UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**No. 4:06CR00337 CEJ/MLM**
v.	)	
	)	
BETONSPORTS PLC, et al.,	)	
	)	
Defendants.	)	
	)	

CONSOLIDATED RESPONSE TO OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION REGARDING MOTIONS TO DISMISS COUNT 1

The United States, through counsel undersigned, hereby responds to objections to Magistrate Judge Medler's Report and Recommendations (Doc. #'s 338 & 339) denying motions to dismiss filed by several of the defendants. The objections to the two Reports are not meritorious, and should be denied.

I. PROCEDURAL HISTORY AND APPLICABLE STANDARD OF REVIEW

Motions to dismiss Count 1 of the Superseding Indictment were filed by defendants Neil Kaplan (Doc. #167), DME Global Marketing & Fulfillment (Doc. #'s 241, 242), William Hernan Lenis (Doc. #244), Monica Lenis (Doc. #249), Tim Brown (Doc. #251), William Luis Lenis (Doc. #'s 258, 260), and Manny Lenis (Doc. #'s 262, 263). The Government filed Responses to the defense motions (Doc. #'s 211 & 285). After the Magistrate Judge recommended that their motions be denied, objections to the Report and Recommendation were filed by defendants Monica Lenis (Doc. #342), William Hernan Lenis (Doc. #345), Tim Brown (Doc. #348), and Neil Kaplan (Doc. #349).

Defendant Carruthers filed a motion to dismiss Count 1 (Doc. #269), and a reply to the Government response (Doc. #302). The United States filed a supplemental response (Doc. #303), and the Magistrate Judge issued her Report and Recommendation (Doc. #339) on May 7, 2007, recommending that the motion be denied. Defendant Carruthers filed his objections to the Report (Doc. #376), and pursuant to a request from the United States (Doc. #380), the Court authorized this Consolidated Response to all objections to the Magistrate's Reports regarding the defense motions to dismiss Count 1 (Doc. #488).[1]

The District Court is required to make "a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. §636(b)(1). Objections that merely restate previous arguments or present a general disagreement with the Magistrate are insufficient, as they do not provide adequate specificity to facilitate the District Court's de novo review. VanDiver v. Martin, 304 F.Supp.2d 934, 937 (E.D. Mich. 2004). Each defendant's objections are treated below.

II. OBJECTIONS OF DEFENDANT MONICA LENIS

A. The Gambling Enterprise Alleged in the Superseding Indictment is Adequately Pled

Defendant Monica Lenis objects to the Report and Recommendation on the grounds that the Superseding Indictment[2] fails to allege a RICO enterprise separate and apart from the pattern

[1] The Government incorporates herein its Responses to the various defense motions listed above, the Response to the motions to dismiss Count 1 filed by defendants Kaplan and Tucker (Doc. #___), and the Responses to defendant Kaplan's motions to dismiss Counts 3 to 12 (Doc. #___), and Count 13 (Doc. #___), filed this date.

[2] The Superseding Indictment was returned on June 28, 2007, after the defense objections were filed. The only difference between the charges contained in the original and Superseding Indictment is the addition of defendant Penelope Tucker, with allegations regarding her

of racketeering activity in which it engaged.[3] In her Report and Recommendation, the Magistrate Judge found that the Gambling Enterprise described in Count 1 could just have easily been used for an entirely legal purpose, and pursuant to applicable Eighth Circuit law,[4] the Superseding Indictment adequately alleged a RICO enterprise having a structure defined by more than the pattern of racketeering activity it is charged with committing. The defendant offers no additional facts or authority in support of her assertion. In response, the Government reiterates that the Superseding Indictment allegation of an association-in-fact racketeering enterprise meets all of the legal requirements and states all of the facts necessary under the applicable law:

> [A] RICO enterprise must exhibit three basic characteristics: (1) a common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that in a pattern of racketeering.

United States v. Nabors, 45 F.3d 238, 240 (8th Cir. 1995) (interior citation omitted).

Count 1 of the Superseding Indictment states that the Gambling Enterprise shared the goals of making money through the operation of illegal gambling businesses (¶21), and tax evasion (¶22). Paragraphs 25 to 36 state the Manner, Method and Means of the Racketeering Conspiracy, providing further factual detail regarding the cohesive structure of the Gambling Enterprise, demonstrating the Enterprise's continuity. The operators of the Gambling Enterprise

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participation in the RICO conspiracy. These additions do not require the defendants or the Court to re-visit the issues determined in the Magistrate Judge's Report and Recommendation.

