UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. GARY STEPHEN KAPLAN, NEIL SCOTT, KAPLAN, LORI BETH KAPLAN MULTZ, DAVID CARRUTHERS, TIM BROWN, PENELOPE ANN TUCKER, DME GLOBAL MARKETING & FULFILLMENT, INC., WILLIAM HERNAN LENIS, WILLIAM LUIS LENIS, MANNY GUSTAVO LENIS, AND MONICA LENIS, Defendants.	)	Case No. SI4:06CR337CEJ(MLM)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE CONCERNING MOTIONS TO DISMISS THE SUPERSEDING INDICTMENT AS A VIOLATION OF UNITED STATES TREATY OBLIGATIONS

This matter is before the court on Motions to Dismiss the Superseding Indictment for Violations of United States Treaty Obligations. Originally Motions were filed by: William Hernan Lenis, Doc. 174; Monica Lenis, Doc. 179; Lori Beth Kaplan Multz, Doc. 225; Neil S. Kaplan, Doc. 237; DME Global Marketing & Fulfillment, Inc., Doc. 243; Tim Brown, Doc. 252; William Luis Lenis, Doc. 261; Manny Gustavo Lenis, Doc. 266; David Carruthers, Doc. 270 at pages 30-38. The government responded. Docs. 210, 226 and 288.

On April 25, 2007 this court permitted further briefing on this issue. Supplemental briefs were filed by: Monica Lenis, Docs. 333 and 356; William Hernan Lenis, Doc. 343; Neil S. Kaplan, Doc. 355; Tim Brown, Doc. 357; Manny Gustavo Lenis, Doc. 359; Lori Beth Kaplan Multz, Doc. 362; William Luis Lenis, Doc. 363; David Carruthers, Doc. 364.

Subsequently, Motions were filed by Gary Stephen Kaplan, Doc. 457 and Penelope

Tucker, Doc. 474. The government filed a consolidated Response, Doc. 514. David Carruthers replied, Doc. 555 as did Gary Stephen Kaplan, Doc. 562.

In all of the defendants' Motions they argue, under a variety of theories, that recent decisions of the dispute resolution arm of the World Trade Organization bar prosecution of defendants for their role in facilitating online gambling allegedly protected under the General Agreement on Trade in Services ("GATS").

I. BACKGROUND AND APPLICABLE LAW

In the early 1990's the General Agreement on Trade in Services ("GATS") was negotiated during the Uruguay Round of mandated negotiations under the General Agreement on Trade and Tariffs ("GATT"). As a result of the Uruguay Round negotiations, the World Trade Organization ("WTO") replaced the GATT as the international organization, but the General Agreement still exists as the WTO's umbrella treaty. Pursuant to GATS the United States made commitments to allow foreign providers of services access to certain domestic markets.[1] Congress formally ratified GATS in the Uruguay Round Agreements Act ("URAA") effective December 8, 1994: 19 U.S.C. § 3511 states that: "The Congress approves - (1) the trade agreements described in subsection (d) of this section resulting from the Uruguay Round of multi-lateral trade negotiations. . . and (2) the statement of administrative action proposed to implement the agreements." The GATS treaty is specifically listed in subsection (d) at (14).

[1] The Government provided the United States Schedule of Specific Commitments and its Supplements as well as other pertinent GATS documents to the court on a disk. The court has placed the documents in binders titled "WTO Document Submission" which will be cited as such in this R&R. Both the disk and the binders will be submitted for the convenience of the district court.

In the URAA, Congress addressed the "relationship of [the Uruguay Round Agreements] to United States' law" and directed that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance that is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3512 (a)(1). In addition the URAA makes clear that the Act shall not be construed "to amend or modify any law of the United States... or ... to limit any authority conferred under any law of the United States...". It goes on to say that "[n]o person other than the United States. . . shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement." 19 U.S.C. § 3512(c)(1)(A). "No person other than the United States may challenge. . . any action. . . by any department, agency or other instrumentality of the United States, any state. . . on the ground that such action. . . is inconsistent with such agreement." 19 U.S.C. § 3512(c)(1)(B).

