UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
St. Louis Division

UNITED STATES OF AMERICA,	)	
	)	No. S1-4:06CR00337 CEJ (MLM)
Plaintiff,	)	
	)	
v.	)	
	)	
PENELOPE A. TUCKER,	)	
	)	
Defendant.	)	
	)	

DEFENDANT PENELOPE A. TUCKER'S MOTION TO DISMISS COUNT 1 OF THE SUPERSEDING INDICTMENT AND INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

The Defendant Penelope A. Tucker respectfully moves to dismiss Count 1 of the Superseding Indictment. The Government has attempted to combine disparate elements, including three (3) separate alleged gambling operations spanning fifteen (15) years and four (4) countries into a unified RICO conspiracy. The only common link between these separate and distinct elements, however, is co-defendant Gary Kaplan's alleged involvement in each of them. Mrs. Tucker is not referenced in the allegations pertaining to these separate and distinct gambling operations of codefendant Kaplan and is, in fact, only named in precisely three (3) places in the entire Superseding Indictment.

As a result of the Government's decision to charge this case as a single, continuous RICO conspiracy, the Superseding Indictment fails to adequately allege RICO's two most essential elements: enterprise and "pattern of racketeering activity".

The Indictment not only fails to allege the crucial continuity and structure necessary for a RICO enterprise in fact but, of decisional significance, on its face affirmatively demonstrates the absence of the necessary continuity and structure. Lacking this crucial element, the RICO charge must be dismissed. Moreover, the RICO allegations that the defendants engaged in a pattern of racketeering activity are either flawed as a matter of law or so vague and unspecific that they must be dismissed under Rule 7 of the Federal Rules of Criminal Procedure. For all of these reasons, the RICO Count of the Indictment should be dismissed.

ARGUMENT

I. THE INDICTMENT FAILS TO STATE A RICO OFFENSE.

A. The Superseding Indictment Fails To Allege a RICO Enterprise.

To prove a RICO violation, the Government must establish four elements: (1) the existence of an enterprise; (2) Tucker's association with the enterprise; (3) Tucker participated in the conduct of the enterprise's affairs; and (4) that Tucker's participation was through a pattern of racketeering activity. *United States v. Bennett,* 44 F. 3d 1364, 1373 (8th Cir. 1995); 18 U.S.C. section 1962(c). "To be sufficient, an indictment must fairly state all the essential elements of the offense." *United States v. Camp*, 541 F.2d 737, 739 (8th Cir. 1976).

1. *A RICO charge must allege an "Enterprise."*

The enterprise concept lies at the heart of RICO. *See United States v. Anderson,* 626 F. 2d 1358, 1367 (8th Cir. 1980). The Government may establish an enterprise in one of two ways: an enterprise "includes [1] any individual, partnership, corporation, association, or other legal entity, and [2] any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. section 1961(4); *see also United States v. Davidson,* 122 F. 3d 531, 534 (8th Cir.

1997). The first type of enterprise, ad *de jure* enterprise, does not require a showing beyond the mere existence of a *legal* entity. The second kind of enterprise, the so-called "enterprise in fact," is limited by the statute to an association of individuals that is "not a legal entity."

In *United States v. Turkette*, 452 U.S. 576 (1981), the Supreme Court clarified the dimensions of an enterprise in fact under RICO and recognized that it must be something more than the pattern of racketeering activity which serves as RICO's other major component. The court's analysis was focused on the risk of collapsing the enterprise element into the "pattern of racketeering" element and reducing RICO's complex structure into little more than a sentencing enhancement for multiple predicate act offenses. *Id.* at 583. To emphasize the critical separation between these two elements, the Supreme Court held that "[t]he enterprise is not the pattern of racketeering activity; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id.* Following the Supreme Court's guidance in *Turkette*, the Eighth Circuit held that for a RICO enterprise in fact to have this necessary existence separate and apart from the pattern of racketeering activity it must have : 1) a common or shared purpose; 2) an "ongoing organization" whose members "function as a continuing unit"' and 3) an ascertainable structure distinct from that inherent in the conduct of the pattern of racketeering activity." *United States v. Bledsoe*, 674 F. 2d 647, 664-65; *see also United States v. Lemm*, 680 F. 2d 1193, 1198 (8th Cir. 1982). Critically, "[c]ontinuity or the ongoing nature of an association in fact is the linchpin of enterprise status." *Ocean Energy II, Inc. V. Alexander & Alexander, Inc.*, 868 F. 2d 740, 749 (5th Cir. 1989); *see also Bledsoe, supra.* at 665. If the alleged enterprise

consists of merely a loose association of individuals, without continuity of structure or personnel, the standard has not been met.

For example, in *Begala v. PNC Bank*, 214 F.3d 776 (6th Cir. 2000), the court dismissed a civil RICO complaint for failing to make any factual allegations showing "ongoing, coordinated behavior among the defendants that would constitute an association-in-fact." *Id.* at 781. Instead the complaint "essentially list[ed] a string of entities allegedly comprising the enterprise, and then list[ed] a string of supposed racketeering activities in which the enterprise pruportedly engage[ed]." *Id.*[1]

The Eighth Circuit has described the "continuity" of the "enterprise" as a structural consideration–one that requires that the enterprise have "an organizational pattern or system of authority that provides a mechanism for directing the group's affairs on a continuity rather than *ad hoc* basis." *Reynolds v. Condon*, 908 F. Supp. 1494, 1513 (N.D. Iowa 1995). "The determinative factor is whether the associational ties of those charged with a RICO violation amount to an organizational pattern or system of authority." *Lemm, supra.* at 1199. In short, an enterprise must have both continuity and structure as well as an existence separate and apart from the pattern of racketeering activity in order to constitute a RICO enterprise in fact. *Bledsoe, supra.* at 664; *United States v. Riccobene*, 709 F. 2d 214, 222 (3d Cir. 1983). Here, the Government's conclusory allegation that the enterprise in fact "functioned as a continuing unit" (Superseding Indictment par. 18) cannot overcome the contradictory allegations of the indictment that affirmatively demonstrate the absence of such continuity.

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[1] Although *Begala*, as a civil case, was decided under the civil standard of Rule 9 of the Federal Rules of Civil Procedure, its failure to find an enterprise without ongoing, coordinated behavior also applies in a criminal case.

