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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CARDROOM INTERNATIONAL, LLC, Plaintiff and Appellant, v. MARK SCHEINBERG et al., Defendants and Respondents.	B251313 (Los Angeles County Super. Ct. No. SC114330)

APPEAL from an order of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed in part and reversed in part with directions.

Sanais and Cyrus M. Sanai for Plaintiff and Appellant.

Payne & Fears and Sean A. O'Brien for Defendants and Respondents Mark Scheinberg and Oldford Group, Ltd.

Cozen O'Connor, Erik L. Jackson, Nathan Dooley; Cozen O'Connor and Ronald F. Wick for Defendants and Respondents

Tiltware, LLC, Chris Ferguson, Pocket Kings, Ltd., Erik Seidel and Andy Bloch.

Gibson, Dunn & Crutcher, Maurice Suh, Jay Srinivasan and Elizabeth M. Burnside for Defendant and Respondent Philip S. Gordon.

Chesnoff & Schonfeld and Richard A. Schonfeld for Defendant and Respondent Phil Ivey.

Dykema Gossett, Craig N. Hentschel and Vivian I. Kim for Defendant and Respondent Perry Friedman.

Law Offices of Neil M. Sunkin and Neil M. Sunkin for Defendant and Respondent John Juanda.

INTRODUCTION

Plaintiff Cardroom International, LLC (Cardroom) appeals from an order sustaining without leave to amend the demurrer of defendant Tiltware, LLC (Tiltware) to Cardroom's second amended complaint and dismissing the action in its entirety. The order also resolved specially appearing defendant Phil Ivey's (Ivey) joinder in Tiltware's demurrer, motion to quash and demurrer; defendant Philip S. Gordon's (Gordon) demurrer; defendant Chris Ferguson's (Ferguson) joinder in the demurrers filed by Tiltware, Ivey and Gordon; and motions to quash service of summons and complaint by specially appearing defendants Pocket Kings, Ltd. (Pocket Kings), Erik Seidel (Seidel), Andy Bloch (Bloch) and Perry Friedman (Friedman).

Cardroom sued the above defendants and others for violations of the Racketeer Influenced and Corrupt Organizations

Act (RICO; 18 U.S.C. § 1961 et seq.), the Florida Antitrust Act of 1980 (Fla. Stats., § 542.15 et seq.), and the Cartwright Act (Bus. & Prof. Code, § 16700 et seq.) in connection with their operation of Internet poker sites and provision of software and services for operating poker games to other entities. The gravamen of Cardroom's second amended complaint was that due to defendants' illegal activities, Cardroom was placed at a competitive disadvantage and lost business and business opportunities.

On appeal, Cardroom challenges the trial court's determination that it could not state a cause of action. Cardroom also challenges rulings with respect to defendants who filed joinders in Tiltware's demurrer and defendants who specially appeared and challenged the court's jurisdiction over them. We affirm.

FACTUAL BACKGROUND[1]

A. *Background Facts as Alleged in the Operative Second Amended Complaint*

1. *The Parties*

Cardroom is a Florida limited liability company operating in both Florida and California. It "owns a fully developed, mature and proven software system" for playing poker on the Internet, either for real money or for points.[2]

Defendant Pokerstars Group (Pokerstars) was founded by Isai Scheinberg in 2001 and is headquartered on the Isle of Man. Pokerstars included defendants Oldford Group, Ltd., Rational Entertainment Enterprises Ltd., Pyr Software Ltd., Stelekram Ltd. and Sphene International Ltd. Isai Scheinberg is president and his son, Mark Scheinberg, is an executive of Pokerstars. Pokerstars operated a website, pokerstars.com, through which it

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1 On appeal from an order of dismissal following the sustaining of a demurrer without leave to amend, """[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]"' (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

2 Two types of Internet poker play are involved in the action. One is referred to as "real money" poker, in which players play with and for money. The other is fantasy or "play money" poker, in which players may play for points or other rewards but do not play for money.

offered “real-money peer-to-peer poker games to United States and foreign customers until April 15, 2011.”[3] Thereafter, Pokerstars continued to offer real money Internet poker games to foreign customers and play money Internet poker games to customers in the United States.

Defendant Full Tilt Poker (Full Tilt) is comprised of a number of individuals and companies. The individuals include defendants Ferguson and Rafe Furst (Furst), residents of Los Angeles County; Raymond Bitar (Bitar), who is under house arrest in Los Angeles County following his indictment in federal district court in New York; John Juanda (Juanda), a resident of Los Angeles County who fled to Japan; Erick Lindgren (Lindgren), a resident of San Diego County; Friedman, Seidel, Howard Lederer (Lederer), Michael Matusow and Allen Cunningham, residents of Nevada; Gordon, a resident of Washington; Gus Hansen, a citizen of Denmark; and Patrik Antonius, a citizen of Finland. The companies associated with Full Tilt include defendants Tiltware, a California company; Pocket Kings, a company based in the Republic of Ireland and owned by Tiltware; Pocket Kings Consulting Ltd., an Irish company; Kolyma Corporation A.V.V., a Curacao company; Filco Ltd.; Vantage Ltd.; Ranston Ltd.; Oxalic Ltd.; Orinic Ltd.; and Mail Media Ltd.

Some of the Full Tilt individuals were originally part of a software development company which developed software for

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[3] On April 15, 2011, a federal grand jury in New York indicted a number of the defendants for conspiracy to violate the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA; 31 U.S.C. § 5361 et seq.).

online poker play. In 2003 they obtained a licensing agreement allowing them to use and transfer the software. They founded Tiltware in Los Angeles in 2003, and the other Full Tilt companies were established between 2004 and 2010. Full Tilt operated a website, fulltiltpoker.com, which "provided real-money Internet peer-to-peer poker games to United States . . . customers until April 15, 2011."

Cardroom alleges the Full Tilt companies operated what was in essence "a 'poker Ponzi scheme,'" siphoning off money from the Internet poker players to the various Full Tilt companies, then laundering it and transferring it to the various Full Tilt Owners. Full Tilt "collaps[ed] after the United States indicted . . . Bitar and took possession of [Full Tilt's] United States . . . website, and the Alderney Gaming Commission revoked its licenses [due to] fraud." In 2012, Pokerstars acquired the operating assets of the Full Tilt companies and thereafter operated the fulltiltpoker website.

Defendant Nelson Burtnick (Burtnick) was employed first by Pokerstars and then by Full Tilt. "He served as the linchpin and coordinator between" the two groups of companies. He pled guilty to assisting fraud by Full Tilt and is awaiting sentencing in New York.

2. *Pokerstars and Full Tilt's Online Poker Operations*

In traditional casinos, the players play poker and other card games against one another. The owner has no stake in the outcome of the card game but instead charges a fee to play each hand. To play poker for real money at online poker rooms, such as pokerstars.com and fulltiltpoker.com, a player signed up for an account online and sent money to a bank account, online payment system or credit card processor. After a deduction for transfer fees, the money would be received by the online poker room operator. The player appeared to other players in the online poker room as an "avatar" with a screen name chosen by the player.