[3] The objection filed by the defendant actually states "it is the position of the Defendant that the racketeering activity in these particular cases, has no ascertainable structure distinct and apart from the individual acts pertaining thereto."

[4] United States v. Darden, 70 F.3d 1507, 1521 (8th Cir. 1995); Handeen v. Lemaire, 112 F.3d 1339, 1352, n.16 (8th Cir. 1997); United States v. Kragness, 830 F.2d 842, 857 (8th Cir. 1987).

did not come together, take an illegal bet, and then disperse: The Gambling Enterprise was an ongoing business. As pointed out in the Darden decision, "[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 to commit each of the acts charged as predicate racketeering offenses." 70 F.3d at 1521 (internal citation omitted). Therefore, the defendant's objections to the Magistrate Judge's Report and Recommendation should be denied, along with the defendant's motion to dismiss Count 1.

B. The Pattern of Racketeering Activity Alleged in the Superseding Indictment is Adequately Pled

Defendant Monica Lenis objects to the finding by the Magistrate Judge that the pattern of racketeering activity alleged in the Superseding Indictment is adequate to charge a RICO conspiracy. The defendant states that the acts alleged are not a pattern, but "a string of dissimilar and similar acts, loosely connected, the exclusion of which would similarly exclude the racketeering activity itself." (Def.'s Obj. ¶3). The defendant offers no additional facts or authority in support of her assertion. It is difficult to discern precisely in what manner the defendant claims the alleged racketeering activity fails to define a "pattern" under the applicable law.

In the Report and Recommendation, the Magistrate Judge found that each of the racketeering acts alleged a violation of applicable federal or State statutes, and that the alleged conduct amounted to continued criminal activity. Under Eighth Circuit law:

> In order to show a pattern of racketeering activity, the evidence must show continuity between the separate criminal acts predicate to a RICO violation. H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Continuity can be shown by related acts continuing over a period of time lasting at least one year (closed ended continuity), Primary Care

> Investors, Seven, Inc. v. PHP Healthcare Corp., 986 F.2d 1208, 1215 (8th Cir.1993), or by acts which by their very nature threaten repetition (open ended continuity). Northwestern Bell, 492 U.S. at 241, 109 S.Ct. 2893.
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> * * *
>
> Criminal acts are sufficiently related to be considered part of the same enterprise if they had the same or similar purposes, results, participants, victims or methods of commission, or if they were otherwise 'interrelated by distinguishing characteristics' as opposed to being 'isolated events.'

United States v. Hively, 437 F.3d 752, 761-62 (8th Cir. 2006). In this case, the racketeering acts alleged in the Superseding Indictment demonstrate both forms of continuity. The racketeering acts are related in that they had similar purposes, i.e., to make money for the Gambling Enterprise through maximizing the number of individuals in the United States who opened wagering accounts and used those accounts to place illegal bets, and to avoid applicable federal taxes (Superseding Indictment, ¶¶ 21 & 22). The racketeering acts had similar results; they increased and facilitated the operations of the Gambling Enterprise. The targets of the fraudulent scheme and the methods used to further that scheme remained the same during the time period alleged in the Superseding Indictment. And, while all of the participants in the commission of the racketeering acts did not remain constant throughout the life of the Gambling Enterprise, the roles of the participants remained the same; advertisers to promote, clerks to answer phones and take bets, managers and directors, et cetera. The variation within the Gambling Enterprise is well within that allowed under Eighth Circuit law. See United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982).[5]

[5] The Magistrate Judge noted an error in the citation of an Illinois State statute in the original Indictment, and ruled this error was not a basis for dismissal of Count 1, particularly since the Government represented it would supersede to correct the erroneous citation. The Superseding Indictment was returned on June 28, 2007; the erroneous citation has been corrected.

As the pattern of racketeering activity is adequately pled, the determination of whether the pattern of racketeering activity actually occurred is a question of fact that must be determined at trial. United States v. Nabors, 45 F.3d 238, 241 (8th Cir. 1995) ("it is up to the government to prove at trial that those alleged acts amount to more than 'sporadic crime.' That proof, however, need not be offered until trial." (interior citation omitted)); See also Reynolds v. Condon, 908 F.Supp. 1494, 1512 (N.D. Iowa 1995). Therefore, the defendant's objection is without basis and should be denied.