Congress adopted a statement of administrative action ("Statement") in the URAA which is an "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

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

> The WTO will have no power to change U.S. Law. If there is a conflict between U.S. Law any of the Uruguay Round Agreements, section 102(a) [19 U.S.C. § 3512(a)] of the implementing bill makes it clear that U.S. law will take precedence. . .Moreover, as explained in greater detail in this Statement in connection with the Dispute Settlement Understanding, WTO dispute settlement panels will not have any power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.

Statement, 1994 WL 16137731 at 4042, 1994 U.S.C.C.A.N. at 4042.

A section of the Statement dealing with **federal law** states that "[s]ection 101(a)(1) [19 U.S.C. § 3512(a)(1)] clarifies that no provision of a Uruguay Round agreement will be given effect under domestic law if it is inconsistent with federal law, including provisions of federal law enacted or amended by the bill." Statement, 1994 WL 16137731 at 4050, 1994 U.S.C.C.A.N. at 4050.

A section of the Statement dealing with **private lawsuits** states:

> The provision also precludes a private right of action attempting to require, preclude, or modify federal or state action on grounds such as an allegation that the government is required to exercise discretionary authority or general "public interest" authority under other provisions of law in conformity with the Uruguay Round Agreements. . . . Section 102(d) [19 U.S.C. § 3512(d)] makes clear that this Statement is to be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and the Uruguay Round implementing legislation in any judicial proceeding in which a question on that subject may arise, . . . as regards private rights of action or defenses under or in connection with those agreements.

Statement, 1994 WL 16137731 at 4055, 1994 U.S.C.C.A.N. at 4055.

A section of the Statement dealing with **dispute settlement** states:

> [T]he new WTO dispute settlement system does not give panels any power to order the United States or other countries to change their laws. If a panel finds that a country has not lived up to its commitments, all a panel may do is recommend that the country begin observing its obligations. It is then up to the disputing countries to decide how they will settle their differences. The defending country may choose to make a change in its law. Or it may decide instead to offer trade "compensation" - - such as lower tariffs.

Statement, 1994 WL16137731 at 4300, 1994 U.S.C.C.A.N. at 4300.

A section of the Statement dealing with **implementation** states:

> Reports issued by panels or the Appellate Body under the [Dispute Settlement Understanding] have no binding effect under the law of the United States and do not represent an expression of U.S. foreign or trade policy. . . . If a report recommends that the United States change federal law to bring it into conformity with a Uruguay Round agreement it is for Congress to decide whether any such change will be made.

> Furthermore, neither federal agencies nor state governments are bound by any finding or recommendation included in such reports. In particular, panel reports do not provide legal authority for federal agencies to change their regulations or procedures or refuse to enforce particular laws or regulations. In all cases following a panel report, the DSU leaves to the discretion of the United States any change in federal or state law and the manner in which any such change may be implemented.

Statement, 1994 WL 16137731 at 4318, 1994 U.S.C.C.A.N. at 4318.

When the House Committee on ways and Means recommended passage of the Uruguay Round Agreements on October 3, 1994 it stated:

> The Uruguay Round Agreements Act incorporates all amendments to existing Federal statutes or provision of new authorities, including authority for Federal agencies to issue regulations, known to be necessary or appropriate to enable full implementation of, and compliance with, U.S. obligations under the agreements.
>
> ***
>
> Since the Uruguay Round Agreements as approved by the Congress, or any subsequent amendments to those agreements, are not self-executing, any dispute settlement findings that a U.S. statute is inconsistent with an agreement also cannot be implemented except by legislation approved by the Congress unless consistent implementation is permissible under terms of the statute. . . . Also, there is no private right of action to challenge, under any other law, any action or inaction, by the United States or State or local government on the ground that it is inconsistent with the Uruguay Round Agreements.

H.R. Rep. 103-826 (I), H.R. Rep, #826(I), 103rd Cong. 2nd Sess., 1994, 1994 WL 548728 at 25-26.