Cardroom alleges the fulltiltpoker.com website, as operated by Full Tilt, was not a legitimate real money Internet peer-to-peer poker room because the owners participated in the outcome of the game. They did this in two ways: First, some of the owners were well-known professional poker players who played on the website themselves. Second, they used robots—avatars controlled by computer programs—to fill tables and earn money from less skilled players. That the professionals played on the website was heavily publicized and a marketing strategy; that they were also owners of the website and played using Full Tilt money was not known by other players on the website.

In 2003, the Department of Justice advised the National Association of Broadcasters that interstate advertising of illegal Internet gambling was a criminal act. It subsequently confiscated funds received for advertising an online poker website.

Cardroom alleges Pokerstars in response created a new website, pokerstars.net, offering play money, or "fantasy," Internet poker games. It functioned as a promotional tool, interesting players in Internet poker, identifying people who might be interested in playing real money Internet poker, and promoting the Pokerstars brand in the United States with media companies afraid of accepting advertising from real money Internet poker businesses. Through advertisements for pokerstars.net, Pokerstars created, packaged and sponsored television programs featuring professional poker players on Fox, ESPN and other networks. Pokerstars represented that its website, pokerstars.net, provided only legal fantasy play. However, while the programs featured the Pokerstars brand, identification of the pokerstars.net website was inconspicuous or nonexistent. This made it likely someone searching for the Pokerstars website would use the more common .com suffix and end up at the pokerstars.com real money website. If a player did go to the pokerstars.net play money website, the play would be subject to constant solicitations to play on the pokerstars.com website. From 2007 to 2011, pokerstars.com was the largest and most successful real money Internet poker website in the world, having over 50 percent of the market and earning $1.4 billion per year.

Full Tilt similarly created a fulltiltpoker.net website and put money into advertising on cable television programs. The fulltiltpoker.com website was the second largest and second most successful real money Internet poker website in the world, with 25 percent of the market and $700 million in revenue each year.

3. *Cardroom's Attempts To Enter the Online Poker Market*

In 2008, Cardroom obtained an Internet peer-to-peer system through a bankruptcy sale "of the software and copyrights of the software development company which the Full Tilt [o]wners . . . originally invested in. Cardroom's software system and the software system used by . . . Full Tilt . . . are derivative works of the same copyrighted code. Cardroom has sought to license its technology both for the real money and play money areas." Cardroom was unsuccessful, however.

Cardroom alleges Pokerstars and Full Tilt had obtained dominant positions in the world online poker market by 2008 because they "successfully cooperated in finding mechanisms for illegally transferring money to and from United States players" and because Full Tilt "created the fraudulent impression of liquidity by employing robots," presumably to make it appear more people were using its site. "By the time Cardroom's system was ready for licensing in late 2008," the demand for a single-site software system such as Cardroom's was nonexistent due to the overwhelming market position of Pokerstars and Full Tilt.

4. *The Grand Jury Indictment and Its Effect on Cardroom*

On April 15, 2011, the United States Attorney for the Southern District of New York unsealed grand jury indictments against Bitar, Burtnick and others for conspiracy to violate and violation of the UIGEA, money laundering, conspiracy to commit bank and wire fraud, and operation of an illegal gambling business in violation of state law. Also unsealed was a civil forfeiture complaint, seeking forfeiture of the assets of Bitar, Burtnick, Full Tilt and Pokerstars. The district court entered forfeiture orders as to millions of dollars worth of assets. On September 20, 2011, the civil complaint was amended to add Ferguson, Furst and Lederer as defendants based on "their operation of the fulltiltpoker.com website as a fraudulent Ponzi scheme."

While the "elimination of the fulltiltpoker.com website and the massive reduction in liquidity for the pokerstars.com website [could have] created a new opportunity for Cardroom," Cardroom contends this opportunity was "imperiled by the actions of the

United States Attorney, who in a misguided effort to assist the victims of the Internet poker Ponzi scheme operated by the Full Tilt [d]efendants in conspiracy with the Pokerstars [d]efendants, allowed the Pokerstars [d]efendants to settle the forfeiture claims by payment of over $500 million to the United States in return for settlement of the forfeiture claims and transfer of the software and certain other assets of the Full Tilt [d]efendants to Pokerstars."

B. *RICO Cause of Action*

1. *Defendants' Schemes for Hiding Internet Gambling Proceeds*

After the passage of the UIGEA in 2006, banks in the United States were not permitted to open bank accounts for Internet gambling businesses or receive proceeds from those businesses. Full Tilt and Pokerstars used deceptive means, Cardroom alleges, in order to have banks in the United States process the proceeds of their Internet gambling businesses.

Credit card companies use a particular transaction code for Internet gambling transactions. The banks which issued the credit cards could—and did, especially after the passage of the UIGEA—decline to authorize transactions bearing the Internet gambling transaction code. Cardroom alleges that to trick the banks into authorizing the transactions, the defendants arranged for their companies to apply incorrect transaction codes to Internet gambling transactions in order to hide the fact the transactions were for Internet gambling. One ploy they used was to create phony online businesses through which they processed the Internet gambling transactions. Because the credit card networks eventually discovered the phony businesses and stopped processing transactions for them, Bitar and Burtnick had a supply of phony merchants defendants could use when one was discovered.

Another ploy allegedly involved the use of prepaid credit, debit or phone cards. From 2007 to 2010, the Scheinbergs, Bitar and Burtnick developed cards that could be loaded with funds from a United States customer's credit card without using an Internet gambling transaction code. The prepaid card could then be used to transfer the funds to Full Tilt and Pokerstars.

Because the credit card networks were constantly working to ferret out attempts to circumvent their rules regarding Internet gambling transactions, the Scheinbergs, Bitar, Burtnick and others developed another method of deceiving United States banks and financial institutions through the use of electronic checks processed through the Automated Clearinghouse system. They found third parties to open bank accounts and process e-check transactions on their behalf using phony company names, for which they were paid higher processing fees, disguising transactions so they appeared legitimate.

By late 2009, following the discovery and collapse of multiple e-check processing systems Full Tilt and Pokerstars were using, and the judicially-ordered seizure of funds held by the processors, Cardroom alleges the Scheinbergs, Burtnick and the Full Tilt managers began exploring a new payment strategy: "transparent processing," which was supposedly invisible to law enforcement. A third party would convince the principals of small, local United States banks in financial difficulty to process Internet gambling transactions in exchange for sizeable fees and other financial benefits.

2. *The Indictment*

The April 15, 2011 indictment charged Bitar, Isai Scheinberg, Burtnick, Full Tilt and Pokerstars with violating 18 United States Code section 1955 (prohibition of illegal gambling businesses) by their ownership and operation of an illegal gambling business. The indictment also charged them with conspiracy to violate 18 United States Code sections 1343 and 1344 (wire fraud, bank fraud) through their use of interstate and international wired communication systems to deceive financial institutions by disguising Internet gambling transactions. It further charged them with conspiracy to violate 18 United States Code sections 1956(a)(2)(A) and 1957 (money laundering, engaging in monetary transactions in property derived from unlawful activity) by transferring funds with the intent to carry on an illegal gambling business and engaging in monetary transactions over $10,000 in criminally derived property from the operation of an illegal gambling business.