C. Racketeering Conspiracy Does Not Require that the Defendant Personally Commit a Racketeering Act

Defendant Monica Lenis objects to the Superseding Indictment because it does not charge that she personally committed any of the alleged racketeering acts. As the Magistrate Judge determined, such an allegation is not required to lawfully charge an individual with racketeering conspiracy. In Salinas v. United States, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997), the Supreme Court considered the appeal of a former sheriff (Marmolejo) and his deputy (Salinas) from convictions of substantive RICO charges and RICO conspiracy. The deputy sheriff claimed that he could not be convicted of RICO conspiracy unless it were alleged and proven that he agreed to personally commit two racketeering acts in furtherance of the illegal agreement. The Court stated:

> One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense. It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself. See Callanan v. United States, 364 U.S. 587, 594, 81 S.Ct. 321, 325, 5 L.Ed.2d 312 (1961).

> It makes no difference that the substantive offense under §1962(c) requires two or more predicate acts. The interplay between subsections (c) and (d) does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense. True, though an 'enterprise' under §1962(c) can exist with only one actor to conduct it, in most instances it will be conducted by more than one person or entity

Salinas, 522 U.S. at 65, 118 S.Ct. at 477-78. The defendant's objection is therefore without legal basis, and should be denied.

D. A Defendant's Claim of "Mere Presence" is Not an Appropriate Basis for Dismissal of the Superseding Indictment

Defendant Monica Lenis claims that she was not part of the Gambling Enterprise and the racketeering conspiracy, stating that she is simply the daughter of co-defendant William Hernan Lenis, and that she worked, briefly, for one of the corporate co-defendants. This claim cannot be addressed in a motion to dismiss the Superseding Indictment. It concerns matters that can only be determined by a trial on the merits. See United States v. Brown, 481 F.2d 1035, 1041 (8th Cir. 1973) ("There is no authority under Rule 12, however, to dismiss on the basis of a sufficiency-of-the-evidence defense which raises factual questions embraced in the general issue."). Therefore, the defendant's objection to the Report and Recommendation should be denied.

III. OBJECTION FILED BY DEFENDANT WILLIAM HERNAN LENIS: THE EXISTENCE OF THE RACKETEERING ENTERPRISE IS ADEQUATELY PLED

Defendant William Hernan Lenis objects to the Magistrate Judge's Report and Recommendation on the same grounds as defendant Monica Lenis, claiming that the Gambling Enterprise as alleged in Count 1 has no existence separate from the alleged predicate racketeering acts. The defendant does not state any specifics in his objection, simply asserting that the Magistrate Judge is wrong. The United States therefore relies on incorporated materials

and the Response to co-defendant Monica Lenis' objection, stated in Section IV.A.1. above. Defendant William Hernan Lenis has not provided any factual or legal basis for his objection, and therefore it should be denied.

IV. OBJECTIONS FILED BY DEFENDANT TIMOTHY BROWN

A. The Gambling Enterprise Alleged in the Superseding Indictment is Adequately Pled

Defendant Tim Brown objects to the Magistrate Judge's finding that the Gambling Enterprise as alleged in Count 1 has an organizational structure separate and apart from the alleged pattern of racketeering activity. Defendant Brown does not state any factual or legal basis for his assertion. Therefore, the United States relies on incorporated material and its Response to co-defendant Monica Lenis' objection, stated in Section IV.A.1. above. The defendant has not provided any factual or legal basis for his objection, and therefore it should be denied.

B. The Pattern of Racketeering Activity Alleged in the Superseding Indictment is Adequately Pled

Defendant Brown objects to the Magistrate Judge's finding that the racketeering activity charged in Count 1 is a legally and factually sufficient allegation of a "pattern of racketeering activity." The defendant does not state any factual or legal basis for his assertion, which is similar to that made by co-defendant Monica Lenis. Therefore, the United States relies on incorporated materials and its Response to co-defendant Monica Lenis' objection, stated in Section IV.A.2. above. The defendant has not provided any factual or legal basis for his objection, and therefore it should be denied.

C. The Charge of Racketeering Conspiracy Does Not Require that the Defendant Personally Commit a Racketeering Act

Defendant Brown objects to the Magistrate Judge's Report and Recommendation on the grounds that Count 1 of the Superseding Indictment is subject to dismissal because it does not allege that he personally committed a racketeering act. This objection is the same as that raised by co-defendant Monica Lenis, and does not allege any additional factual or legal basis for defendant Brown's assertion. Therefore, the United States relies on incorporated materials and the Response stated in Section IV.A.3. above. The defendant's objection is without basis, and therefore should be denied.