Approximately ten years after the enactment of GATS a dispute arose between Antigua & Barbuda (herein "Antigua") and the United States in which Antigua claimed the United States was in violation of its GATS commitments by making it unlawful for foreign providers to supply gambling and betting services to consumers within the United States. Antigua requested a consultation with the United States consistent with the WTO dispute resolution procedures. See WTO Document Submission, Request for Consultations,

WT/DS 285/R/1, March 27, 2003. However, the consultation did not resolve the matter. In June, 2003, Antigua requested the Dispute Settlement Body to establish a panel. After a brief suspension to allow for negotiations, the panel issued a final report in November, 2004. See WTO Document Submission, Report of the Panel, WT/DS 285/R, November 10, 2004. The panel found:

> ...that Antigua & Barbuda had met its burden of proving that the United States had committed to open its domestic gambling market to foreign competition, and that by enforcing certain specified state anti-gambling laws relating to gambling, the United States failed to comply with its GATS obligations. The Panel also found that, although the United States had demonstrated that the federal laws were designed to protect public morals and public order, they were not "necessary" to do so, and thus were not provisionally justified under the general exceptions to the obligations imposed on WTO member states by the GATS. In addition, the Panel found evidence of discriminatory application of the federal laws in relation to Internet betting on horse racing.

Gov.'s Consolidated Response, Doc. 514 at 11.

In January, 2005 both Antigua and the United States appealed the findings of the panel to the Appellate Body which upheld the Panel decision and issued a report in April, 2005. See WTO Document Submission, Report of the Appellate Body, WT/DS 285/AB/R, April 7, 2005. The Appellate Body found "that the United States had committed to allow foreign suppliers to access the United States market for gambling and betting services and that the Wire Act and other federal laws regulating online gambling violate the commitments of the United States under GATS." United States v. Lombardo, 2007 WL 4404641 (D. Utah) at *13, citing the April 7, 2005 Appellate Body report.

On May 19, 2005 the United States informed the dispute settlement body that it would implement the recommendations and rulings in the dispute but that it required a reasonable period of time to do so. The response time provided expired on April 3, 2006. At the dispute settlement body meeting of April 12, 2006 the United States explained that

it was in compliance with the recommendations and rulings the Appellate Body made in this dispute. Antigua did not agree and sought an additional ruling from the dispute settlement body. On March 30, 2007 a panel of the dispute settlement body concluded that the United States had not complied with the recommendations and rulings of the dispute settlement body. See Gov.'s Consolidated Response, Doc. 514 at 11-12.

On May 4, 2007, the United States Trade Representative, John K. Veroneau, issued a press release summarizing how the United States would respond to this determination:

> The United States is invoking procedure under Article XXI of the General Agreement on Trade in Services (GATS) in order to clarify its commitment involving 'recreational services' which was interpreted in the course of WTO dispute settlement as including a U.S. commitment to allow Internet gambling services.
> ***
> 'U.S. laws banning interstate gambling have been in place for decades. Most WTO Members have similar laws. Unfortunately, in the early 1990's, when the United States was drafting its international commitments to open its market to recreational services, we did not make it clear that these commitments did not extend to gambling. Moreover, back in 1993 no WTO Member could have reasonably thought that the United States was agreeing to commitments in direct conflict with its own laws,' said Deputy United States Trade Representative John K. Veroneau.
> ***
> 'Neither the United States nor other WTO Members noticed this oversight in the drafting of U.S. commitments until Antigua and Barbuda initiated a WTO case ten years later. In its consideration of this matter, the WTO panel acknowledged that the United States did not intend to adopt commitments that were inconsistent with its own laws. However, under WTO rules, dispute settlement findings must be based on the text of commitments and other international documents, rather than the intent of the party. The United States strongly supports the rules-based trading system and accepts the dispute settlement finding. In light of those findings, we will use WTO procedures for clarifying our commitments.'
>
> In light of these developments in the WTO dispute, the United States has decided to make use of the established WTO procedures to correct its schedule in order to reflect the original U.S. intent - - that is, to exclude gambling from the scope of the U.S. commitments under the GATS. The GATS provides that when a Member modifies its services schedule, other Members who allege they will be affected by this action may make a claim for compensatory adjustment to other areas of the GATS Schedule. However,

> since no WTO Member either bargained for or reasonably could have expected the United States to undertake a commitment on gambling, there would be very little, if any, basis for such claims.

Veroneau, John K., Statement of Deputy United States Trade Representative John K. Veroneau Regarding U.S. Actions Under GATS Article XXI, May 4, 2007, available at http://www.ustr.gov.

In July, 2007 the Office of the United States Trade Representative requested public comment regarding the negotiations for compensatory adjustments to the United States Schedule of Services Commitments under the GATS and the dispute settlement body agreed that the matter had been referred to arbitration in accordance with Article 22.6 of the Dispute Settlement Understanding. See Gov.'s Consolidated Response, Doc. 514 at 12 - 13.

