

Board. Plaintiff's claim for conversion of comp points also stands as it clearly meets the requirements set forth by the Nevada Supreme Court.

MEMORANDUM OF POINTS AND AUTHORITIES

A suit may be dismissed under Rule 12(b)(6) only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Defendants have failed to make this required showing and, to the contrary, facts and law support each of Plaintiff's claims.

I. ALL ELEMENTS OF RICO PROPERLY PLED

Defendants argue that Plaintiff's Original Complaint fails to properly plead the existence of “racketeering activity,” a “pattern of racketeering activity,” and “collection of an unlawful debt.” Defendants' Motion to Dismiss, pp. 5-11. Each such element of Plaintiff's RICO claim has been pled in accordance with applicable law and is supported by facts which would entitle Nelson to relief. For ease of reference, each element attacked by Defendants is addressed separately below.

A. “Racketeering Activity” Pled In Accordance with Applicable Standards

For purposes of this lawsuit, “racketeering activity” consists of “any act or threat involving . . . gambling . . . which is chargeable under state law and punishable by imprisonment for more than one year.” 18 U.S.C. § 1961(1). Defendants contend the predicate acts pled by Nelson fail to meet the definition of “racketeering activity.” Defendants' Motion to Dismiss, p. 5, lines 11-13. Specifically, Defendants argue that the state laws Nelson cites as predicate acts of racketeering activity—various provisions of Chapter 465 of the Nevada State Statutes—do not apply because they are limited in application only to violations that occur in the course of a gambling game. Defendants' Motion to Dismiss, pp. 6-7. Defendants' contention is contrary to a

plain reading of the statutes and thus must be rejected. Each statute is addressed specifically below.

1. Section 465.070.3

Nelson properly asserted a violation of § 465.070.3 by alleging facts showing that Defendants, by failing to make the wire transfers as promised and instead holding onto the sums Defendants promised would be transferred, engaged in the following unlawful activity: “to claim, collect or take, or attempt to claim, collect or take, money or anything of value in or from a gambling game, with intent to defraud, without having made a wager contingent thereon.” NEV. REV. STAT. § 465.070.3. There is no question that the money to be transferred came “from a gambling game,” in the words of the statute. The wire transfers at issue in this case were necessitated by Plaintiff’s gambling winnings and were in fact to be made as part of Defendants’ operations, hence the connection to “a gambling game.” Plaintiff’s claim focuses on the Defendants’ actions of collecting, taking, or attempting collect or take the money that was supposed to be sent by wire transfers to Plaintiff’s account in Houston. Contrary to Defendants’ contention, there is no allegation, and Plaintiff does not contend, that any gambling game itself was unlawfully conducted.

2. Section 465.070.4

The same analysis applies to the other sections of Chapter 465. Plaintiff has properly asserted a claim under § 465.070.4 by alleging that Defendants’ failure to make the wire transfers as promised and instead offering up a total of \$235,000 for play which Plaintiff thought had been safely transferred to Houston served to “knowingly to entice or induce [Plaintiff] to go to any place where a gambling game is being conducted or operated in violation of the provisions of this chapter, with the intent that the other person play or participate in that gambling game.” NEV.

REV. STAT. § 465.070.4. This statute has nothing to do with any specific gambling game, but rather the surrounding circumstances, which is exactly what is at issue in this case. As the Original Complaint makes clear, Plaintiff would not have been enticed to stay and play the \$235,000 back into Defendants' coffers had Defendants made the wire transfers as they had promised. Plaintiff's Original Complaint, pp. 5-7.

3. Section 465.075.3

Nelson properly stated a claim under § 465.075.3 by alleging that Defendants' use of data-mining and its detailed computer database of Nelson's habits constituted the "use [of] . . . [a] device to assist in analyzing the probability of the occurrence of an event relating to the game." NEV. REV. STAT. § 465.075.3. The phrase "relating to the game" is key, as it shows that the statute covers not just a game, but surrounding circumstances such as, in this case, the wire transfers. The "device" Defendants used is their computer database and its Players Club and associated data-mining software.

4. Section 465.080.1

Nelson properly alleged a violation of § 465.080.1 by asserting that Defendants gave him false receipts for the wire transfers they promised to make but did not. Such false receipts for wire transfers are "counterfeit wagering instruments" and thus violate NEV. REV. STAT. § 465.080.1. Although Defendants assert that this section only extends to the use of counterfeit debit instruments in a gambling game, that is not what the statute says. The statute specifically makes unlawful the use of "counterfeit wagering instruments" in connection with "associated equipment." Nelson contends that the casino's computerized player-tracking system and its wire-transfer equipment constitutes "associated equipment." By giving Nelson false receipts for wire

transfers and also giving false computer reports showing that the wire transfers had been made, Defendants gave Nelson “counterfeit wagering instruments.”