While the court entered an order seizing the pokerstars.com and fulltiltpoker.com domain names, the United States Attorney subsequently agreed to allow the companies to use these domains to refund money to United States players. Pokerstars returned substantially all of the funds due its players, but Full Tilt was unable to do so.

3. *Elimination of Competition*

Cardroom alleges Pokerstars and Full Tilt "saw television programs and associated websites as their best means of promoting their gambling services to customers in the United States. In addition, from 2009 onwards the [d]efendants were aware that United States customers were moving to fantasy poker play as confidence in the creditworthiness of the services was being eroded by delays in repaying customers due to fund seizures. The [d]efendants decided that dominance, to the extent possible, of the fantasy poker market should also be obtained."

Toward that end, Cardroom claims Pokerstars and Full Tilt "cooperated in a scheme to defraud cable companies by providing them integrated packages of cable programming, advertising and exclusive software services which the Pokerstars [d]efendants and Full Tilt [d]efendants created and sponsored, which packages would also give the Pokerstars [d]efendants and Full Tilt [d]efendants leverage to exclude other potential competitors in the fantasy poker market from obtaining a platform. The Pokerstars [d]efendants required the cooperation of the Full Tilt [d]efendants, as the Full Tilt [c]ompanies had the majority of well-known professional poker players under exclusive promotional contracts."

Pokerstars and Full Tilt "made written representations to companies owning cable channels such as NBC, Fox, and Disney that the advertisements were not promoting illegal gambling and were not themselves illegal in any way. The representations were made with full knowledge of their falsity. The purpose of making these false representations was, in the case of the components of the integrated packages which were software license agreements, to ensure that no competitor licensor could obtain the agreement by arguing that the agreements were illegal." Further, the representations were "in furtherance of the defrauding of the cable companies, the Full Tilt [d]efendants['] customers, and United States banks, and to injure Cardroom and other competing licensors of software."

Because Pokerstars and Full Tilt's illegal actions "crushed opportunities to license Cardroom's software for real money play outside of the United States, from 2009 onward Cardroom sought to license its software to sports sites in the United States. However, Pokerstars and Full Tilt reached agreements for licensing of their software with the companies owning the espn.com website and several sports-related websites before meetings could be arranged. Cardroom was able to progress discussions with Fox Sports, and would have obtained a license agreement with Fox Sports in 2010 had Pokerstars not linked its agreement to purchase airtime for its poker-related cable television programs, made in conspiracy with Full Tilt [d]efendants, with a demand that it be given the exclusive right to license its software for fantasy poker play on Fox Sports' website."

Cardroom alleges Pokerstars and Full Tilt caused it injury in other ways. "First, by dominating the on-line poker business in the United States from 2008 to 2011, Pokerstars and Full Tilt had a base of players that no international company could easily compete with. . . . Second, the market dominance of the pokerstars.com and fulltiltpoker.com websites meant that investors until April 15, 2011 were highly skeptical of the business prospects of independent software houses seeking to advance and develop software systems for legal on-line poker, given the apparent impunity by which [Pokerstars and Full Tilt] operated their websites in defiance of United States law for half a decade."

After April 15, 2011, "Cardroom's position as a licensor was substantially improved." However, Cardroom alleges Gordon and others who had been part of Full Tilt all too soon "realized the potential for such software and began developing software systems with capabilities similar to those of Cardroom's to compete with Cardroom, using the intellectual property of Full Tilt they appropriated during its collapse." After Full Tilt's demise and the transfer of its assets to Pokerstars, Pokerstars resurrected the fulltiltpoker.com website and began licensing Full Tilt's software, which was allegedly derivative of copyrighted software owned by Cardroom and infringed upon Cardroom's copyright.

Cardroom alleges Pokerstars and Full Tilt were "association[s]-in-fact" constituting criminal enterprises and co-conspirators, which conducted the foregoing pattern of racketeering activity within the meaning of RICO from before 2007 through April 15, 2011. Further, it alleges Pokerstars recommenced its racketeering activities in 2012 by infringing on Cardroom's copyright and "seeking to license the former Full Tilt poker software to the same entities as Cardroom in amounts vastly less than Cardroom can charge." Cardroom's injuries from these activities "include not only out-of-pocket losses but also the income and investment capital that [Cardroom] could have earned but for the conduct" of Pokerstars and Full Tilt's criminal enterprise.

C. *Florida Antitrust Act Cause of Action*

From 2007 to April 15, 2011, Pokerstars and Full Tilt maintained their dominant position in the real money Internet poker market worldwide and in Florida, Cardroom alleges, "because they were the most successful in creating illegal payment processing methods with persons in the United States, and in the case of the Full Tilt [c]ompanies, because they immediately spent player deposits on promotional expenses, in particular sponsorship and promotional agreements with the bulk of the world's professional poker players."

These actions "injured consumers in Florida by fostering [*sic*] on them services which were of inferior quality." In particular, Full Tilt lacked creditworthiness because it was operating its business as a Ponzi scheme, and Pokerstars lacked creditworthiness because it commingled funds from legal and illegal online poker operations, subjecting those funds to repeated seizures by the United States government.

In addition, plaintiff alleges Pokerstars and Full Tilt "used their dominant position in real-money play, maintained by criminal activities, to require their software system with the purchase of airtime or advertising time on broadcast and cable networks in the United States, including without limitation, Fox, ESPN, and NBC, be utilized for fantasy poker play offered on the websites associated with these cable networks. Full Tilt and Pokerstars further directly conspired in the creation of the programs. In particular, the programs created and sponsored by Pokerstars were made with the direct agreement and consent of the Full Tilt [o]wners and the direct participation of the Full Tilt [o]wners who are professional poker players, all of whom appeared in at least one such cable television program distributed in Florida. This made it impossible for Cardroom to license its software to such media companies. With respect to fantasy poker, the [d]efendants' conduct restricted consumer choice of Florida players to three platforms only, those of Full Tilt, Pokerstars, and the Facebook-associated Zynga, thus injuring consumers. . . . The sales of combined package[s] of television programs and compulsory acceptance of an exclusive license was an unreasonable restraint of trade on its own, and because it also sought to further fraudulent conduct of the [d]efendants, was a per se violation of the anti-trust laws."

Although Pokerstars and Full Tilt were "nominally competitors, they directly cooperated in the creation of multiple fraudulent payment processing mechanisms and in the fraudulent, cooperative purchase of cable advertising time and broadcast time linked to the exclusive employment of their respective software systems. The purpose of this conspiracy was to strangle competition in the market for providing on-line poker worldwide in the real-money and fantasy markets" so that when online poker was "explicitly legalized in the United States," they would "have a dominant position in the United States market and in the Florida market."