2. *The Superseding Indictment's Description of the Enterprise.*

The Government's enterprise theory fails to meet the Eighth Circuit standard, because the indictment describes at least three *distinct* gambling operations rather than one continuous enterprise in fact. The Superseding Indictment's description of the RICO enterprise begins with the conclusory, but unequivocal, allegation that "[a]t least as early as 1992 ... defendants ... and other, known and unknown, constituted an ... ongoing organization, whose members functioned as a continuing unit, for the common purpose of achieving the objectives of the enterprise." Superseding Indictment par. 18. Yet the indictment provides no details about the activities of the enterprise, its members, or its activities (other than codefendant Gary Kaplan and his arrest) before the year 2000. The only common thread that could possibly provide the necessary continuity is the alleged involvement of codefendant Gary Kaplan. The description of the enterprise makes this clear:

- [*Phase I*] Beginning in approximately 1992, defendant Gary Stephen Kaplan and others operated an illegal sports betting business in and near New York City. After Gary Kaplan's arrest on New York State gambling charges in May of 1993, Gary Kaplan relocated his illegal gambling operation to Florida, continuing to take sports wagers from bettors in New York by telephone.

- [*Phase II*] In approximately 1995, Gary Kaplan moved the illegal gambling business to Aruba, in the West Indies, but continued to operate primarily in the United States. To facilitate its U.S. operations, the gambling businesses established and controlled toll-free telephone services and Internet web sites, and caused these services to accept sports wagers from gamblers in the United States.

- [*Phase III*] In about 1996-1997, Gary Kaplan relocated the gambling operations to Antigua, and then to Costa Rica, leaving certain aspects of the financial operations in Antigua. Through all these relocations, Gary Kaplan and the other defendants always operated, and caused the operation of their primary revenue-producing business, illegal sports wagering, in the United States.

Superseding Indictment, ¶ 1. The indictment accordingly describes three separate operations without any overarching structure or common control.

a) The U.S. Based Gambling Operation

First, the indictment describes a domestic gambling operation in which Gary Kaplan and "others" took sports wagers by phone, based first in New York and later in Florida. Superseding Indictment, ¶ 1. The indictment alleges that codefendant Kaplan's New York-and Florida- based operations constituted the first phase of an ongoing enterprise. *Id.* This allegation however, is refuted by the indictment's failure to mention these activities again at any point.

Moreover, neither this section, nor any other part of the indictment, alleges that Mrs. Tucker or any of the other defendants, or any other named individual, had any involvement with codefendant Kaplan's domestic gambling activities. *Id.* ¶¶ 4-17. The other defendants and Mrs. Tucker are described solely in terms of their involvement with BetonSports.com or affiliated organizations that emerge years after Kaplan's alleged activities in the United States. *Id.* ¶¶ 5-8. The only fact the indictment offers about Mrs. Tucker is that she was involved with NASA International, "a computer-based sportsbook." *Id.* par 2. A careful reading of the indictment reveals that NASA International was in operation in December 2001, more than six years after codefendant Kaplan left the United States. *Id.* par 37(1).

The remainder of the indictment, starting in Paragraph 2, describes a computer-or Internet-based operation with no further references to telephone-only operation of the kind codefendant Kaplan allegedly operated in the United States. *See, id.* ¶¶ 2, 4-11, 17, 19-21, 25-28, 30, 32, 36-37. The Indictment even specifies that the enterprise's "principal goal" was to make money via its "internet gambling web sites." *Id.* ¶ 21. Yet it is not until the next phase of the

enterprise, *after* the move to Aruba, that codefendant Kaplan is alleged to have established web sites by which to take wagers. *Id.* ¶ 1.

b) The Aruba-Based Gambling Operation

The Aruba phase of the enterprise is alleged to have existed from "approximately 1995" to 1996. *Id*. As discussed above, no other section of the indictment makes mention of this timeframe. *Id.* ¶¶ 4-17. Tellingly, the section of the indictment detailing the "Manner, Method and Means of the Racketeering Conspiracy" describes only events that happened after the Costa Rica move. *Id.* ¶¶ *25-36.* The earlier act listed in the "overt Acts" section is alleged to have occurred on September 6, 2000. *Id.* ¶¶ *37(1)-(25).* And once again, the indictment fails to describe Mrs. Tucker or a single defendant, other than Kaplan, who was involved with the enterprise prior to 2000.

c) The Costa Rica Gambling Operation

The third alleged gambling operation that the Government attempts to stuff into its enterprise theory began when codefendant Kaplan allegedly moved to Costa Rica in 1996 or 1997. *Id.* ¶ 1. According to the indictment, after this move codefendant Kaplan established a sophisticated internet-gambling operation involving several corporate entities. *See e.g. id.* ¶¶ *25-36.* This scale of operations is far removed from the "taking bets over the phone" operation that constituted the first phase of the alleged enterprise. And even if the facts alleged to have occurred in this phase were sufficient in themselves to constitute a RICO charge, the drastic shift in scope, personnel, location, and operations distinguishes the Costa Rican operation from earlier gambling operations in which codefendant Kaplan was allegedly involved and destroys the continuity required for a RICO enterprise. As the Eighth Circuit has put it, while "[a]n

enterprise can grow and evolve ... it must be shown to have some continuity of structure and personality and the participants must maintain their common purpose." *Bledsoe, supra.* at 665. The alleged commonality of codefendant Kaplan and gambling are simply insufficient to establish the "continuity of structure and personality and participants" working together to maintain "their common purpose." *id.* necessary for a RICO enterprise in fact.

3. *The alleged enterprise lacks the continuity and structure to support a RICO charge.*

The Government could have limited the RICO enterprise as encompassing only the internet-based gaming operations that allegedly were established after the move to Costa Rica. Instead, it chose to plead an enterprise beginning no later than 1992 that includes codefendant Kaplan's alleged gambling activities long before the alleged offshore Internet-based sports betting and casino operations at the heart of the RICO charge began. Given its deliberate choice to charge the enterprise in this manner, the Government must demonstrate that the enterprise it chose to present to the grand jury had sufficient continuity and structure during its entire temporal breadth.