5. Section 465.083 and 465.015.1(c)-(d)

Nelson contends Defendants have engaged in “cheating” as that term is defined by § 465.083. That section uses the defined term “cheat” which, in relevant part, “means to alter the . . . criteria which determine . . . the value of a wagering instrument; or the value of a wagering credit.” NEV. REV. STAT. § 465.015.1(c)-(d). Defendants cheated by altering the criteria for sending a wire transfer by contending after-the-fact that wire transfers need not be made immediately and may be delayed several days. Original Complaint, p. 11, paragraph 25.e.

6. 18 U.S.C. § 1343

Defendants contend Nelson has failed to meet the pleading standard for alleging wire fraud as a RICO predicate act.¹ In support of this contention, Defendants cite to *Camp v. Pacific Financial Group*, 956 F.Supp. 1541 (C.D.Cal. 1997). The Original Complaint meets every element addressed in *Camp*.

Nelson has alleged “(1) a scheme or artifice to defraud.” *Camp* at 1550. Nelson specifically pled as follows:

The acts of the Defendants that violate this section include obtaining possession of \$235,000 over a period of days by falsely promising to transfer that sum of money pursuant to Nelson’s wiring instructions; upon information and belief moving the money to a separate account in the name of MGM Mirage so that it appeared the \$235,000 had in fact been transferred; using Defendants’ Players Club and other customer information to determine that Nelson would use the \$235,000 to gamble at the Casino if returned to him in cash; and then on the last day of Nelson’s trip obtaining recovery of the entire \$235,000 by advising Nelson that it was available in cash, knowing full well that he would gamble it all back into Defendants’ coffers.

¹ Nelson acknowledges that 18 U.S.C. § 1343 is once incorrectly referenced in paragraph 27 as mail fraud and that he is not asserting mail fraud, only wire fraud. There is no dispute that the wire fraud statute is within those enumerated by RICO as possible predicate acts. 18 U.S.C. § 1961(1)

Plaintiff's Original Complaint, pp. 11-12, paragraph 27.a. The foregoing clearly alleges facts constituting a "scheme or artifice to defraud."

The quoted language also meets the second required element, that a plaintiff plead "(2) use of United States wires or interstate wires." *Camp* at 1550. Although specific mention of the exact wires used is not mentioned, the quoted language is clearly referring to the wires used in "moving the money to a separate account in the name of MGM Mirage so that it appeared the \$235,000 had in fact been transferred" and the wires used to look up the computerized "Players Club and other customer information to determine that Nelson would use the \$235,000 to gamble at the Casino if returned to him in cash." These allegations echo those made in pages 5-6 of the Complaint, paragraph 15.

The final element is "(3) specific intent to defraud." This element has also clearly been met, both in the paragraph quoted above and also in paragraph 17. Defendants' specific intent to defraud is manifested "by falsely promising to transfer" amounts totaling \$235,000, as well as by "knowing full well that [Nelson] would gamble it all back into Defendants' coffers." *See* Plaintiff's Original Complaint, pp. 6-7 and pp. 11-12, paragraph 27.a.

Plaintiff also alleged "the *time, place, and specific content of the false representations* as well as the identities of the parties to the misrepresentations." *Camp* at 1551. The time is the last day of Nelson's trip, February 6, 2004. Plaintiff's Original Complaint, p. 5, paragraph 6. The place is the casino "cage." *Id.* The specific content of the false representations is found in the receipts for the never-executed wire transfers and the accompanying statements. Plaintiff's Original Complaint, p. 5, paragraph 15. The persons involved were personnel of the "cage." *Id.* Although the names are not known at present, Plaintiff has supplied sufficient information to allow Defendants to identify them from payroll records which will show who worked at the cage

between February 2 and 6, 2004, and can match employees to the handwriting on the wire transfer receipts.

B. “Pattern of Racketeering Activity”

Defendants contend Nelson has failed to meet the pleading standard for a “pattern of racketeering activity.” Defendants’ Motion to Dismiss, pp. 9-11. However, the principal case Defendants cite actually holds to the contrary. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). To begin with, there is no question that Nelson’s pleading meets the actual terms of RICO:

Defendants have engaged in a “pattern of racketeering activity” because they have engaged in “at least two acts of racketeering activity” within the past ten years. 18 U.S.C. § 1961(5). The “acts of racketeering activity” are those set forth in paragraphs 25 through 27 and 29 through 30.”