The defendants' actions also damaged Cardroom, which lost income and investment capital that it "could have earned but for the conduct of the anti-competitive, criminal enterprise" defendants operated.

D. *Cartwright Act Cause of Action*

Cardroom alleges Pokerstars and Full Tilt were able to maintain their dominant positions in the online poker market "because they were the most successful in creating illegal payment processing methods with persons in the United States, including California." Pokerstars and Full Tilt's actions "injured consumers in California by fostering [*sic*] on them services which were of inferior quality, in a state where peer to peer, on-line poker which is not a banking or percentage game is legal." In particular, California consumers were injured because Pokerstars and Full Tilt lacked creditworthiness because of repeated seizures of funds by the United States as a result of mingling of legal and illegal funds.

In addition, Pokerstars and Full Tilt's "sales of combined package[s] of television programs and compulsory acceptance of an exclusive license was an unreasonable restraint of trade on its own, and because it also sought to further fraudulent conduct of the [d]efendants, was a per se violation of the anti-trust laws." Moreover, "[t]he anti-competitive conspiracy and actions taken by the Pokerstars [c]ompanies and Full Tilt [c]ompanies against banks, their customers, and cable television companies were criminal and fraudulent, and therefore per-se violations of the law." Again, the defendants' actions also damaged Cardroom, which lost income and investment capital that it "could have earned but for the conduct of the anti-competitive, criminal enterprise" defendants operated.

PROCEDURAL BACKGROUND

A. *First Amended Complaint and Related Proceedings*

Cardroom filed its original complaint in this action on September 30, 2011 and its first amended complaint on November 9, 2011.

Mark Scheinberg, the Oldford Group, Ltd., Pocket Kings, Ltd., Bitar, Lederer and Friedman specially appeared and filed motions to quash service of summons and complaint based on improper service and lack of personal jurisdiction. Ivey, Seidel, Bloch and Juanda specially appeared and filed motions to quash service of summons and complaint based on lack of personal jurisdiction. Ivey also filed a demurrer claiming the first amended complaint failed to state a cause of action against him, and Cardroom failed to establish the court could exercise jurisdiction over him, because he was a Nevada resident.

Tiltware and Ferguson filed demurrers claiming the first amended complaint failed to state a cause of action. Mark Scheinberg and the Oldford Group, Ltd. filed a joinder in the demurrers of Tiltware and Ferguson.

On August 20, 2012, Tiltware filed a notice of related case, *Lary Kennedy et al. v. Full Tilt Poker et al.* (Super. Ct. L.A. County, 2013, BC423036), and the two actions were subsequently deemed related.[4]

Gordon filed an answer to Cardroom's first amended complaint. He denied the allegations of the complaint and asserted a number of affirmative defenses, including that the complaint failed to state a cause of action. At some point, he filed a motion for judgment on the pleadings.

On December 31, 2012, the trial court sustained the demurrers of Tiltware, Ferguson and Ivey with leave to amend. It granted Gordon's motion for judgment on the pleadings with leave to amend. It also granted Mark Scheinberg and the Oldford Group, Ltd.'s motion for joinder in the demurrers. As to Cardroom's RICO cause of action, the court found Cardroom had failed to plead the requisite proximate causation. As to the Florida Antitrust Act and Cartwright Act causes of action, the court discussed the various theories of liability Cardroom had propounded and concluded it had failed to state a cause of action under any of these theories. The court explained, "There is no

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4 Concurrently with this opinion, we issue our decision in the appeal from the judgment in *Kennedy v. Full Tilt Poker,* B253090.

tangible injury. There is no proximate cause . . . there's very little that the court can look to try to establish either the RICO or antitrust claims."

The trial court granted the motions to quash by Mark Scheinberg and the Oldford Group, Ltd., Lederer, Juanda and Friedman. It denied Bitar's motion to quash.

The trial court continued the hearing on the motions to quash by Ivey, Pocket Kings, Ltd., Seidel and Bloch. The court would consider those in conjunction with the second amended complaint.

Cardroom filed a notice of stay of proceedings as to Lindgren only on February 11, 2013 based upon Lindgren having filed a Chapter 7 bankruptcy petition. The court stayed the case as to Lindgren on February 14.

B. *Second Amended Complaint and Related Proceedings*

Cardroom filed its operative second amended complaint on February 10, 2013.

Ivey specially appeared and filed a demurrer to the second amended complaint, on basically the same grounds as his previous demurrer. He also joined in the demurrers of his codefendants.

Tiltware filed its demurrer, again asserting Cardroom had failed to state facts sufficient to state a cause of action and referring to the trial court's ruling sustaining its previous demurrer. Gordon did likewise, joining in the arguments by Ivey and Tiltware as well. Ferguson filed a joinder in the demurrers of Ivey, Tiltware and Gordon.

Friedman specially appeared and made a motion to quash service of the second amended complaint based on lack of personal jurisdiction. He noted the trial court had previously granted his motion to quash. He requested judicial notice of the trial court's ruling and documents filed in the case.

On July 12, 2013, the trial court entered its order sustaining all demurrers without leave to amend and granting all joinders. It declared the motions to quash moot because there were no viable causes of action pending. It dismissed the case in its entirety as to all named defendants, whether served or unserved. Cardroom timely appealed.

DISCUSSION

A. *Whether the Trial Court Erred in Sustaining the Demurrers Without Leave To Amend*

1. *Standard of Review*

As previously stated, when the plaintiff challenges an order sustaining a demurrer without leave to amend, "'"[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]'" (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1126.)

We first "'examine the complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory.'" (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230.) "The purpose of a demurrer is to test the sufficiency of the pleadings to state a cause of action as a matter of law. [Citation.] We are not concerned with plaintiff's ability to prove the allegations or with any possible difficulties in making such proof. [Citation.]" (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1291; see also *Nolte v. Cedars-Sinai Medical Center* (2015) 236 Cal.App.4th 1401, 1406.)

"We review the trial court's denial of leave to amend for an abuse of discretion." (*Rea v. Blue Shield of California* (2014) 226 Cal.App.4th 1209, 1223; see also *Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100.) The question before us is "'whether there is a reasonable probability that the defect can be cured by amendment. [Citation.]' [Citation.]" (*Rea*, *supra*, at p. 1223; accord, *Loeffler*, *supra*, at p. 1100.) "A court's sustaining a demurrer without leave to amend is appropriate when, based on ""the nature of the [complaint's] defects and [the plaintiff's] previous unsuccessful attempts to plead,"" it is improbable the plaintiff can state a cause of action. [Citation.]" (*Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 534, disapproved on another ground in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13; accord, *Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 724.) The plaintiff has the burden of showing "'"in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." [Citation.]'" (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1491; accord, *AREI II Cases* (2013) 216 Cal.App.4th 1004, 1020.)