The face of the indictment demonstrates that there was no continuity of structure or participants between the 1992 activities and the elaborate offshore Internet-based sports-betting organization alleged later in the indictment. Rather than alleging the requisite continuity and structure, the Government apparently decided instead to rely on a single factor – codefendant Kaplan's participation–to establish the existence of the "Kaplan Gambling Enterprise." The well-developed law governing the minimum ongoing continuity and structure of an enterprise in fact requires more. *See e.g. Bledsoe, supra.* at 665-67; *Marriott Bros. v. Gage*, 704 F. Supp. 731 (N.D. Tex. 1988).

In *Bledsoe* the Government alleged that the defendants constituted an enterprise in fact that joined together to sell fraudulent securities of agricultural cooperatives in Missouri, Oklahoma and Arkansas, over a span of several years. *Bledsoe*, 674 F. 2d at 651. The court found that although multiple schemes were initiated by the same person, using the same methods and involved common participants, these facts could not sustain a RICO enterprise. *Id.* at 665-667. In contrast, the Government here relies on a single factor – codefendant Gary Kaplan's participation – to establish the requisite continuity. The Court should reject the Government's attempt to shoehorn this case in the RICO statute, apply the logic of *Bledsoe*, and hold that evidence of "separate associations of individuals without any overarching structure or common control" is not sufficient to meet RICO's enterprise requirements. *Id.* at 666.

In *Marriott Bros. v Gage*, only one defendant was alleged to have participated in all of the transactions alleged to make up the pattern of racketeering. 704 F. Supp. at 742. Each of the loans at issue there involved different end-borrowers with no connection to the other loans. *Id.* And "[n]early all of the alleged predicate acts entail some allegedly wrongful act by [one defendant], not by associates acting at his behest." *Id.* at 742. As in *Bledsoe*, the *Gage* court rejected the plaintiffs' conclusory allegations that one defendant's supposed "control" over all of the transactions satisfied the continuity and structure requirement of the RICO enterprise element. *Id.* at 742-43. The same reasoning applies here.

In describing the U.S.-based operations in New York and Florida, the indictment does not allege that codefendant Kaplan and Mrs. Tucker or any of the *defendants* took sports wagers by phone – it states that "Gary Kaplan and *others* operated an illegal sports betting *business."* Superseding Indictment par 1 (emphasis added). The indictment defines neither these "others,"

nor the nature of the sports wager "business." Neither Mrs. Tucker nor any of the other codefendants are alleged to have had a role in the U.S.-or Aruba-based operations. In fact, the indictment does not describe the activities of Mrs. Tucker or the other defendants prior to 2001 and focuses exclusively on the activities of codefendant Kaplan. Perhaps most tellingly, the section of the indictment detailing the "Manner, Method and Means of the Racketeering Conspiracy" describes only events that happened after the Costa Rica move. *Id.* ¶¶ 24-25.

The Superseding Indictment also fails to allege an organized structure – a crucial component of an enterprise in fact. To satisfy this element, "the government must show that some sort of structure exists within the group for the making of decisions, whether it be hierarchical or consensual." *United States v. Riccobene*, 709 F. 2d 214, 222 (3d Cir. 1983). Furthermore, "[t]here must be some mechanism for controlling and directing the affairs of the group on an on-going rather than an ad hoc basis." *Id.* Here, again, the indictment relies almost exclusively on codefendant Kaplan's participation in lieu of demonstrating an organizational structure.

Indeed, the Government has completely failed to allege any facts detailing the framework of the enterprise that operated from 1992 to 2006. The Government's conclusory allegations that "[t]hrough all these relocations GARY KAPLAN and the other defendants always operated, and caused the operation of their primary revenue-producing business, illegal sports wagering" (Superseding Indictment ¶ 1) and that the "GAMBLING ENTERPRISE constituted an ongoing organization , whose members functioned as a continuing unit" (*id.* ¶ 18) are also inadequate. The Government has not specifically alleged how decisions were made within the enterprise as a whole. This is particularly problematic as the Government conceded, through its reference to the

participation of undefined "others," that the alleged enterprise contained members other than the three defendants in this case. *Id.* at ¶¶ 1, 18, 23, 39-40, 44. Likewise, the Government offers no particularized facts detailing the mechanism for controlling the affairs of the enterprise in fact on an on-going basis throughout the relocations from New York to Florida, Florida to Aruba and Aruba to Costa Rica. *Id.* ¶ 1.

The Government has also failed to adequately allege that the "various associates function as a continuing unit." *Turkette,* 454 U.S. at 583. This element requires that "each person perform a role in the group consistent with the organizational structure ... and which furthers the activities of the organization." *Riccobene,* 709 F. 2d at 223; iWhelan v. Winchester Prod. Co., 319 F. 3d 225, 229 (5th Cir. 2003). Once again, the Government offers no particularized facts explaining how each member of the association in fact enterprise performed a role consistent with its structure and in furtherance of its activities. The defendants are left with little more than a description of their roles in the operation of BetOnSports with no indication of what their independent roles were in the enterprise in fact that allegedly existed "at least at early as 1992." Because it has failed to plead the requisite continuity and structure that must, as a matter of law, underlie an enterprise in fact, the Government has failed to allege the essential "enterprise" element of 18 U.S.C. Section 1962(d).

B. The Indictment Fails To Allege An Enterprise Distinct From The Structure Necessary To Commit The Various Predicate Acts.

"The term enterprise must signify an association that is substantially different from the acts which form the pattern of racketeering. A contrary interpretation would alter the essential elements of the offense as determined by Congress." *Anderson,* 626 F. 2d at 1365 (internal quotation omitted); *see also Turkette,* 452 U.S. at 583. Accordingly, the Government must

charge and prove the existence of an enterprise that is "separate and apart from the pattern of [criminal] activity in which it engages." *Davidson*, 122 F. 2d at 534 (citing *Turkette*, 452 U.S. at 583). The court's inquiry res on whether – if all of the predicate acts were "put to one side" – there is still evidence of other legal and illegal acts. *United States v. Kragness*, 830 F. 2d 842, 857 (8th Cir. 1987). Put simply, if the predicate acts are removed from the indictment, is what remains sufficient to establish the alleged RICO enterprise?