Plaintiff’s Original Complaint, pp. 12-13. By its very terms, this allegation meets RICO’s minimum requirements for “pattern of racketeering activity.”

In elaborating on the requirement to show a “pattern of racketeering activity,” the Supreme Court expressly stated:

a “pattern” is an “arrangement or order of things and activity.” 11 Oxford English Dictionary 357 (2d ed. 1989), and the mere fact that these are a number of predicates is no guarantee that they fall into any arrangement or order. It is not the number of predicates but the relationship that they bear to each other or to some external organizing principle that renders them “ordered” or “arranged.”

* * * *

The legislative history, which we discussed in *Sedima, supra*, 473 U.S., at 496, n. 14, 105 S. Ct., at 3285, n. 14, shows that Congress indeed had a fairly flexible concept of a pattern in mind. A pattern is not formed by “sporadic activity,” S. Rep. No. 91-617, *supra*, p. 158 (1969), and a person cannot “be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses,” 116 Cong. Rec., at 18940 (1970) (Sen. McClellan). Instead, “[t]he term ‘pattern’ itself requires the showing of a ‘relationship’ between the predicates, *ibid.*, and of “the threat of continuing activity,” *ibid.*, quoting S. Rep. No. 91-617, at 158. “It is the factor of *continuity plus relationship* which

combines to produce a pattern.” *Ibid.* (emphasis added). RICO’s legislative history reveals Congress’ intent that 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. at 238-239. The Court makes clear that determining the existence of a “pattern of racketeering activity” is not a simplistic, cookbook process.

The facts forming the basis of Nelson’s RICO claim clearly form a “pattern of racketeering activity.” On at least two occasions Defendants failed to execute wire transfers with the knowledge that, by doing so, they would effect their recovery of the money to be sent out by wire transfer. The two wire transfers are clearly related because they both pertain to Nelson. Defendants’ actions pose a threat of continuing activity because they were not isolated incidents incapable of repetition. To the contrary, the methods and means employed by Defendants can, and Nelson believes are, used to keep winnings on Defendants’ premises and out of the hands of patrons. Defendants’ acts of promising to make the wire transfers, then not making them, then transferring the money to a separate account so that Plaintiff was informed his account was empty, and then returning the money to Nelson at a time and place Defendants’ knew he would gamble it back to Defendants’ benefit, and then entirely cutting off Nelson from his comps and other rights and benefits once he complained about it, all demonstrate an intentional and well-oiled process “that by its nature projects into the future with a threat of repetition.” *H.J. Inc.* at 241. Once could be a mistake. Twice shows repetition. The complexity of Defendants’ acts, particularly the act of transferring the money out of Nelson’s account so as to trick him into thinking the money had in fact been transferred when it had not, is such that “a threat of continuity of racketeering activity might be established at trial by showing that the alleged [intentional false representations of wire transfers] were a regular way of conducting [Defendants’] ongoing business.” *H.J. Inc.* at

250. The extreme act of ending a ten-year relationship as a reaction to Nelson's inquiry about Defendant's behavior is further evidence in support of the pattern and threat of continued activity.

The cases cited by Defendants do not support their contention that Nelson has failed to show a "pattern of racketeering activity." To the contrary, the facts pled by Nelson can and do arise in Defendants' business daily, not just in a limited context such as a strike. *Steam Press Holdings v. Hawaii Teamsters*, 302 F.3d 998, 1011 (9th Cir. 2002). Nor are the facts at hand like the sole, isolated shipment at issue in *Schreiber Dist. v. Serv-Well Furn. Co.*, 806 F.2d 1393 (9th Cir. 1986), the one-time statement of fraud regarding a single boxing match in *Medallion Television Ent. V. SelectTV of California*, 833 F.2d 1360 (9th Cir. 1988), the punishment of an employee writing critical articles about his employer in *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992), or efforts to collect a finite and unique judgment as in *Turner v. Cook*, 362 F.3d 1219 (9th Cir. 2004). The "pattern of racketeering activity" at issue in the case is one which exists every day of Defendants' operation, which is not unique to Nelson's situation, which arises every time a patron asks Defendants to wire out gambling winnings, and poses a threat of continued activity.

C. "Collection of Unlawful Debt"

Defendants' contention that Nelson's claim based on Defendants "collection of an unlawful debt" should be dismissed is based on Defendants' belief that all of Nelson's claims have been adjudicated by the Nevada State Gaming Control Board. Defendants' Motion to Dismiss, p. 11. Defendants' argument is essentially one of jurisdiction, is incorrect, and is addressed more fully in section II, *infra*.