2. *RICO Cause of Action*

a. *General Principles of Law*

RICO, which is contained in sections 1961 through 1968 of title 18 of the United States Code, "is aimed at 'racketeering activity' and to this end, among other civil and criminal remedies, creates a private cause of action for treble damages by providing '[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.' (18 U.S.C. § 1964(c).)" (*Gervase v. Superior Court* (1995) 31 Cal.App.4th 1218, 1228.)[5]

"Although RICO provides for a private cause of action in federal district court, the California Supreme Court has held that state courts have concurrent jurisdiction over RICO claims. [Citation.]" (*Gervase v. Superior Court*, *supra*, 31 Cal.App.4th at p. 1228; accord, *Stansfield v. Starkey* (1990) 220 Cal.App.3d 59, 77.) In ruling on a RICO claim, we apply and, if necessary, interpret "federal statutory law. In this respect the decisions of the United States Supreme Court are binding and the decisions of the lower federal courts are entitled to great weight, but where federal precedents are in conflict or simply lacking, then we must make an independent determination of federal law. [Citation.]" (*Gervase*, *supra*, at pp. 1228-1229, fn. omitted.)

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5 "For an act or omission to qualify as racketeering activity, it must be included in the list of activities set forth in title 18 United States Code section 1961(1). While that list is lengthy, it does not include every criminal or civil wrong a person or entity might commit, and excluded actions, no matter how grievous, cannot qualify as racketeering activity within the meaning of RICO. [Citation.]" (*Gervase v. Superior Court*, *supra*, 31 Cal.App.4th at p. 1232.) Without deciding, for purposes of our analysis, we presume Cardroom can establish certain of defendants' activities constitute a pattern of racketeering under RICO.

"RICO does not purport to provide redress for any and all injuries that may be attributed to a violation; rather, it is limited to injury to a person's business or property. (18 U.S.C. § 1964(c).) In *Sedima, S.P.R.L. v. Imrex Co.*[(1985)] 473 U.S. [479,] 495 [(105 S.Ct. 3275), 87 L.Ed.2d (346)], the court held that RICO does not require some sort of special 'racketeering injury'; rather, it is sufficient that the defendant engaged in a pattern of racketeering activity in a manner forbidden under RICO and the activities injured the plaintiff in his business or property." (*Gervase v. Superior Court*, *supra*, 31 Cal.App.4th at p. 1233.) In three seminal decisions, the Supreme Court articulated the causation requirement to establish a RICO claim, the central issue in this appeal.

In *Holmes v. Securities Investor Protection Corporation* (1992) 503 U.S. 258, 266-269 [112 S.Ct. 1311, 117 L.Ed.2d 532] (*Holmes*), the court held that an injury occurs for purposes of standing to bring a RICO action when the illegal acts are the proximate cause of a plaintiff's injury. The statute requires "some direct relation between the injury asserted and the injurious conduct alleged." (*Id.* at p. 268.) A link that is "too remote," "purely contingent," or indirect is insufficient. (*Id.* at p. 271.) In *Holmes*, a company which reimbursed customers of broker-deals who were unable to meet their financial obligations brought a RICO claim against an individual who had manipulated stock prices, causing prices to plummet and forcing the company to cover large losses as a result. The court found the "link too remote between the stock manipulation alleged and the customers' harm," the company's harm "being purely contingent on the harm suffered by the broker-dealers." (*Ibid.*)

The requirement a plaintiff adequately allege proximate cause was further explored in *Anza v. Ideal Steel Supply Corp.* (2006) 547 U.S. 451, 457 [126 S.Ct. 1991, 164 L.Ed.2d 720] (*Anza*) in the context of claims based, as here, on alleged anti-competitive conduct. Ideal, a steel supplier, brought a RICO case against its competitor, National, alleging it suffered a loss of sales due to National's unlawful racketeering scheme by which National did not charge sales taxes to customers, thereby attracting more customers by charging less. The fraudulent tax returns submitted by National, omitting sales taxes, were acts of mail and wire fraud, or the predicate racketeering acts under RICO. The court found the connection between Ideal's injuries and National's injurious conduct too attenuated to support a claim under RICO. (*Id.* at pp. 458-459.) "A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." (*Id.* at p. 460.) Further, the court explained, "[t]he requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims," the situation in *Anza*, because the directly injured party, the State of New York, could be expected to pursue appropriate remedies to collect unpaid sales tax. (*Ibid.*)

Hemi Group, LLC v. City of New York (2010) 559 U.S. 1, 9 [130 S.Ct. 983, 175 L.Ed.2d 943], the Supreme Court's most recent visit to this issue, also found insufficient nexus between the predicate act and the plaintiff's injuries to satisfy proximate cause. In that case the City of New York sought to pursue a RICO claim against an individual illegally selling cigarettes. The City had alleged the seller engaged in a "general 'systematic scheme to defraud the City of tax revenue'" by failing to report the sales to the necessary state tax authorities, resulting in the City not being able to collect city taxes. (*Id.* at p. 13.) On these facts, which the court found even more attenuated than in *Anza*, the court held the City could not establish its injuries were proximately caused by the fraudulent sales scheme. (*Id.* at pp. 11-12.)

b. *The Trial Court's Ruling*

Against this background, we review the trial court's decision sustaining Tiltware's demurrer to the RICO claim because Cardroom "failed to plead the requisite proximate causation element." The court scrutinized in turn each theory of injury advanced by Cardroom in light of Supreme Court precedent, particularly *Anza's* directive courts consider whether there are "'immediate victims of an alleged RICO violation [who] can be expected to vindicate the laws by pursuing their own claims.'" (*Anza*, *supra*, 547 U.S. at pp. 460, 469.) The court also drew on Ninth Circuit and other precedent. (E.g., *Mendoza v. Zirkle Fruit Co.* (9th Cir. 2002) 301 F.3d 1163, 1168-1169 ["potential plaintiffs who have suffered 'passed-on' injury—that is, injury derived from a third party's direct injury—lack statutory standing"]; *Hill v. Opus Corp.* (C.D.Cal. 2011) 841 F.Supp.2d 1070, 1098 ["[t]he presence of a more direct victim thus weighs strongly against a finding that plaintiffs can assert a RICO claim based on bank fraud].)[6]

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[6] While the trial court stated "'[o]nly financial institutions have standing to allege violations of bank fraud . . . as predicate acts for RICO purposes,'" the court proceeded to undertake a broad inquiry into whether Cardroom could present any direct

The court found several groups of direct victims based on the allegations in the second amended complaint: the direct victims of defendants' fraudulent schemes to circumvent laws and rules prohibiting processing gambling transactions were the financial institutions; the "direct victims of the Full-Tilt [c]ompanies Ponzi-esque payout practices [were] the gamblers themselves"; the victims of the scheme to defraud cable companies by concealing the illegal nature of the product advertized were the cable companies, "who were put at risk for criminal prosecution."

Turning to the specific allegations of the complaint, the trial court addressed the bases for standing asserted by Cardroom. First was Cardroom's "theory . . . that [d]efendants' RICO violations enabled them to attain a dominant position in the world market, which has harmed [Cardroom's] ability to license its technology for both the real money and play money areas." Based on *Anza*, the trial court concluded "the facts alleged cannot meet the U.S. Supreme Court's proximate causation requirement for purposes of a RICO cause of action."