II. DISCUSSION

A. STANDING

In their numerous motions the defendants contend that by carrying on this prosecution, the United States is in direct violation of its international obligations and the rulings of the WTO appellate body.

As an initial matter, the defendants do not have standing to raise alleged violations of the GATS or the rulings of any WTO body. "However, 'WTO decisions are not binding on the United States, much less this court'". Lombardo, 2007 WL 4404641 at *15 citing Corus Staal BV v. Dep't. of Commerce, 395 F.3d 1343, 1348 (Fed.Cir. 2005), (quoting Timken Co. v. United States, 354 F.3d 1334, 1344 (Fed.Cir. 2004)). Further, "[n]o provision of any of the Uruguay Round Agreements . . . or the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3512(a). "Neither the GATT nor any enabling

international agreement outlining compliance therewith . . . trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or any enabling agreement, it is strictly a matter for Congress." Corus Staal, 395 F.3d at 1348; see also, Timken, 354 F.3d at 1344.

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

Lombardo, 2007 WL 4404641 at *15 citing Statement, 1994 WL 16137731 at 4318.

In addition, the URAA expressly forecloses any cause of action or defense under any of the Uruguay Round Agreements. 19 U.S.C. § 3512(c)(1)(A). "A failure on the part of the United States to comply with a decision of the Appellate Body may give rise to WTO sanctions against the United States under GATS." Lombardo, 2007 WL 4404641 at *15. "However, whether to accept those sanctions, modify federal law, or re-negotiate its GATS commitments is a matter committed to the discretion of Congress. It is the court's role to apply federal law to the case at hand. . . ." Id.

The United States has elected the re-negotiation option and has decided to use WTO procedures to correct its schedule in order to reflect the original United States intent, that is, to exclude gambling from the scope of the U.S. commitments under the GATS. Lombardo, 2007 WL 4404641 at *15 citing U.S. Trade Representative John K. Veroneau's statement regarding United States actions under GATS Article XXI, May 4, 2007.

Generally, international agreements do not confer private rights: "International treaties are not presumed to create rights that are privately enforceable. Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide

a private right of action." Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir.); cert. denied, 506 U.S. 955 (1992). 19 U.S.C. § 3512(d); Statement, 1994 WL 16137731 at 4055, 1994 U.S.C.C.A.N. at 4055 ("The language of [19 U.S.C. § 3512(c)(2)] is intended to make clear that Congress seeks the complete preclusion of Uruguay Round agreements-related actions and defenses in respect of state law in any action or proceeding brought by or against private parties."); House Committee on Ways and Means, Oct. 3, 1994, 1994 WL 548728 at 25 (". . .the Uruguay Round agreements are not self executing. . ."). "A 'self-executing' international agreement is one that directly accords enforceable rights to persons without benefit of congressional implementation." Haitian Refugee Center, Inc. v. Baker, 949 F.2d 1109, 1110 (11th Cir. 1991); cert. denied, 502 U.S. 1122 (1992); Cornejo v. County of San Diego, 504 F.3d 853, 856 (9th Cir. 2007) (". . . a treaty must be self-executing for it to create a private right of action. . ."). See also Auguste v. Ridge, 395 F.3d 123, 132, n.7 (3rd Cir. 2005) ("Treaties that are not self-executing do not create judicially enforceable rights unless they are first given effect by implementing legislation.")[2]

Based on the forgoing, it is clear that the GATS does not confer private rights. As set out more fully *supra* in Section I at pp 3-5 no provision of any of the Uruguay Round Agreements that is inconsistent with any law of the United States shall have effect. See 19 U.S.C. § 3512(a)(1). Defendants have no standing to raise the argument that the instant prosecution is prohibited by the GATS. Even if they did, based on the enabling legislation, as set out above, their arguments are without merit and their Motions to Dismiss on that ground should be denied.

[2]See also the extensive list of cases cited in Gov's. Consolidated Response, Doc. 514 at 8-9.