D. The Defendant's Claim of "Mere Presence" is Not an Appropriate Basis for Dismissal of the Superseding Indictment

Defendant Brown asserts a defense of "mere presence," stating that he is the son-in-law of a co-defendant, and that he did not commit racketeering or racketeering conspiracy. This is similar to the claim made by co-defendant Monica Lenis, and, as stated above in Section IV.A.4., does not constitute a basis for dismissal. The United States relies on its earlier pleadings and the response to defendant Monica Lenis above. The defendant's objection is without merit, and therefore should be denied.

V. OBJECTIONS FILED BY DEFENDANT NEIL KAPLAN: THE EXISTENCE OF THE RACKETEERING ENTERPRISE IS ADEQUATELY PLED

Defendant Neil Kaplan argues that the Magistrate's Report and Recommendation cannot be reconciled with the ruling in United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980). The defendant asserts that Anderson stands for the proposition that a RICO enterprise must have some function or activity apart from the pattern of racketeering activity it is alleged to have

committed. This is an incorrect reading of the Anderson decision, and the RICO statutes. As the Court stated:

> We hold that congress intended the phrase 'a group of individuals associated in fact although not a legal entity,' as used in its definition of the term 'enterprise' in section 1961(4), to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the 'pattern of racketeering activity.'

Anderson, 626 F.2d at 1372 (interior citations omitted). This, however, does not mean that an organization that is entirely illegal cannot qualify as a RICO enterprise. The United States Supreme Court stated in National Organization for Women, Inc. v. Scheidler that the motivation of a RICO enterprise need not be economic in nature. 510 U.S. 249, 257 ("Nowhere in either §1962(c) or the RICO definitions in §1961 is there any indication that an economic motive is required."). Rather, as stated in United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982):

> [A]n enterprise must have an 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity. Anderson, 626 F.2d at 1372. This distinct structure might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes.

Nothing in the statute or the applicable case law states that, as claimed by the defendant, an enterprise that engages solely in conduct which could be charged as racketeering activity is, therefore, by definition, not a RICO enterprise.

The argument advanced by defendant Gary Kaplan has been specifically rejected by the Eighth Circuit Court of Appeals. As noted by the Magistrate Judge, the decision in Handeen v. Lemaire, 112 F.3d 1339 (8th Cir. 1997), upheld the determination that a RICO enterprise engaged in bankruptcy fraud met the statutory definition, even though the only acts of the enterprise were

the racketeering predicates alleged in the complaint:

> It might be argued that the enterprise would have collapsed without the fraudulent submission because failure to file those [false] documents would have resulted in dismissal of [the defendant's] petition [in bankruptcy]. In removing the predicate acts from our analysis, however, we assume that the filings would have been made, but with accurate contents. Otherwise, it would be unduly difficult to find an enterprise in situations similar to this.

Handeen, 112 F.3d at 1352, n. 16.

Defendant Neil Kaplan's argument is also factually inaccurate, as can be determined from the face of the Superseding Indictment. The defendant claims that "[w]hether BetonSports could have conducted other business, be it 'legal' or illegal, is not at issue here. The only issue is that its structure is inseparable from the acts the government charges are 'racketeering' activity." (Def. Obj. 2). In fact, Count 1 of the Superseding Indictment states that the Gambling Enterprise operated Internet web sites and toll-free telephone services. In order to engage in these activities, the Gambling Enterprise had to arrange for the services of Internet web designers and telephone and Internet service providers. These activities, while aimed at the accomplishment of the Gambling Enterprise's unlawful goals, were not, in and of themselves, illegal. The Gambling Enterprise established business relationships with wire transfer companies and banks in order to facilitate its criminal goals, not inherently illegal conduct. Therefore, the defendant's argument regarding the allegation of the "enterprise" element in the Superseding Indictment is not supported in law or in fact, and should be denied.

VI. OBJECTIONS FILED BY DEFENDANT DAVID CARRUTHERS

A. The Gambling Enterprise Alleged in the Superseding Indictment is Adequately Pled

The first portion of defendant Carruthers' objections are very similar to those filed by co-defendant Neil Kaplan. Therefore, the United States relies upon incorporated material and Section IV.D.1. above for its response to these objections.