Next, were Cardroom's allegations that it was unable to complete a licensing deal with Fox Sports due to "Pokerstars' agreement with that network, which included a contractual exchange of the purchase of airtime on the network (presumably a show featuring professional poker players) conditioned upon the network using Pokerstars' software and system on the network's website. As noted [in *Anza*], a [d]efendant's increasing market share at a competitor's expense does not satisfy the

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causal connection between the fraud activities and its injuries, the appropriate inquiry in this case.

proximate causation requirement for purposes of a RICO cause of action."

Cardroom further alleged that Pokerstars and Full Tilt's dominance in the online poker market created a barrier to Cardroom's entry into the market. They had "'a base of players that no international company could easily compete with,' resulting in 'fewer participants in the market for legal Internet poker willing to consider licensing the software of Cardroom.' 'Those companies that did license software necessarily preferred software which linked together multiple websites of different companies' instead of the 'bespoke (i.e., custom-made) system offered by Cardroom, which is intended to be used by a single operator.'" The trial court observed that "[t]his appears to be the most direct cause of [Cardroom's] injury—its product was modeled on a system that was not preferred by companies looking to license software. It was the companies' preference for other software—not [d]efendants' alleged illegal conduct (which as alleged may not even constitute 'predicate acts' of 'racketeering activity' under RICO), which was the proximate cause of [Cardroom's] failure to license it[s] software to certain companies."

The trial court added that Cardroom "also allege[d] that 'the market dominance of the pokerstars.com and fulltiltpoker.com websites meant that investors until April 15, 2011 were highly skeptical of the business prospects of independent software houses seeking to advance and develop software systems for legal on-line poker.' . . . The reasons why investors were skeptical in this regard is speculative." (Bold omitted.)

Finally, the trial court addressed Cardroom's copyright infringement allegations. It noted that copyright violations "are subject to the exclusive jurisdiction of [the] federal courts." "Thus, the direct harm of which [Cardroom] complains is a copyright dispute which is subject to exclusive federal jurisdiction," and does not provide a basis for a RICO cause of action.

c. *Analysis*

On appeal, Cardroom contends "the trial court's analysis is completely in error, because it ignored the legal fact that any competitive injury suffered by a party based on the conduct or operation of [an illegal gambling] business is recoverable under RICO." Cardroom claims that *Anza* and *Hemi*, which discuss the proximate causation requirement, are inapposite because they "involve situations where an otherwise legal business was accused of committing a fraud in the conduct of that legal business. . . . They do not address this case, where every act taken by the enterprise to conduct the illegal gambling business, including acts taken to promote the business or acquire customers, was a violation of federal law."

The parties agree that our analysis starts with *Anza* as it considered the question of what link needs to be shown between racketeering activities and alleged harm caused to competitors. The plaintiff in that case, Ideal, claimed predatory pricing practices flowing from its competitor's refusal to pay sales taxes proximately caused it injury by giving the competitor a pricing advantage over Ideal. (*Anza, supra*, 547 U.S. at p. 455.) While acknowledging the conduct was illegal and caused injury to the people of New York—the unpaid sales taxes—the court held the injury to Ideal was too attenuated: "The cause of Ideal's asserted harms . . . is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." (*Id*. at p. 458.) Moreover, the fraud was not necessarily connected to the lowering prices: the court found the company could have lowered its prices for any number of reasons and Ideal's lost sales could have resulted from factors other than petitioner's alleged acts of fraud. The court explained: "Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices." (*Id*. at p. 459.) The court cited approvingly similar language in *Holmes*: "'If the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets.'" (*Anza*, *supra*, at p. 459, quoting *Holmes*, *supra*, 503 U.S. at pp. 272-273.)

Cardroom does not rely on the holding in *Anza*, but rather Justice Thomas's concurring and dissenting opinion in the case.[7]

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[7] None of the parties bring to the court's attention a related case seeking damages under RICO for poker players injured by Full Tilt Poker, Ferguson, Furst and several of the other defendants named in this suit: *Lawson v. Full Tilt Poker Ltd.* (S.D.N.Y. 2013) 930 F.Supp.2d 476. The court there denied standing under RICO to a plaintiff who sought to recover monies that could not be recovered from Full Tilt and the others after their gambling activities were uncovered and their accounts frozen. While the case is not directly on point, it is an example of the strict requirements for proximate cause under RICO. In that

Justice Thomas opined: "The Court today limits the lawsuits that may be brought under the civil enforcement provision of [RICO] . . . , by adopting a theory of proximate causation that is supported neither by the Act nor by our decision in *Holmes*[, *supra*,] 503 U.S. [at p.] 268 . . . , on which the Court principally relies. The Court's stringent proximate-causation requirement succeeds in precluding recovery in cases alleging a violation of [18 United States Code section] 1962(c) that, like the present one, have nothing to do with organized crime, the target of the RICO statute. However, the Court's approach also eliminates recovery for [any] plaintiffs whose injuries are precisely those that Congress aimed to remedy through the authorization of civil RICO suits. Because this frustration of congressional intent is directly contrary to the broad language Congress employed to confer a RICO cause of action, I respectfully dissent from Part II of the Court's opinion [establishing the proximate-causation requirement]." (*Anza*, *supra*, 547 U.S. at p. 463 (conc. & dis. opn. of Thomas, J.).)

"[I]t needs no citation of authority to point out that a majority opinion of the Supreme Court states the law and that a dissenting opinion has no function except to express the private view of the dissenter." (*Wall v. Sonora Union High School Dist.*

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case, the court found that the plaintiffs could not establish their injuries were proximately caused by Full Tilt's activities because their injury had occurred when the government began to seize assets. The government's crackdown on the illegal gambling activities caused their injuries, not the illegal operations themselves. The decision is instructive on the point mere existence of an illegal gambling operation is not sufficient to establish a RICO violation without the requisite proximate cause.

(1966) 240 Cal.App.2d 870, 872; accord, *Glover v. Board of Retirement* (1989) 214 Cal.App.3d 1327, 1337.) Even if the dissent raises questions as to the correctness of the Supreme Court's decision, we are nonetheless "'bound to follow a controlling Supreme Court precedent until it is explicitly overruled by that Court.' [Citations.]" (*Nunez-Reyes v. Holder* (9th Cir. 2011) 646 F.3d 684, 692.) More particularly, "[i]n interpreting federal statutes . . . , we are bound to follow controlling opinions of the United States Supreme Court . . . ." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 327-328; accord, *James v. State* (2014) 229 Cal.App.4th 130, 143.)

It follows that we are bound by the United States Supreme Court's decisions applying proximate cause analysis to the determination whether a plaintiff has standing to bring a RICO cause of action. We cannot, as Cardroom would have us do, reject those decisions and rely instead on the dissent in *Anza*.