B. THE *CHARMING BETSY* DOCTRINE AND INTERNATIONAL COMITY

Defendants argue that the *Charming Betsy* cannon of statutory construction should be applied to the GATS and/or the Uruguay Round enabling statutes and/or WTO Appellate Body decisions to prohibit the prosecution in this case. The *Charming Betsy* doctrine arose out of the seizure of an American-owned schooner sailing under a Danish flag in the very early 1800's. The Supreme Court interpreted the applicable statute so as to make the seizure unlawful thereby avoiding confrontation with the Danish government. See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). The *Charming Betsy* canon has come to stand for the proposition that "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." Restatement (3rd) of Foreign Relations Law of the United States § 114(1987). However, the *Charming Betsy* canon only comes into play where Congress' intent is ambiguous.

> [T]he *Charming Betsy* canon comes into play only where Congress' intent is ambiguous. If a statute makes plain Congress' intent. . . then Article III courts, which can overrule Congressional enactments only when such enactments conflict with the Constitution, must enforce the intent of Congress irrespective of whether the statute conforms to customary international law.

Lombardo, 2007 WL 4404641 at *14 citing Guaylupo-Moya v. Gonzalez, 423 F.3d 121, 135-36 (2nd Cir. 2005).

Under this rule the *Charming Betsy* canon has no application to United States statutes concerning the GATS and its dispute resolution process. Likewise, the principle of international comity[3], when applied as a rule of statutory construction, "has no

[3] "Analysis of comity often begins with the definition proffered by Justice Gray in Hilton v. Guyot, 159 U.S. 113, 163-164, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1985): "'Comity,'

application when Congress has indicated otherwise." Lombardo, 2007 WL 4404641 at *14 quoting In Re: Maxwell Communication Corp., 93 F.3d 1036, 1047 (2nd Cir. 1996). Congress has made its intent crystal clear not only in the legislative history of the GATS but in the language of the implementing statutes.

Defendants claim that the *Charming Betsy* doctrine and the principle of international comity requires that the Wire Act be construed as to lack extraterritorial application. First, the Superseding Indictment does not require the extraterritorial application of § 1084. The Wire Act's prohibitions apply to the transmission as well as the reception of bets and betting information. United States v. Reeder, 614 F.2d 1179, 1184-85 (8th Cir. 1980); see also United States v. Pezzino, 535 F.2d 483, 484 (9th Cir.) (per curiam), cert. denied, 429 U.S. 839 (1976); United States v. Sklaroff, 506 F.2d 837, 839 (5th Cir.), cert. denied, 423 U.S. 874 (1975); United States v. Tomeo, 459 F.2d 445, 446-47 (10th Cir.), cert. denied, 409 U.S. 914 (1972). All the alleged conduct of the defendants, that is, all the communications alleged in the Superseding Indictment were either initiated or terminated in the United States. Therefore, no extraterritorial application of the statute is required.

Furthermore, to the extent that defendants argue that §1084 does not apply to Internet gambling because the Internet did not exist when the Wire Act was enacted, the clear language of the statute refutes this position:

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in the legal sense, is neither a matter of absolute obligation, on one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Although Hilton addressed the degree to which a foreign judgment is conclusive in a court of the United States, the principle expressed is one of broad application." In re Maxwell Communication Corp., 93 F.3d 1036, 1046 (2nd Cir. 1996).

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

Title 18 U.S.C. § 1081. The definition clearly and absolutely encompasses Internet computer communications. See Lombardo, 2007 WL 4404641 at *15; United States v. Cohen, 260 F.3d 68, 74-75 (2nd Cir. 2001) (upholding Wire Act's application to online gambling), cert. denied, 536 U.S. 922 (2002); United States v. Corrar, 512 F. Supp. 2d 1280, 1289 (N.D. Ga. 2007) (same).

To the extent that defendants argue that the *Charming Betsy* canon should be applied to the Uruguay Round authorizing statutes to require the Department of Justice to comport with "binding WTO norms," their arguments must fail. As stated above,[4] the statement of administrative action states: "[s]ection 102(a)(1)[19 U.S.C. § 3512(a)(1)] clarifies that no position of the Uruguay Round Agreements will be given effect under domestic law if it is inconsistent with federal law, including provisions of federal law enacted or amended by the bill." Statement, 1994 WL 16137731 at 4050, 1994 U.S.C.C.A.N. at 4050. Further, "neither federal agencies nor state governments are bound by any finding or recommendation included in [WTO] reports. In particular, panel reports do not provide legal authority for federal agencies to change their regulations or procedures or refuse to reinforce particular laws or regulations." Statement, 1994 WL 16137731 at 4318, 1994 U.S.C.C.A.N. at 4318.