The Government's enterprise theory is that from 1992 to 2006 the defendants "constituted an ongoing organization" for the common purpose of making money by encouraging individuals in the United States to place "illegal bets." Superseding Indictment, ¶¶ 1, 18, 21. Twelve of the sixteen predicate acts listed in the indictment allege violations of state and federal gambling statutes. *Id.* ¶ 23. Once these predicate acts are subtracted out in accordance with *Kragness* there is nothing left. This fact is especially apparent when the *Kragness* test is applied to each stage of the enterprise described in the indictment.

The only facts alleged with regard to the U.S. based "illegal sports betting business" are that codefendant Kaplan and "others" operated it from New York and later relocated to Florida, but "continu[ed] to take sports wagers from bettors in New York by telephone." *Id.* ¶ 1. Once the allegedly illegal gambling operation is put to the side, there is simply nothing left. This is equally true of phase two – the Aruba-based gambling operation. Although the offshore operation described during this time period is slightly more complex than the alleged U.S. based operations – allegedly including "toll-free telephone services and Internet web sites" – it is equally devoid of "other legal and illegal acts" unrelated to the gambling operation. *Id.*

Even the most complicated operation in the post-Costa Rica operation fails to display a structure distinct from the alleged pattern of racketeering. The only common factor linking the defendants together and defining them as a distinct group is their participation in the alleged gambling enterprise.

In sum, the indictment alleges that the defendants jointly engaged in an illegal gambling operation through which they accepted and facilitated wagers and solicited, paid for and disseminated advertisements to promote their operation. *Id* . ¶¶ 37(1)-(25). Once these predicate acts are removed, however, the enterprise in fact evaporates. *See e.g. Stephens Inc. V. Geldermann, Inc.*, 962 F.2d 808, 815-816 (8th Cir. 1992)(dismissing a civil RICO claim where the only common factor that linked all the parties together and "defined them as a distinct group was their direct or indirect participation in [a fraudulent] scheme").

This point is best seen by contrast to those cases where the court has found sufficient evidence of a distinct enterprise in fact. In *United States v. Darden,* 70 F. 3d 1507 (8th Cir. 1995) the Government offered evidence of "oversight and coordination activities sufficient to establish an ascertainable structure distinct from the structure needed to commit the predicate acts or to engage in the pattern of racketeering activities."*Id.* at 1521. As the court explained:

> [I]t is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity [such as a legitimate line of business], but rather that it has an existence beyond that which is necessary merely to commit each o f the acts charged as predicate racketeering offenses. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an ongoing basis is adequate to satisfy the separate existence requirement.

Id. The evidence in *Darden* met this standard because the evidence showed that the defendants carried out three types of predicate acts: murder, attempted murders, and dealing drugs. *Id.* In

addition to carrying out these activities, the members shared information to protect their drug trade and attended "post-shooting reviews" to improve their ability to "snuff out rivals and informants." *Id.* at 1521. And the same individual was shown to have directed the members in their activities for over two decades. *Id.*

The Superseding Indictment fails to allege this type of structure. Codefendant Kaplan is the only defendant alleged to have been involved in the first two phases of the enterprise. Superseding Indictment, ¶ 1. The facts alleged fail to describe any purpose to the enterprise other than the carrying out of the alleged gambling scheme. Thus, once those acts are subtracted out, the Government's claim fails. *See e.g. United States v. McClendon*, 712 F. Supp. 723, 727 (E.D. Ark. 1988). While the Government has no duty to reveal all of its proof before trial, *United States v. Nabors,* 45 F. 3d 238, 240 (8th Cir. 1995), "the Indictment must nonetheless contain sufficient facts to reflect [the RICO characteristics that] must be adduced at trial, in part so that RICO is not applied to 'isolated or sporadic criminal acts.'" *United States v. Cuong Gia Le*, 310 F. Supp. 2d 763, 776 (E.D. Va. 2004)(quoting *United States v. Diaz*, 176 F. 3d 52, 93 (2d Cir. 1999)). Thus, in addition to its failure to plead the requisite continuity and structure to allege the "enterprise" element, the Government has failed to describe an enterprise that is separate from the pattern of racketeering activity.

C. The Superseding Indictment Fails To Allege A Pattern Of Racketeering Activity.

A RICO based on 1964(c) must allege that the defendant's participation was through a pattern of racketeering activity. *Bennett,* 44 F. 3d at 1373; 18 U.S.C. section 1962. A pattern of racketeering activity consists of at least two predicate acts, "although two may not be sufficient [to prove such a pattern]." *Darden*, 70 F. 3d at 1525. The Supreme Court explained "to prove a

pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. V. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989).

1. *The pattern charged in the Superseding Indictment is inadequate because it merely parrots the statutory language or cites to statutes.*

The pattern of racketeering activity alleged in the indictment includes violations of state gambling statutes (Superseding Indictment ¶ 23) and violations of federal law including the Wire Act, 18 U.S.C. § 1084; the mail-fraud and wire-fraud statutes, 18 U.S.C. §§ 1341, 1343; the Travel Act, 18 U.S.C. § 1952; The Illegal Gambling Business Act, § 1955; the Wagering Paraphernalia Act, § 18 U.S.C. § 1953; and 18 U.S.C. § 1956, which prohibits money laundering. Superseding Indictment ¶ 23(a)-(g).

18 U.S.C. §§ 1084 (The Wire Act) and 1953 (The Wagering Paraphernalia Act).

The grand jury did not cross-incorporate any of the substantive violations charged in Counts 3 to 13 in which Mrs. Tucker is not a named defendant. Mrs. Tucker, therefore, is left to guess, at her peril, the specificity of the overt acts alleged in Count 1 which reference the Wire Act and Paraphernalia violations, and what, exactly forms the allegations which form the pattern of racketeering activity alleged in Count 1.[2]

18 U.S.C. § 1341 (Mail Fraud).

The conduct underlying the mail-fraud pattern allegations similarly is not cross incorporated with the substantive mail fraud allegations in Count 2, in which Mrs. Tucker is not

[2] Mrs. Tucker is not a named in the substantive wire counts in counts 3 through 12 of the Superseding Indictment; however, co-defendant Kaplan has moved to dismiss these counts on several grounds. If co-defendant Kaplan is correct that the charges under those statutes should be dismissed, the alleged violations of the Wire Act and Paraphernalia Act cannot be the basis for the finding that there was a pattern of racketeering activity and, therefore, the overt acts must also fail.

a named defendant. Thus, Mrs. Tucker again must speculate at her peril as to what the forms the predicate acts of mail fraud alleged in Count 1. As further discussed below, however, those allegations must be struck from the indictment because the Government's fraud theory is incorrect as a matter of law. *See* pp. 19-30, *infra*.