Additionally, the defendant relies on the opinion in Stephens, Inc. v. Geldermann, Inc., 962 F.2d 808, 815-816 (8th Cir. 1992), which held that an enterprise in which "[t]he only common factor that linked all parties together and defined them as a distinct group was their direct or indirect participation in [the] scheme to defraud" did not have a structure independent from the racketeering activity alleged. Defendant Carruthers argues that the Gambling Enterprise is similar to that alleged in Geldermann, while the Magistrate Judge determined it to be similar to the RICO enterprise alleged in United States v. Darden, 70 F.3d 1507, 1521 (8th Cir. 1995). As pointed out above, the Gambling Enterprise conducted many activities related to its core goals. And, as stated by the Eighth Circuit Court, "[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 is has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses." Darden, 70 F.3d at 1521.

Defendant Carruthers also objects to the Magistrate Judge's reliance on Handeen v. Lemaire, 112 F.3d 1339 (8th Cir. 1997), arguing that the situation in Handeen is distinguishable because that case dealt with a legal-entity RICO enterprise, while the defendant is alleged to have conspired to conduct the operations of an association-in-fact RICO enterprise. This difference, however, is not relevant to the legal analysis, which is the same for both types of

racketeering entity. In distinguishing a RICO enterprise's structure as separate and distinct from the pattern of racketeering activity, the nature of the enterprise, legal entity or an association-in-fact, is not determinative.

Defendant Carruthers cites to VanDenBroeck v. CommonPoint Mortgage Co., 210 F.3d 696, 699 (6th Cir. 2000), quoting that "'simply conspiring to commit a fraud is not enough to trigger the Act if the parties are not organized in a fashion that would enable them to function as a racketeering organization ***for other purposes***.'" (Defendant's motion, page 5, emphasis added by the defendant). The defendant has misplaced the emphasis in this quotation: the crucial term is "***enable***." The RICO enterprise must be organized in a fashion which "would enable them to function" as an organization for other purposes. The requirement is that a RICO enterprise be able to function apart from its RICO activities, not that it actually do so. VanDenBroeck, 210 F.2d at 699 ("All that is required is some minimal level of organizational structure between the entities involved.").

The other cases cited by the defendant, Whelan v. Winchester Production Co., 319 F.3d 225, 230 (5th Cir. 2003), and Javitch v. Capwill, 284 F.Supp.2d 848, 851-52, 857 (N.D. Ohio 2003), deal with entities whose structures are clearly distinguishable from that of the Gambling Enterprise. As defendant Carruthers has not shown that the RICO enterprise in Count 1 is inadequately pled, the matter must be left to the jury after a trial on the merits. United States v. Nabors, 45 F.3d 238, 241 (8th Cir. 1995) (sufficiency of the evidence is a jury question). Therefore, the defendant's objections to the Magistrate's Report and Recommendation should be denied.

B. The Allegations of State Law Violations in Count 1 are Not Defective

Defendant Carruthers claims that the allegation regarding violations of Mo. Rev. Stat. 572.020 must be stricken from the Superseding Indictment because the Government cannot possibly prove that any of the defendants fall under the definition of "professional player" in that statute, and unless the alleged offenses involved a "professional player," the violations cannot qualify as racketeering activity. As noted by the Magistrate Judge, if the allegations contained in the Superseding Indictment are legally sufficient, the question of what the Government can prove, i.e., the sufficiency of the evidence, is a question for the jury. As Mo. Rev. Stat. 572.020 defines a felony violation of Missouri law, it is a proper racketeering predicate. The defendant's objection is without merit, and therefore should be dismissed.

C. The Wire Wager Act is not Limited to Sports Betting

Defendant Carruthers claims that the Magistrate Judge has wrongly concluded that the Wire Wager Act[6] is not limited to sports betting. The defendant states that the Judge's Report and Recommendation is not supported by the plain language and structure of the statute, or the legislative history of the Act. However, it is the defendant that is in error, not the Magistrate Judge. The law supporting the Magistrate's construction of the Act is very clear: "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the

[6] 18 U.S.C. §1084: "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 [have committed an offense]."

disparate inclusion or exclusion." Hamdan v. Rumsfeld, ___ U.S. ___, 126 S.Ct. 2749, 2765-66 (2006).

The Eighth Circuit Court holds that "[w]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." Watt v. GMAC Mortgage Corp., 457 F.3d 781, 783 (8th Cir. 2006). Congress clearly indicated that it knew how to modify "bets or wagers," and chose not to do so in the final clause of the Wire Wager Act. Therefore, the Magistrate Judge was correct in her reading of the statute, and its application to non-sports betting.