[4] 19 U.S.C. § 3512(d) states that the statement of administrative action shall be regarded as the authoritative expression of the U.S. concerning the interpretation and application of the URAA and the URA Act in any judicial proceeding.

The defendants also argue that the passage of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), 31 U.S.C. §§ 5361-6367 is a concession by the United States that the WTO rulings invalidated pre-existing federal statutes that prohibit Internet gambling and thus the instant charges constitute an *ex post facto* prosecution. These claims are refuted by the UIGEA itself:

> New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders. ...
> No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.

31 U.S.C. § 5361(a)(4) and (b). The UIGEA addresses only the mechanisms used to fund Internet gambling. It makes no changes to pre-existing law.[5]

For the foregoing reasons, defendants' Motion to Dismiss on the ground that this prosecution is prohibited by the *Charming Betsy* canon or principles of international comity should be denied.

C. THE RULE OF LENITY

Defendants also claim that the charges against them should be dismissed because the statements of the United States Trade representative show that the status of Internet gambling was uncertain and thus the rule of lenity should be applied to their benefit. The rule of lenity states that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." United States v. Lanier, 520 U.S. 259, 266 (1997). However, the rule of lenity only applies if a statute is ambiguous. United States v. Clawson,

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[5] The cases cited by defendants in support of their position are cases involving self-executing treaties. They are inapplicable here.

408 F.3d 556, 558-59 (8th Cir. 2005) ("[T]he rule of lenity only applies if there is a grievous ambiguity or uncertainty in the language or structure of a statute.") See also United States v. Newsome, 409 F.3d 996, 999 (8th Cir.) (same), cert. denied, 546 U.S. 953 (2005); United States v. Kirchoff, 387 F.3d 748, 752-53 (8th Cir. 2004) (same), cert. denied, 545 U.S. 1130 (2005); United States v. Andrews, 339 F.3d 754, 758, n.3 (8th Cir. 2003) (same); United States v. Pherigo, 327 F.3d 690, 697 (8th Cir.) (same), cert. denied, 540 U.S. 960 (2003); United States v. Warren, 149 F.3d 825, 828 (8th Cir. 1998) ("Thus we will not 'blindly incant the rule of lenity to "destroy the spirit and force of the law which the legislature intended to [and did] enact"'" citing Huddelston v. United States, 415 U.S. § 814, 832 (1974) quoting American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907).

Defendants argue that §§ 1084, 1952 and 1955 are ambiguous in light of the WTO rulings, not that the statutes are inherently or intrinsically ambiguous or are insufficient to give notice of the prohibited conduct. The plain reading of the statutes allows "ordinary people [to] understand what conduct is prohibited in a manner that does not encourage arbitrary and discriminatory enforcement." United States v. Sheikh, 367 F.3d 756, 764 (8th Cir. 2004)[6]. The Second Circuit specifically rejected a rule of lenity defense under 18 U.S.C. 1084 in United States v. Cohen, 260 F.3d 68 (2nd Cir. 2001); see also United States v. Corrar, 512 F. Supp 2d 1280, 1289 (N.D. Ga. 2007)

Because the statutes at issue are not ambiguous, the Motions to Dismiss on the ground that the rule of lenity should be applied should be denied.

D. ENTRAPMENT BY ESTOPPEL

[6] In its consolidated Response, (Doc. 514 at 33, n. 35) the government proffers evidence that defendants, particularly Lori Kaplan Multz and Monica Lenis who raise this argument, had actual knowledge that their conduct was illegal.

Other defendants[7] also claim an ambiguity was created in the federal statutes under which they are charged by the WTO treaty and rulings. As shown above, there is no ambiguity in the statutes and pursuant to 19 U.S.C. § 3512, the defendants have no standing to assert protection under any WTO treaty or ruling.

Defendants claim their rights to due process and fundamental fairness have been violated by "entrapment by estoppel." Even if the court considers WTO litigation as applying to this case, the alleged "ambiguity" did not cause a violation of the defendants' rights.