Other Predicate Acts.

The remaining pattern allegations are wholly unsupported by or identified in the indictment. The indictment lists twelve statutes that were allegedly violated as part of the pattern of racketeering activity not charged elsewhere in the indictment: 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1952 (The Travel Act); 18 U.S.C. § 1955 (Operation of an Illegal Gambling Business); 18 U.S.C. § 1956 (Money Laundering); and nine (9) state gambling statutes. Superseding Indictment ¶ 23. The indictment, however, merely provides statutory citations with no other reference to these complex criminal offenses.[3]

An indictment, to be sufficient under Rule 7 of the Federal Rules of Criminal Procedure, "must do more than simply repeat the language of the criminal statute." *Russell v. United States*, 369 U.S. 749, 764 (1962); *see also United States v. Zangger*, 848 F.2d 923, 925 (8th Cir. 1988) ("[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."). In the Superseding Indictment, the Government has reached new heights of vagueness, as it does not even repeat

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[3] Mrs. Tucker submits that codefendant Kaplan's three (3) separate motions to dismiss counts 3-12, 13, and 14-22 of the Superseding Indictment, which allege various grounds, if granted would affect the allegations in Count 1, the only Count in which Mrs. Tucker is named. If the allegations in Counts 3-13, 13, 14-22 fail, based on the correctness of co-defendant Kaplan's arguments in his three(3) separate motions, than the RICO conspiracy allegations contained in Count 1 must also fail.

the language of the twelve criminal statutes, but instead is content merely to cite to them. "Stating that an act is 'in violation of [a statute]' adds no factual information as to the act itself [and] is of scant help" in determining what was in the mind of the grand jury. *United States v. Camp*, 541 F.2d 737, 740 (8th Cir. 1976). Where a predicate act is overly vague or fails to provide critical information, it must be dismissed under Rule 7. *See United States v. McDonnell*, 696 F. Supp. 356, 360 (N.D. Ill. 1988) (dismissing a predicate act because the indictment failed to provide the defendant with "critical information" without which "the defendant cannot prepare a meaningful defense; he can only hazard to guess").

Moreover, the vagueness of the indictment would permit the Government 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.*

Wire Fraud (18 U.S.C. § 1343).

The indictment states that acts indictable under the wire-fraud statute constituted part of the pattern of racketeering activity. Superseding Indictment ¶ 23(c). But the indictment does not charge any defendant with wire fraud. Mrs. Tucker once again is left to speculate, at her peril, as to which conduct described in the indictment underlies the wire-fraud predicates. *See, e.g., Id.* ¶ 29 ("The GAMBLING ENTERPRISE used radio and television to deliver fraudulent advertising, through broadcasts and cable casts in and across the United States."). Moreover, to

the extent that the Government's theory of wire fraud is that one or more of the defendants defrauded U.S. gamblers about the legality of internet gambling, the wire-fraud predicate is flawed as a matter of law, as further discussed below.

The Travel Act (18 U.S.C. § 1952).

Section 18 U.S.C. § 1952 prohibits "Interstate travel in aid of a Racketeering Enterprise." *See* Superseding Indictment ¶ 23(d). The language of § 1952 however shows that it is a violation of the statute to "travel[] in interstate or foreign commerce *or* use[] the mail . . . with intent to . . . promote . . . any unlawful activity." 18 U.S.C. § 1952(a)(3) (emphasis added). Because the indictment never specifies what actions the alleged enterprise took in violation of §1952, Mrs. Tucker is left to scrutinize the rest of the indictment for clues as to what acts she is alleged to have taken in violation of this statute. Different sections of the indictment repeat the language of § 1952, without providing any useful detail. *See, e.g.*, Superseding Indictment ¶¶ 33(d), 36. These descriptions contain some of the language of the statute, but fail to connect those words to any specific factual allegations.

Conversely, the "Overt Acts" section of the indictment provides specific factual allegations, but fails to indicate what statutes each act allegedly violates. *Id.* ¶ 37(1)-(25). This is troubling as the language of § 1952 is so broad that several of the alleged overt acts could conceivably fall under its ambit – making it near impossible for Mrs. Tucker to identify the acts against which she must defend. In short, the indictment includes so many descriptions and examples of "use of the mail" that it is impossible to determine what conduct underlies the Travel Act allegations that are allegedly part of the pattern of racketeering activity. *See, e.g., Id.* ¶¶ 37(16), 37(21-22).

Gambling violations under 18 U.S.C. § 1955 and state laws.

The indictment similarly lists multiple gambling statutes as predicate acts of racketeering including 18 U.S.C. § 1955 and nine state gambling statutes. *Id.* ¶ 23. These statutes prohibit the operation of an illegal gambling business, but the Government has done nothing more than provide citations to the statutes. There is no account in the indictment of what conduct underlies these pattern allegations, and the Government's decision to charge a RICO conspiracy involving an alleged gambling enterprise that spans fifteen years, two states, and four countries makes it impossible to determine from the facts in the indictment what conduct is supposedly criminalized by these statutes. The Government's bare citations to statutes cannot suffice as allegations of a pattern of racketeering activity.

Money Laundering under 18 U.S.C. § 1956.

Finally, the account of the pattern of racketeering activity includes violations of 18 U.S.C. § 1956, but cites no conduct alleged to violate the act. Superseding Indictment ¶ 23(g). A careful reading of the indictment uncovers only one reference to money laundering:

> Another component of the conspiracy was to have the members and associates of the GAMBLING ENTERPRISE launder money received by the ENTERPRISE in the form of illegal wagering funds and fees.

Id. ¶ 35. Mere parroting of the statute is not sufficient to give the constitutionally required notice or to state a violation that could create a pattern of racketeering activity. *United States v.Opsta*, 659 F.2d 848, 850 (8th Cir. 1981). There is not even an effort to allege the numerous elements of a 1956 violation including the critical monetary transactions at issue. Without this information Mrs. Tucker has a complete inability to defend.