The defendant simply disagrees with the Magistrate Judge's analysis of the legislative history of the Wire Wager Act. However, it is the language of the statute that is determinative, and not the legislative history. "Generally, where the text of a statute is unambiguous, the statute should be enforced as written, and 'only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.'" United States v. Sabri, 326 F.3d 937, 943 (8th Cir. 2003) (quoting United States v. Albertini, 472 U.S. 675, 680 (1985)), affirmed Sabri v. United States, 541 U.S. 600, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004).

Defendant Carruthers claims that the Magistrate Judge should not have considered the language of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA)[7] in determining the proper scope of the Wire Wager Act. This is incorrect. It is well established that judges may look to one statute for guidance when interpreting another. "Where Congress uses the same form of statutory language in different statutes having the same general purpose, courts presume

[7] Title 31, U.S.C. §§5361 to 5367 (2006).

that Congress intended the same interpretation to apply in both instances." United States ex rel. Zissler v. Regents of Univ. of Minnesota, 154 F.3d 870, 875 (8th cir. 1998) (interior citation omitted). Furthermore, Congress is presumed to act with knowledge of existing laws, and a newly-enacted law is presumed to be harmonious with existing law, absent a clear manifestation of contrary intent. Estate of Wood v. C.I.R., 909 F.2d 1155, 1160 (8th Cir. 1990). Therefore, it was proper for the Magistrate Judge to consider the UIGEA in her deliberations.

Defendant Carruthers objects to the Magistrate Judge's finding regarding the Fifth Circuit decision, In re MasterCard International Int'l. Inc. Internet Gambling Litigation, 132 F.Supp.2d 468 (E.D. La. 2001), affirmed, 313 F.3d 257 (5th Cir. 2002). The defendant did not provide any additional factual or legal basis for his objection. Therefore, the United States relies on materials herein incorporated by reference. The defendant's objection is without substance, and should therefore be denied.

D. The Rule of Lenity Has no Application in this Case

The defendant claims that the Magistrate has unjustifiably refused to apply the rule of lenity to his case. This is incorrect. The Eighth Circuit has held that the rule of lenity "is not applicable unless there is a grievous ambiguity or uncertainty in the language or structure of the Act, such that even after a court has seize[d] every thing from which aid can be derived, it is still left with an ambiguous statute." United States v. Speakman, 330 F.3d 1080, 1083 (8th Cir. 2003) (interior citation omitted). The Magistrate employed the common tools of statutory interpretation and reached a reasonable and legally supported conclusion as to the meaning of the Wire Wager Act. Therefore, application of the rule of lenity is not warranted and the defendant's objection on that basis should be denied.

E. Dismissal of the Superseding Indictment is Not an Appropriate Remedy

Defendant Carruthers objects to the Magistrate Judge's determination that, if the District Court finds the Wire Wager Act inapplicable to non-sports betting, the appropriate remedy is not dismissal, but to strike the non-sports wager language from the Superseding Indictment. The defendant reiterates his previous arguments, claiming that striking the non-sports allegations from the Superseding Indictment would leave the legality of the grand jury's decision to return a true bill in doubt.

Defendant Carruthers cited Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed.2d 397 (1956), for the proposition that the court may dismiss an indictment for prosecutorial misconduct or error that "substantially influenced" the grand jury, where prejudice to the defendant is demonstrated. Counsel for the Government believe this citation to be in error. The Costello court stated that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." Costello, 350 U.S. at 363, 76 S.Ct. at 409. Counsel for the Government believe that defendant Carruthers intended to cite Bank of Nova Scotia v. United States, 487 U.S. 250, 256, 108 S.Ct. 2369, 2374, 101 L.Ed.2d 228 (1988). In that case, the Supreme Court reversed the dismissal of an indictment for prosecutorial misconduct and other violations of federal rules applicable to grand juries, finding no prejudice. As the defendant will not be prejudiced by the removal of non-sports wagering from the Superseding Indictment, there is no basis for its dismissal.

Defendant Carruthers further claims that, should the non-sports wagering allegations be stricken, he will not be able to prepare a defense because he won't be able to tell from the face of the Superseding Indictment which of the wagers alleged were sports related and which were not. This is a nonsensical argument. If the non-sports bets are stricken, there will be none in the Superseding Indictment, and the defendant would not be required to make the distinction that he claims is impossible. The defendant asserts that the Government will be unable to separate the evidence regarding sports and non-sports wagers for presentation at trial. That, of course, is a matter which can be determined only by a trial on the merits.