The trial court here, in rejecting Cardroom's position, noted that *Anza* has since been cited with approval by the United States Supreme Court in *Hemi Group, LLC v. City of New York*, *supra*, 559 U.S. 1, which "expressly discredited Justice Thomas's concurrence/dissent in *Anza* touting a foreseeability analysis rather than a 'direct relationship' analysis" in determining standing. *Hemi Group* noted "[o]ne consideration we have highlighted as relevant to the RICO 'direct relationship' requirement is whether better situated plaintiffs would have an incentive to sue. [Citation.] . . . [¶] The dissent would have RICO's proximate cause requirement turn on foreseeability, rather than on the existence of a sufficiently 'direct relationship' between the fraud and the harm. It would find that the City has satisfied that requirement because 'the harm is foreseeable; it is a consequence that Hemi intended, indeed desired; and it falls well within the set of risks that Congress sought to prevent.' [Citation.] If this line of reasoning sounds familiar, it should. It is precisely the argument lodged against the majority opinion in *Anza***.** There, the dissent criticized the majority's view for 'permit[ting] a defendant to evade liability for harms that are not only foreseeable, but the *intended* consequences of the defendant's unlawful behavior.' [(*Anza*, *supra*, 547 U.S. at p. 470 (conc. & dis. opn. of Thomas, J.).)] But the dissent there did not carry the day, and no one has asked us to revisit *Anza*." (*Hemi Group, LLC*, *supra*, at pp. 11-12.)

In its reply brief and at oral argument, Cardroom relied heavily on *Bridge v. Phoenix Bond & Indemnity Co.* (2008) 553 U.S. 639 [128 S.Ct. 2131, 170 L.Ed.2d 1012] (*Bridge*), arguing that *Bridge* "rolled back the analysis from *Anza"* with respect to what a plaintiff need allege for proximate cause. Not so. *Bridge* repeatedly affirmed the proximate cause analysis set forth in *Anza* and *Hemi*, in ruling on the distinct question of whether the plaintiff in a RICO case must be the direct recipient of the fraudulent statements. While the Supreme Court concluded that the plaintiff need not have received or relied on the false statements to have standing under RICO, the plaintiff must still establish that its injuries were proximately caused by the fraud. (*Bridge*, *supra,* at pp. 657-658.)

Nor do the facts in *Bridge* lend support to Cardroom's position, as there was a manifest link between conduct and injury in that case. *Bridge* considered a RICO claim brought by real estate investors seeking to acquire parcels of property which were subject to tax liens and offered at public auction by Cook County. Because property obtained by auction had a much higher value than the bids received, the county often received multiple "winning" bids at the same nominal price of zero plus assumption of the lien by the bidder. Faced with many such tied bids and trying to devise a fair process that did not allow one party to obtain an unfair share of parcels, the county devised a system to allocate parcels on a rotational basis when there was a tie. To prevent anyone from gaming the system, the county required that anyone submitting a bid had to appear in person and could not send an agent. The petitioners submitted false declarations to county officials that they were not using agents, when in fact they were using agents to stand in for them at the rotation, obtaining more than their share of the parcels. (*Bridge*, *supra*, 553 U.S. at pp. 641-644.)

The court found the scenario presented in *Bridge* to be a "case in point" of a plaintiff being able to allege a "sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury to satisfy the proximate-cause principles articulated in *Holmes* and *Anza*." (*Bridge*, *supra*, 553 U.S. at pp. 657-658.) The court found that "[r]espondent's alleged injury—the loss of valuable liens—is the direct result of petitioner's fraud. It was a foreseeable and natural consequence of petitioner's scheme to obtain more liens for themselves that other bidders would obtain fewer liens. And here, unlike in *Holmes and Anza*, there are no independent factors that account for [the] respondent's injury, there is no risk of duplicative recoveries by [the] plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue." (*Id.* at p. 658.)

Cardroom cannot easily square its allegations with the direct injury described in *Bridge*. Under no theory could the fraudulent statements made by defendants to banks and credit card companies be deemed directly related to Cardroom's claimed injury that no purchasers wanted to buy its software. False statements made to poker players to get them to favor defendants' sites cannot be said to have directly caused Cardroom's injuries in the way false statements to Cook County caused the petitioners to obtain a higher number of bids in the county's strict rotational system.

The fraudulent statements made to the networks themselves are even more vague and attenuated as to the injury they actually are alleged to have caused. As framed in the reply brief, the most direct proximate cause injury alleged is that defendants made false statements to the networks that the "activities of Pokerstars and Full Tilt Poker were legal." These statements, Cardroom alleges, were "illegal, because the purpose of creating the 'fantasy poker' sites was to market and promote the 'real money' websites to United States citizens [where] Pokerstars and Full Tilt Poker were engaging in criminal activities." This allegation does not explain how these statements caused, directly or otherwise, the networks to decide against buying Cardroom's software. There is no direct injury alleged as there was in *Bridge*, where each fraudulently concealed agent was allocated a bid, directly benefiting the petitioners and depriving the respondents of a parcel of land.

For purposes of proximate cause analysis, Tiltware and Ferguson cite *Sybersound Records, Inc. v. UAV Corp.* (9th Cir. 2008) 517 F.3d 1137 (*Sybersound)* in support of the trial court's finding Cardroom failed to allege the requisite proximate cause for purposes of RICO. In *Sybersound*, the parties were "competitors that produce and sell karaoke records. They primarily sell to a group of distributors and retailers that resell these records to the public." (*Id*. at p. 1141.) They were required to obtain licenses from the copyright holders for the songs on their karaoke records. The plaintiff alleged the defendants represented they had obtained licenses for all songs on their records but intentionally failed to obtain the promised licenses. (*Ibid*.)

The plaintiff sued, alleging a RICO cause of action. (*Sybersound*, *supra*, 517 F.3d at p. 1142.) The plaintiff alleged the defendants engaged in racketeering "by engaging in the predicate acts of criminal copyright infringement, mail fraud, and wire fraud." (*Id*. at p. 1147.) It further alleged defendants "invested the proceeds from these predicate acts to unfairly reduce prices to undercut their competitors." (*Ibid*.) It contended it met the RICO standing requirements "because it is a competitor that has been directly injured by the resulting undercutting of its prices." (*Ibid*.)

Sybersound reviewed *Holmes* and *Anza*, and particularly the requirement that the plaintiff be the direct victim of the racketeering activity. Following *Anza*, the Ninth Circuit concluded: "the court would have to engage in a speculative and complicated analysis to determine what percentage of [the plaintiff's] decreased sales, if any, were attributable to the . . . [d]efendants' decision to lower their prices or a [c]ustomer's preference for a competitor's products over [the plaintiff's], instead of to acts of copyright infringement or mail and wire fraud. [Citation.] This case would require an even more speculative analysis than *Anza* because [the plaintiff] has more than one principal competitor. [¶] As noted by the Supreme Court, "'[t]he element of proximate causation recognized in

Holmes is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation. It has particular resonance when applied to claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws.' [Citation.] 'When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to plaintiff's injuries.' [Citation.]" (*Sybersound*, *supra*, 517 F.3d at pp. 1148-1149.) Using this analysis, the court held that the plaintiff could not "overcome the proximate causation hurdle to assert a RICO violation." (*Id*. at p. 1149.)