2. *The mail-fraud and wire-fraud allegations must be dismissed.*

The section of the Superseding Indictment describing the pattern of racketeering activity includes allegations of mail fraud and wire fraud. Superseding Indictment ¶ 23(b)-(c). The indictment, however, fails as a matter of law to allege a scheme to defraud.

The mail-fraud count of the indictment (Count 2) incorporates only paragraphs 26, 28, and 29. *Id.* ¶ 38. Those paragraphs state that:

> 26. It was part of the conspiracy that in order to increase traffic and wagering on ENTERPRISE web sites and telephone services, the GAMBLING ENTERPRISE targeted U.S. gamblers, even though soliciting and accepting bets placed on sports and sporting events using interstate wire communications facilities was and is illegal in the United States, except where specifically authorized by federal law. The ENTERPRISE spent millions of dollars in the United States, advertising ENTERPRISE-controlled Internet web sites and telephone services in magazines, sports annuals and other sports publications, on sports radio, and on television
>
> ***
>
> 28. It was part of the conspiracy to develop a scheme to defraud gamblers in the United States, by inviting, inducing and persuading them to place bets with the GAMBLING ENTERPRISE through its various Internet web sites and telephone lines. As part of the scheme, the members and associates of the GAMBLING ENTERPRISE created and disseminated advertising throughout the United States, which falsely stated that Internet and telephone gambling on sporting events and contests was "legal and licensed." The GAMBLING ENTERPRISE concealed the fact that the multiple websites and telephone services through which it offered sports and casino style gambling were all owned and operated by the ENTERPRISE, and used to conduct the ENTERPRISE's illegal gambling businesses that were in fact not legal or licensed in the United States.
>
> 29. As part of the scheme to defraud, the GAMBLING ENTERPRISE used the United States mail system to deliver its fraudulent print advertising, and to cause bettors in the United States to send money to ENTERPRISE-controlled entities for the purpose of placing illegal bets. The GAMBLING ENTERPRISE

> used radio and television to deliver fraudulent advertising, through broadcasts and cable casts in and across the United States.

Thus, according to paragraph 28, the scheme to defraud underlying the mail-fraud allegations is that the alleged enterprise "falsely stated that Internet and telephone gambling on sporting events and contests was 'legal and licensed.'" The victims of this scheme to defraud were "gamblers in the United States." *Id.* ¶ 28. There is no allegation that the defendants cheated gamblers, that they failed to pay out winnings, or that they used improper tactics in collecting gambling losses—in short, there is nothing that would demonstrate that defendants engaged in a scheme to unfairly deprive the supposed victims of money or property. Instead, the theory rests solely on the notion that a statement of law (i.e., that Internet gambling is legal) can constitute a fraud.

a) Misstatements of law cannot be the basis for mail-fraud or wire fraud charges.

In formulating this scheme to defraud, the Government ignores the longstanding common-law principle, incorporated into the mail-fraud and wire-fraud statutes, that a misstatement of law is not fraud. In *Neder v. United States*, the Supreme Court held that the mail-fraud and wire-fraud statutes incorporated terms used at common law, and that the statutes' terminology must therefore be given its common law meaning. 527 U.S. 1, 21-25 (1999). In concluding that the element of materiality had been incorporated into the fraud statutes, the court stated that "both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud and bank fraud statutes, actionable 'fraud' had a well-settled meaning at common law . . . . [T]he well-settled meaning of 'fraud' required a misrepresentation or concealment of *material* fact." *Id.* at 22.

The language of the mail-fraud and wire-fraud statutes, including the term "fraud," also includes the common-law requirement that the allegedly fraudulent misstatement be a misstatement of *fact*, and not of *law*. "It is . . . well settled, as a general rule, that fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law." 37 AM. JUR. 2D *Fraud and Deceit* § 97 (2001) (collecting cases).

In *Miller v. Yokohama Tire Corp.*, 358 F.3d 616 (9th Cir. 2004), a civil RICO case, the court considered whether a misrepresentation of law could constitute mail fraud for purposes of the RICO statute. Applying *Neder*, it answered that question in the negative because, analyzing the common law, it found that "[s]tatements of domestic law are normally regarded as expressions of opinion which are generally not actionable in fraud even if they are false." *Id.* at 621.

Miller, an employee of Yokohama Tire, claimed he was falsely told by his employers that he was not entitled to overtime pay because he was salaried. *Id.* at 618. Miller was not a lawyer, and he was not familiar with the laws and regulations relating to overtime pay. *Id.* He claimed that he placed his trust in his employers, who concocted a fraudulent scheme to deny him and other employees overtime compensation by misinforming them about the law. *Id.* at 619. He further alleged that mailed communications and wired paychecks from his employers constituted predicate acts of mail and wire fraud that supported a RICO claim. *Id.*

The Ninth Circuit found that Miller failed to state an actionable claim for mail or wire fraud that could support a RICO suit because he was alleging a misstatement of law and not of fact. Applying the common-law meaning of the term "defraud," the court found that there were four exceptions to the general rule that a misstatement of law cannot constitute fraud, including

when (1) a defendant purports to have special knowledge of the law, (2) a defendant stands in a fiduciary or similar relation of trust and confidence to the recipient, (3) a defendant has successfully endeavored to secure the confidence of the recipient, and (4) a defendant has some other special reason to expect that the recipient will rely on his opinion. *Id.* at 621.

None of these exceptions applied to the statements made to Miller by his employers, because (1) the defendants were not lawyers or otherwise purporting to have special legal knowledge, (2) the employer-employee relationship did not create a fiduciary duty or other special relationship, (3) the defendants did not endeavor to secure Miller's confidence, and (4) there was no special reason that the defendants would expect Miller, who neither "[had] a particular lack of intelligence or [was] particularly gullible" to rely on their opinion. *Id.* at 622. Even though Miller and the managers of Yokohama had an employer-employee relationship, none of the exceptions to the general rule applied.