F. The Racketeering Acts Alleging the Operation of an Illegal Gambling Business Pursuant to Title 18, U.S.C. §1955 are Adequately Pled, and not Subject to Dismissal Prior to Trial

Defendant Carruthers claims that the racketeering acts describing the operation of illegal gambling businesses pursuant to Title 18, U.S.C. §1955 must be dismissed, because the Gambling Enterprise's operations occurred in Costa Rica, and not the United States. The defendants have asserted this claim, in various guises, often during this prosecution. Here, the defendant claims that the Magistrate Judge was in error in finding that the ruling in United States v. Truesdale, 152 F.3d 443 (5th Cir. 1998) did not support his claim. The Magistrate Judge cited United States v. Kaczowski, 114 F.Supp.2d 143 (W.D. N.Y. 2000), another case in which an offshore gambling defendant claimed his conduct was legal in the jurisdiction where his business was physically located, and therefore could not be unlawful in the United States. The New York District Court found the Truesdale decision unavailing, and refused to dismiss the indictment charging the defendants with bookmaking in violation of New York State law. Kaczowski, 114 F.Supp.2d at 147. The defendant's claim that the Magistrate Judge's treatment of the Truesdale

decision was based on "technical and procedural grounds" is in error.

Defendant Carruthers objects to the Magistrate Judge's reliance on United States v. Cohen, 260 F.3d 68 (2nd Cir. 2001), claiming that Cohen applies only to the Wire Wager Act (18 U.S.C. §1084), and not an illegal gambling business charged under 18 U.S.C. §1955. The defendant is correct in asserting that neither statute criminalizes the conduct of placing a bet. However, the Magistrate Judge made no such claim, and did not base her decision on such a conclusion. The Magistrate Judge discussed the act of betting as one part of a continuous course of conduct which includes placing a bet, accepting a bet, and other activities that constitute "the business of betting or wagering."

The Magistrate Judge cited to the decision in United States v. Scavo, 593 F.2d 837 (8th Cir. 1979), on this point. The defendant objects, claiming that Scavo is inapplicable because, though the alleged illegal conduct included the transmission of line information from Las Vegas to Minnesota, the bets were placed and accepted in Minnesota, and there was no "extraterritorial" application of federal law. However, the Scavo court specifically rejected jury instructions that would have limited "the business of betting or wagering" to "bookmakers," and instructed that the term "business" (in "wagering business") be given its "usual and ordinary meaning." Scavo, 593 F.2d at 842. The Eighth Circuit has clearly rejected a definition of "gambling business" focused solely on the location of the placing and receiving of bets.

G. Advertising of the Illegal Gambling Businesses Operated by the Gambling Enterprise Was Not Protected Speech

In his objection, defendant Carruthers claims that the criminal allegations relating to the advertisement of illegal Internet gambling alleged in the Superseding Indictment amount to *de facto* regulation or banning of commercial speech in violation of the First Amendment. The

defendant does not cite to any legal support for this claim, nor is it factually supported. The United States does not seek to prevent the defendant from publishing whatever he may choose to publish, in any forum he chooses. However, the defendant must, as every person must, accept the consequences if his conduct constitutes criminal activity.

Defendant Carruthers claims that, as the conduct of the Gambling Enterprise was legal in Antigua and Costa Rica, its advertising in the United States must be considered legal as well. This is patently ridiculous. Such a ruling would make advertisements of any product protected speech under the First Amendment, based solely on the legal status of the product outside the United States. The First Amendment does not protect fraudulent and misleading statements in advertising simply because another country has not criminalized the product or service being offered.

Defendant Carruthers claims that the advertising disseminated by and on behalf of the Gambling Enterprise is precisely the sort of communication that the First Amendment was designed to protect. The defendant claims that he is being denied the right to discuss and debate important issues, and that the threat of prosecution has acted as a complete ban on the promotion of Internet gambling. This is not true. The defendant is free to lobby Congress, state his opinions regarding Internet gambling should be legal, and otherwise make his position publicly known.[8] He may not, however, use interstate and international wire communications facilities, or the U.S. Mail, to facilitate the operation of a RICO enterprise and perpetrate a fraud.

[8] Please refer to news reports, attached as Exhibit A.