The Eighth Circuit has made it clear that entrapment by estoppel "arises when a government official tells a defendant that certain conduct is legal, and the defendant commits what otherwise would be a crime in reasonable reliance on the official representation." United States v. Parker, 267 F.3d 839, 844 (8th Cir. 2001), cert. denied, 535 U.S. 1011 (2002); United States v. Ray, 411 F.3d 900, 903 (8th Cir.) (same), cert. denied, 546 U.S. 955 (2005) ; United States v. Patient Transfer Service, Inc., 413 F.3d 734, 743 (8th Cir. 2005) (same). In order to assert an entrapment by estoppel defense an affirmative misrepresentation by the government must be identified. Hood v. United States, 342 F.3d 861, 865 (8th Cir. 2003) (defendant must demonstrate an affirmative misrepresentation by the government), cert. denied, 540 U.S. 1163 (2004); United States v. Benning, 248 F.3d 772, 775 (8th Cir.), cert. denied, 534 U.S. 922 (2001); United States v. Achter, 52 F.3d 753, 755 (8th Cir. 1995).

The defendants allege the government misled them but they do not identify any affirmative misrepresentation upon which they rely. Although defendants state the

[7] William Hernan Lenis, William Luis Lenis, Manny Lenis and Neil Kaplan filed virtually identical Motions.

government has been inconsistent in its treatment of Internet gambling, it is clear that the government's position has always been that Internet gambling is illegal in the United States. The assertions of the WTO panel and the Appellate Body concerning United States laws cannot constitute a statement of the United States government required to establish entrapment by estoppel and thus the defense of entrapment by estoppel is unavailable to the defendants. United States v. Austin, 915 F.2d 363, 367 (8th Cir. 1990) (defendants have burden of proof to establish they were misled by the statements of a government official into believing their conduct was unlawful), cert. denied, 499 U.S. 977 (1991).[8] The Motions to Dismiss on grounds of entrapment by estoppel should be denied.

III. CONCLUSION

The defendants rely on the GATS treaty and the rulings of the WTO Appellate Body as a defense to the charges. This treaty does not create private or individual rights. It does not directly impact domestic law. The defendants have no standing under the GATS to challenge this prosecution. The federal statutes authorizing the Uruguay Round Agreements preclude reference to the GATS, WTO panel reports or appellate body rulings in determining the legality, application and scope of United States statutes. The defendants' various Motions to Dismiss the Superseding Indictment on the ground that the instant prosecution constitutes a violation of United States treaty obligations should be denied.

Accordingly,

[8] Again, in its Consolidated Response, Doc. 514 at n. 36, the government proffers evidence that William Hernin Lenis, Neil Kaplan and Manny Lenis had actual knowledge that their conduct was illegal.

IT IS HEREBY RECOMMENDED that the Motion to Dismiss the Superseding Indictment for Violations of U.S. Treaty Obligations filed by William Hernin Lenis be **DENIED** [Doc. 174]; Monica Lenis be **DENIED** [Doc. 179]; Lori Beth Kaplan Multz be **DENIED** [Doc. 225]; Neil S. Kaplan be **DENIED** [Doc. 237]; DME Global Marketing & Fulfillment, Inc. be **DENIED** [Doc. 243]; Tim Brown be **DENIED** [Doc. 252]; William Luis Lenis be **DENIED** [Doc. 261]; Manny Gustavo Lenis be **DENIED** [Doc. 266]; David Carruthers be **DENIED** [Doc. 270 at p. 30-38].

IT IS FURTHER RECOMMENDED that the Supplemental Motion filed by Monica Lenis be **DENIED** [Doc. 333 and 356]; William Hernin Lenis be **DENIED** [Doc. 343]; Neil S. Kaplan be **DENIED** [Doc. 355]; Tim Brown be **DENIED** [Doc. 357]; Manny Gustavo Lenis be **DENIED** [Doc. 359]; Lori Beth Kaplan Multz be **DENIED** [Doc. 362]; William Luis Lenis be **DENIED** [Doc. 363]; David Carruthers be **DENIED** [Doc. 364].

IT IS FURTHER RECOMMENDED that the Motion to Dismiss the Superseding Indictment for Violation of U.S. Treaty Obligations filed by Gary Kaplan be **DENIED** [Doc. 257] and Penelope Tucker be **DENIED** [Doc. 474].

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

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

Dated this 18th day of July, 2008.