Although the *Miller* case concerned a civil RICO action, the issue presented required the court to determine the criminal elements of mail fraud under § 1341, and therefore its holding applies in a criminal context as well. *See, e.g., United States v. Panthaky*, Nos. 05-10569, 05-10575, 2007 WL 1280750 (9th Cir. May 1, 2007) (mail fraud conviction cannot be premised on misrepresentation of law except in "special situations"). Courts in the Eighth Circuit apparently have not yet considered this issue in the context of a criminal prosecution, but they have, consistent with *Miller*, repeatedly recognized the common-law principle that fraud cannot be based on misrepresentations of law, absent special circumstances. *See, e.g.*, *Nodak Oil Co. v. Mobil Oil Corp.*, 533 F.2d 401, 406 (8th Cir. 1976) (applying North Dakota law); *Greater Chicago Auto Auction, Inc. v. Associates Discount Corp.*, 323 F.2d 429 (8th Cir. 1963)

(misrepresentations of law by defendants were not evidence of fraud); *Johnson v. Berry*, 171 F. Supp. 2d 985, 991 (E.D. Mo. 2001) ("[I]t has been consistently held that an action for fraud cannot be based upon a misrepresentation of law.") (applying Missouri law).

Here, the scheme to defraud proposed by the Government is that gamblers in the United States were misinformed by the defendants that the internet gambling they were engaged in was legal. Superseding Indictment ¶ 8. But a statement that internet gambling is legal, even if that statement is false, is a misrepresentation of law that cannot provide a basis for a mail or wire fraud charge.[4]

The *Miller* rule applies in this case because none of the four exceptions to the common law rule applies. The supposed victims of the scheme were gamblers in the United States who read the defendants' allegedly false advertising—it is not alleged that they had a special relationship of trust with the defendants. Indeed, there is nothing in the indictment to indicate that defendants purported to have special knowledge about the law, or that there was *any* relationship, let alone a fiduciary or special relationship, between the defendants and the alleged victims. The relationship between Miller and his employers was found to be insufficient to bring the employers' misstatements under one of the exceptions to the general rule, and here there is much less of a relationship between the defendants and the supposed victims. The defendants' alleged misstatement that their internet gambling business was legal and licensed therefore cannot support a mail-fraud or wire-fraud allegation, and those allegations must be

[4] As for the alleged statement that the internet gambling was "licensed," the indictment notably does *not* allege that defendants stated that their internet gambling operation was licensed *in the United States*. The indictment simply charges that the activity was said to be "licensed," a statement which is not even alleged to be false. Superseding Indictment ¶ 28. Plainly, a foreign company can truthfully represent that it is licensed without misrepresenting that it is licensed in the United States.

dismissed.

In fact, *the very same fraud theory now advanced by the Government was rejected wholesale in the Fifth Circuit* Mastercard *litigation*, where American internet gamblers brought a civil RICO action against credit-card companies on a theory that the companies aided and abetted internet gambling. The court held that the plaintiffs failed to state claims of mail fraud and wire fraud to support their RICO suit, because the internet gambling at issue was legal. The court also found—crucially for purposes of this case—that even if the internet gambling were illegal, the plaintiffs could not base mail-fraud and wire-fraud allegations on a theory that the defendants misrepresented the legality of the activity.

> 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."*

In re Mastercard Int'l Inc. 132 F. Supp. 2d 468, 482 (E.D. La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2002) (emphasis added). Since the mail-fraud and wire-fraud allegations in the RICO count (Count 1) are based on alleged misstatements of law, they must be dismissed.

b) The alleged victims of the scheme to defraud lack the capacity to be defrauded, because gamblers do not have a cognizable right not to be misinformed about the legality of their gambling.

i. Where the Government has identified victims, those victims must be capable of being defrauded.

In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court established that

the federal fraud statutes are implicated only when a fraud is intended to deprive the victim of a legally recognized property right.[5] There, the Court held that the mail-fraud statute does not encompass schemes to defraud citizens of their intangible right to honest government. The Court instructed: "§ 1341 [is] limited in scope to the protection of property rights" in that the purpose of the statute is "to protect the people from schemes to deprive them of their money or property." *McNally*, 483 U.S. at 356, 360.

It is clear that the alleged victims of the charged scheme to defraud (i.e., American gamblers who placed bets or wagers with the defendants) were not deprived of a legally recognized property right. In *United States v. Evans*, 844 F.2d 36, 39 (2d Cir. 1988), the Court recognized the importance of the specification of the victim in defining the parameters of the scheme to defraud, stating that "[i]f a scheme to defraud must involve the deceptive obtaining of property, the conclusion seems logical that the deceived party must lose some money or property." The Government is of course not required to show actual loss to the victims; but if it does identify victims, the victims must at least have *the capacity* to suffer a loss from the charged scheme to defraud.

Here, the alleged victims lack the capacity to suffer a loss of money or property interest, because a gambler is not defrauded of money or property when he is misinformed about the legality of his gambling. There is no allegation that the defendants schemed to cheat the supposed victims, thereby defrauding them of their money, or otherwise schemed to cause them harm—the scheme to defraud rests on the bare and startling premise that the plaintiffs had a right to be informed that their gambling was illegal. According to the Government, an

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[5] The exception to this rule is an "honest services" fraud under 18 U.S.C. § 1346. That provision was enacted after *McNally* and is not charged here.

American gambler who placed a $10 bet with defendants and won $500 has been defrauded if he was informed that his winnings were legal.

c) The alleged victims lack the capacity to be defrauded as to the legality of their gambling.

"Misrepresentations amounting only to a deceit are insufficient to maintain a...wire fraud prosecution. Instead, the deceit must be coupled with a *contemplated harm to the victim*." *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (emphasis added); *accord Pasquantino v. United States*, 544 U.S. 349 (2005); *see also United States v. Pierce*, 224 F.3d 158, 165 (2d Cir. 2000) ("A scheme to deceive, however dishonest the methods employed, is not a scheme to defraud in the absence of a property right for the scheme to interfere with."). Thus, where the identified victim cannot have suffered the alleged harm, or where he has no money or property interest of which the scheme to defraud sought to deprive him, the indictment fails to allege mail or wire fraud. To be clear, Kaplan does not argue that the Government failed to identify the victim of the alleged fraud, but rather that the victims *that have been specifically identified in this case* lack the capacity, as a matter of law, to incur injury to their money or property as a result of the charged scheme.