Defendant Carruthers objects to the Magistrate Judge's application of Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), contending that a communication must be "inherently misleading" (Ibanez v. Florida Dept. of Bus. and Prof. Regulation, 512 U.S. 136, 142, 114 S.Ct. 2084, 2088, 129 L.Ed.2d 118 (1994), rather than "more likely to deceive the public than to inform it" (Central Hudson, 447 U.S. at 563-64, 100 S.Ct at 2350) before being considered misleading for purposes of First Amendment analysis. However, review of Ibanez shows that the Court used "inherently misleading" only in dicta, and actually applied the standard of "false, deceptive or misleading" in its ruling. Ibanez, 512 U.S. at 142, 114 S.Ct. 2088-90. The defendant's arguments that the Gambling Enterprise's ads were in fact truthful, and thus protected by the First Amendment, are not supported by the law or the facts in this case. His objections to the Report and Recommendation on this basis should therefore be denied.

H. Customary International Law Does not Divest the Court of Jurisdiction in this Case

The Magistrate Judge concluded that the federal court has jurisdiction in this case, as the alleged unlawful conduct occurred in the United States. The defendant Carruthers objects, claiming that because the placing of bets by individual bettors is not criminal conduct under the Wire Wager Act (18 U.S.C. § 1084) or the Unlawful Gambling Business statute (18 U.S.C. § 1955), the crimes occurred wholly outside the United States. As stated by the Magistrate Judge, the location of the gambling business includes the taking of bets, and that conduct is included in the course of conduct of the business as a whole. Therefore, the location of the business includes the location where bets were taken.

Defendant Carruthers cites to the Charming Betsy doctrine (Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)), and claims that this rule requires the Court to dismiss this prosecution because the jurisdiction of the Court is based on the "passive personality" principle, which is not accepted in customary international law. This is incorrect. The Charming Betsy doctrine does not require U.S. law to give way to international law. At most, the doctrine applies where applicable U.S. law is fatally ambiguous. See Hyundai Electronics Co. v. United States, 53 F.Supp.2d 1334, 1343-44 (Ct. Int'l Trade 1999) ("it is of course true that an unambiguous statute will prevail over the international concern."). In this case, there is no ambiguity: jurisdiction is based upon the occurrence of the charged criminal conduct in the Eastern District of Missouri and elsewhere in the United States. Therefore, there is no application for the Charming Betsy doctrine in this prosecution.

Defendant Carruthers objects to the Magistrate's citation to People Ex Rel. Vacco v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 851 (N.Y. Sup. 1999), claiming that jurisdiction in that case was based on the fact that the defendant corporation was a U.S. citizen. However, the Magistrate's Report and Recommendation cites to the portions of the Vacco opinion dealing with subject matter jurisdiction, not the portions dealing with personal jurisdiction. The defendant's attempt to distinguish Vacco is simply an assertion of what he claims should have been the basis for the New York court's decision, not what the opinion actually states.

I. The 1815 Convention on Commerce and Navigation Does Not Preclude the Arrest and Prosecution of the Defendant

Defendant Carruthers objects to the finding in the Report and Recommendation that the defendant's arrest was not illegal, and that the defendant's argument on this issue is without merit. However, the defendant does not state why the Magistrate's decision is incorrect. His objection is therefore substantively and procedurally deficient, and should be denied.

J. The Due Process Clause of the Fifth Amendment Does Not Preclude this Prosecution

Defendant Carruthers objects to the finding in the Report and Recommendation that this prosecution is not in derogation of his right to procedural due process under the Fifth Amendment. The Magistrate Judge rejected the defendant's assertion that he, as a foreign national, is not subject to U.S. law pursuant to his claim that his conduct did not occur in the United States. The Magistrate Judge also rejected the defendant's claim that he cannot be prosecuted because he had no notice of the U.S. prohibition of Internet gambling. The Report and Recommendation states that the Government will be required to prove its case regarding the defendant's conduct and knowledge at trial, but that there was no basis for dismissal of the Superseding Indictment on Constitutional grounds. The defendant does not state why the Magistrate's decision is incorrect. His objection is therefore substantively and procedurally deficient, and should be denied.

VII. CONCLUSION

None of the arguments put forward by any of the defendants state an adequate basis in law or in fact for rejection of the Magistrate Judge's Report and Recommendation on this issue. Therefore, the objections should be denied, and the Report adopted by the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2007, the foregoing was filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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