An "unlawful debt" in the context of RICO means "a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, [or] a State or political

subdivision thereof . . . and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, [or] a State or political subdivision thereof” 18 U.S.C. § 1961(6). Defendants collected an unlawful debt by recovering the \$235,000 which they had promised to wire to Nelson’s account in Houston but did not. The Casino’s unlawful failure to “promptly redeem” Nelson’s wire transfers totaling \$235,000 allowed the Defendants to recover the \$235,000 they owed to Nelson because, as Defendants knew from the data maintained regarding Nelson’s gaming habits, Nelson predictably gambled the \$235,000 back to the benefit of Defendants. The unlawful gambling activity giving rise to this situation includes Defendants’ failure to promptly redeem Nelson’s chips in violation of § 12.060.2(c) of Nevada Gaming Regulations.

II.
THIS COURT HAS PROPER JURISDICTION

Defendants contend Nelson is attempting to recover a gaming debt and that such is subject to the exclusive jurisdiction of the State Gaming Control Board. *See* Defendants’ Motion to Dismiss, p. 12, lines 3-6. Defendants are incorrect, as the claims in this lawsuit, as well as the facts upon which they are based, are outside of the Nevada State Gaming Control Board’s jurisdiction. The statute cited by Defendants, § 463.362, affords the State Gaming Control Board jurisdiction over disputes “as to alleged winnings, alleged losses or the manner in which a game is conducted.” NEV. REV. STAT. § 463.362. Those are not at issue here. Nelson’s complaint is about wire transfers, not the game he played (craps), and the Defendants’ intentional conduct in failing to effect the wire transfers as promised. Although the parties may reasonably argue about the nature and extent of damages from the failure to effect the wire transfers, there is no question that the source of liability is the Defendants’ failure to effect the wire transfers. The Board itself recognized that Nelson’s complaints were not within its purview. It concluded that Plaintiff’s

“complaints alleged unsuitable methods of operation, i.e. not gaming matters as defined by the Nevada Revised Statutes.” Defendants’ Motion to Dismiss, Exhibit 1, p. 2. That letter further stated that the decision rendered “is not subject to a review by a Hearing Examiner.” *Id.* Nelson has properly and patiently pursued his claim through each possible jurisdiction. At every turn Defendants have contended another jurisdiction was the proper venue for his concerns. Finally, Defendants arguments have come full circle, leading them to argue that jurisdiction is proper in a venue that Nelson has already tried and which has rejected his claim for lack of jurisdiction. Defendants’ contention that this case lacks jurisdiction is wholly without merit. In fact, the two cases Defendants cite for their position have nothing in common with this case. Both involved claims for unpaid slot-machine winnings, clearly within the purview of § 463.362. *Erickson v. Desert Palace, Inc.*, 942 F.2d 694 (9th Cir. 1991), *cert. denied* 503 U.S. 937 (1992); *Devon v. Unbelievable, Inc.*, 820 F.Supp. 528 (D. Nev. 1993), *aff’d* 29 F.3d 631 (9th Cir. 1994). No authority exists to support the contention that this court lacks jurisdiction or that exclusive jurisdiction lies with the Nevada State Gaming Control Board, an entity that has already rejected jurisdiction. To the contrary, the Ninth Circuit holds: “Any non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed on the merits under Rule 12(b)(6). *Bollard v. California Province of the Society of Jesus*, 196 F.3d 940, 951 (9th Cir. 1999).

III. **CONVERSION**

Defendants argue that Nelson can not complain of conversion of his comps because it was lawful to deprive him of his comps pursuant to Defendants’ self-limit access policy. This argument misapprehends the nature of Nelson’s claim of conversion and Defendants’ wrong. Nelson has controlled his gambling for many years by playing with cash and even gave written

instructions to Defendants not to let him play on credit. Defendants consented to this self-limit access arrangement and made significant sums of money off of Nelson. It was only after Nelson complained of the unlawful acts that Defendants applied a different self-limit access program to Nelson which was for the sole purpose, and had the effect of, depriving him of his comps. “Conversion is ‘a distinct act of dominion wrongfully exerted over another’s personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights.’” *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606 (2000), *citing Wants v. Redfield*, 74 Nev. 196, 198 (1958). Defendants converted Nelson’s comps, which were personal property giving him tangible and repeatedly exercised rights and benefits more fully described in the Complaint. Plaintiff’s Original Complaint, pp. 2-4. Defendants cannot avoid a lawful claim of conversion by unilaterally and after-the-fact invoking a program that Nelson never signed up for, never consented to, and never needed.

IV. **CONCLUSION**

Plaintiff believes Defendants’ Motion to Dismiss must be denied. In the alternative, Plaintiff asks this court for permission to replead.

Respectfully submitted,

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/s/ Katherine T. Mize

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