Gamblers have no capacity to be defrauded about the legality of their gambling for two separate and distinct reasons. First, gamblers, like any other individuals, are presumed to know the law, and therefore they cannot, as a matter of law, rely on a statement by another that their gambling is legal. Second, the longstanding public policy against judiciary involvement in gambling transactions should prevent the Court from finding that the federal fraud statutes

should apply to enforce gambling contracts.[6]

As already discussed above, at common law a misstatement of law could not be the basis for a fraud, barring special circumstances. The primary rationale for this common-law rule is that all people are presumed to know the law:

> The reasons generally advanced as the basis of the rule that fraud cannot be predicated upon misrepresentations as to matters of law are that everyone is presumed to know the law, both civil and criminal, and is bound to take notice of it, and therefore cannot, in legal contemplation, be deceived by such misrepresentations.

37 AM. JUR. § 98 (collecting cases). This principle "is based on the theory that 'everyone is equally capable of determining the law, is presumed to know the law and is bound to take notice of the law and, *therefore, in legal contemplation, cannot be deceived by representations concerning the law or permitted to say he or she has been misled*.'" *Equal Justice Found. v. Deutsche Bank Trust Co. Americas*, 412 F. Supp. 2d 790, 795 (S.D. Ohio 2005) (quoting 26 WILLISTON ON CONTRACTS, *Misstatements of Law* § 69:10 (4th ed.)). Commentators have noted that "[t]his maxim has but little support in fact. It merely means that ignorance of the law is no excuse. Indeed, it is a necessary principle or rule lying at the foundation of government." 37 AM. JUR. § 98, at n.1.

Since each person is presumed to know the law, he has no right to be informed of the law by others, and it follows that when someone misrepresents the law to him, that mis-representation cannot constitute fraud. It is not possible, therefore, for American internet

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[6] Moreover, the traditional indicia of property rights are tellingly absent here, because the law has never treated the Government's proposed "right to know what the law is" as property. *See e.g., Cleveland v. United States*, 531 U.S. 12, 24 (2000) (the touchstone of the property requirement is whether the victim was deprived of a thing encompassed within "traditional concepts of property").

gamblers to be victims of a fraud on a theory that Kaplan and other defendants misrepresented the law to them. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985) ("All citizens are presumptively charged with knowledge of the law."); *accord Krentz v. Robertson Fire Protection Dist.*, 228 F.3d 897, 904-05 (8th Cir. 2000) ("persons are conclusively presumed to know the law") (applying Missouri law).

The gamblers who are the supposed victims of the defendants' fraud also lack the legal status necessary to be defrauded because of the strong public policy against courts adjudicating gambling transactions. Since courts have failed to recognize a right of gamblers, who after all are situated *in pari delicto*, to plead in court that they have been defrauded, federal law should not include a gambler's right *not* to be defrauded as one of the rights protected under the mail fraud and wire-fraud statutes. American courts, following a principle in the English "Statute of Anne," enacted in 1710, will generally not enforce gambling debts. *See, e.g., CVN Group, Inc. v. Delgado*, 95 S.W.3d 234 (Tex. App. 2002) (gambling debts are unenforceable contracts); *State v. Iarussi*, Nos. 00CA007554, 00CA007567, 2001 WL 111525 (Ohio App. Feb. 7, 2001) (same); *Seigel v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 745 A.2d 301 (D.C. 2000) (same). Courts also have held that public-policy concerns prevent courts from entertaining claims by gamblers who have suffered losses. *See, e.g., Kelly v. First Astri Corp.*, 84 Cal. Rptr. 2d 810, 827 (1999) ("California's long-standing public policy regarding gambling is a broad, strong policy against judicial resolution of civil claims arising out of gambling contracts or transactions, and this public policy, in the absence of a statutory right to bring such claims, applies to both actions for recovery of gambling losses and actions to enforce gambling debts."). For the same public-policy reasons that have led courts to avoid adjudication of gambling

contracts, this Court should decline to find that a gambler has a cognizable claim of being defrauded when he is misinformed as to the legality of his gambling.

As one federal district court opined: "Bookies . . . routinely tell gamblers how much they stand to win (in terms of the quoted odds). Only a fool more foolish than most gamblers would believe the odds they are quoted vouch for the legality of the wager. And while bookies may violate a congeries of laws by taking bets, they do not also commit fraud by obtaining money for their services." *Miller v. Pac. Shore Funding*, 224 F. Supp. 2d 977, 988-89 (D. Md. 2002).[7]

Indeed, even if a fraud prosecution could proceed on the theory that a misrepresentation of law was made, the necessarily complicated trial that this multi-count indictment would spawn would become even more complex and protracted. To obtain a conviction, the Government would have to prove beyond a reasonable doubt—and the jury would have to determine—that internet gambling was illegal under state, federal, and international law. If they did not, the elements of the crime would not be established.

The *court* could not determine as a matter of law what "the law" was and so instruct the jury. Doing so would run afoul of the Constitution's double guarantee of trial by jury, *see* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. 6, which guarantees a criminal defendant "the right to have a jury determine whether the defendant has been proved guilty of the crime charge" and limits judicial fact-finding. *See Neder v. United States*, 527 U.S. 1, 31, 34-35 (1999) (Scalia, J., concurring in part and dissenting in part); *see also Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Neither the common law nor established precedent permits the Government to fashion mail-fraud and wire-fraud allegations out of the defendants' alleged misrepresentations as to the legality of their internet-gambling business. The mail-fraud and wire-fraud predicates of the RICO count must therefore be dismissed. Since, as discussed above, all of the predicates that allegedly comprise the pattern of racketeering activity must be dismissed, the RICO Count (Count 1) must be dismissed for failing to allege the essential pattern of racketeering activity.

II. THE ENTERPRISE ALLEGATIONS FAIL TO PROVIDE ADEQUATE NOTICE.

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"). Here, the RICO charges not only fail to state a claim, but also are ill-defined, vague, and fail to provide constitutionally adequate notice of the criminal conduct at issue. Consequently, the RICO claim both fails as a matter of law and denies Mrs. Tucker the protections provided by the Fifth and Sixth Amendments. Therefore, the RICO allegations in Count One must be dismissed.

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[7] The *Pacific Shore* court offered this analogy while evaluating whether a statement made by a lender describing certain charges could be read to vouch for the legality of those charges, and answering that question in the negative. *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2007, the foregoing Motion was filed with the Clerk of the Court, via Federal Express, to be served by operation of the Court's electronic filing system upon the following:

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