERVICE

I certify that on August 13, 2007, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

Michael K. Fagan, AUSA
Steven A. Muchnick, AUSA
Marty Woelfle, AUSA

James F. Bennett
Robert F. Epperson, Jr.
[Lori Kaplan Multz]

Jefffrey T. Demerath
Armstrong Teasdale LLP
[BETONSPORTS PLC]

Tim Evans
Evans, Grady, Daniel & Moore
[David Carruthers]

Steven M. Cohen
Jonathan Bach
Kronish Lieb Weiner & Hellman, LLP
[BETONSPORTS PLC]

N. Scott Rosenblum
Adam Fein
Gilbert Sison
[David Carruthers]

Dick DeGuerin
DeGuerin, Dickson & Hennessy
[Gary Stephen Kaplan]

Barry Short
Frederick Hess
Lewis, Rice & Fingersh
[Gary Stephen Kaplan]

Freeman Bosley
[Gary Stephen Kaplan]

Brian Steel
The Steel Law Firm
[Neil Kaplan]

Susan S. Kister
Susan S. Kister, P.C.
[Neil Kaplan]

Robert Katzberg
Kaplan & Katsberg
[Lori Kaplan Multz]

Steve LaCheen
LaCheen Dixon Wittels & Greenberg LLP
[Tim Brown]

Paul D'Agrosa
Law Offices of Wolff & D'Agrosa
[DME Global Mktg. & Fulfillment;
Direct Mail Expertise, Inc.;
Mobile Promotions, Inc.]

Alan Ross
Robbins, Tunkey, Ross, Amsel, Raben, Waxman & Eiglarsh, PA
[William Hernan Lenis]

Burton H. Shostak
Moline, Shostak & Mehan, LLC
[William Luis Lenis]

Rick Sindel
Sindel Sindel & Noble, PC
[Manny Gustavo Lenis]

J. David Bogenschutz
Bogenschutz, Dutko & Kroll, P.A.
[Monica Lenis]

/s/ Samuel J. Buffone
Samuel J. Buffone