Cardroom in its reply brief does not address *Sybersound*. Instead, it argues "this case involves a situation unaddressed by any case law identified by any party: where each act of the operation of the two RICO enterprises was an illegal act, what is the relevant proximate cause analysis?" Cardroom argues that in the case of illegal gambling, "the alleged har[m] articulated by the trial court—the risk of prosecution—is precisely the kind of 'speculative' or 'indirect' injury that could not be recovered under RICO. The only injured parties are persons who are in the business of operating in, or supplying, key infrastructure who were shut out by the activities of the Full Tilt Poker and Pokerstars enterprises. This is a loss of a valuable business opportunity."

Unfortunately for Cardroom, this is precisely the type of loss which the Supreme Court held in *Anza* to be insufficient to confer standing to assert a RICO claim. (*Anza*, *supra*, 547 U.S. at pp. 460-461; see also *Sybersound*, *supra*, 517 F.3d at pp. 1148-1149.) The purpose of defendants' illegal activities, based on the complaint's allegations and all inferences drawn therefrom, was not to hurt a software company which wanted to supply a program to real money or fantasy poker players; the purpose of defendants' protean racketeering scheme was to take money (as much as possible) from poker players and hide that money from government regulators. Cardroom was not the intended victim; the intended victims were the poker players who lost money as part of the Ponzi-esque scheme and the financial institutions which were defrauded. Moreover, as the trial court correctly observed, "the most direct cause of [p]laintiff's injury" was "not [d]efendants' alleged illegal conduct," but rather that "its product was modeled on a system that was not preferred by companies looking to license software. It was the companies' preference for other software—not [d]efendant's alleged illegal conduct . . . , which was the proximate cause of [p]laintiff's failure to license it[s] software to certain companies."

There are additional explanations for defendant's competitive advantage other than these illegal activities: Cardroom acknowledged defendants were either owned by top poker players or engaged such players as consultants and had their own highly competitive software. Indeed, in its operative pleading, Cardroom admits the software systems used by Cardroom and defendants Pokerstars and Full Tilt were "equally reliable and capable." Cardroom admitted "the demand for a single-site software system" such as Cardroom's was nonexistent in 2008 due to the overwhelming market position of Pokerstars and Full Tilt, but it would have to be litigated whether defendants held that position due to a superior product or their alleged illegal activities at that time. Finally, Cardroom conceded in the operative complaint some of its damages were caused by federal prosecutors transferring Full Tilt's assets to

Pokerstars as part of a settlement in 2012, allowing Pokerstars to license Full Tilt's software, further undermining Cardroom's ability to compete. This conduct by the prosecutors, described by Cardroom as a "misguided effort to assist the victims," must be viewed as an intervening cause of some of Cardroom's financial troubles, further undermining Cardroom's proximate cause argument. (See *First Nationwide Bank v. Gelt Funding Corp.* (2d Cir. 1994) 27 F.3d 763, 769 ["when factors other than the defendant's fraud are an intervening direct cause of a plaintiff's injury, that same injury cannot be said to have occurred by reason of the defendant's actions"].)

Anza cautioned against finding causation where complicating factors such as these are present. As in that case, "[a] court considering the claim would need to begin by calculating the portion" of defendants' competitive success "attributable to the alleged pattern of racketeering activity" and then the portion of Cardroom's "lost sales attributable to the relevant part" of defendants' competitive success. (*Anza*, *supra*, 547 U.S. at p. 459.) "The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation. It has particular resonance when applied to claims bought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws." (*Id.* at p. 460.)

For these reasons, the trial court did not err in concluding Cardroom's "theory of causation requires too many steps, too much speculation, and much difficulty in attributing damages to" support a claim under RICO. (See also *4 K & D Corp. v. Concierge Auctions, LLC* (S.D.N.Y. 2014) 2 F.Supp.3d 525, 541 [RICO claim dismissed where there was no assurance that property sellers would have chosen the plaintiff's auction company had they not been allegedly defrauded by the defendants]; *Proven Methods Seminars, LLC v. American Grants & Affordable Housing Institute* (E.D.Cal. Jan. 29, 2008) 2008 WL 269080 at p. 6 [dismissing the defendants' RICO counterclaim for failure to satisfy proximate cause requirement because "[t]here is simply no basis upon which to assume that prospective consumers, absent [the] plaintiffs' alleged scheme [of publishing false advertisements], would have chosen [the] defendants' products and services as opposed to one of the many alternatives"], fn. omitted.)

As it does not appear there are any additional facts it can allege which would be sufficient to confer standing, the trial court did not err in sustaining defendants' demurrers to that cause of action without leave to amend. (*Jenkins v. JPMorgan Chase Bank, N.A.*, *supra*, 216 Cal.App.4th at pp. 523-524; see *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1589 ["'[b]ecause standing goes to the existence of a cause of action, lack of standing may be raised by demurrer'"].)

3. *Cartwright Act and Florida Antitrust Act Causes of Action*

a. *General Principles of Law*

"The Cartwright Act states that '[e]xcept as provided in this chapter, every trust is unlawful, against public policy and void.' ([Bus. & Prof. Code,] § 16726.) [Business and Professions Code s]ection 16720 defines the term 'trust' as 'a combination of capital, skill or acts by two or more persons' for certain enumerated anticompetitive purposes, including '[t]o create or carry out restrictions in trade or commerce.' ([Bus. & Prof. Code,]

§ 16720, subd. (a).) That prohibition is analogous to the catchall language of section 1 of the Sherman Act (15 U.S.C. § 1), which prohibits '[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce.' [Citation.] Thus, although the Cartwright Act was not patterned after the Sherman Act [citation], federal case law interpreting the Sherman Act is often a useful aid in interpreting the Cartwright Act [citation]." (*Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.* (2011) 198 Cal.App.4th 1366, 1374.)

"Under both Cartwright Act and Sherman Act case law, some restraints of trade are treated as per se unlawful, while others are analyzed under the 'rule of reason.' 'In general, only unreasonable restraints of trade are prohibited. [Citation.] However, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." [Citation.] Among these per se violations is the concerted refusal to deal with other traders, or, as it is often called, the group boycott. [Citations.]' [Citation.] Under the rule of reason, the challenged conduct is unlawful only if its anticompetitive effects outweigh its procompetitive effects. [Citation.]" (*Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, *supra*, 198 Cal.App.4th at p. 1374, fn. omitted.)

Similarly, the Florida Antitrust Act is "analyzed under the same rules and case law" as the Sherman Act. (*All Care Nursing Service v. High Tech Staffing* (11th Cir. 1998) 135 F.3d 740, 745, fn. 11.) The Florida Antitrust Act recognizes that "[s]ome acts have been said to be so facially anticompetitive that by their very nature they are deemed unreasonable and, thus, per se violative of antitrust laws. These 'practices are "so plainly anticompetitive," and so often "lack . . . any redeeming virtue," that they are conclusively presumed illegal without further examination under the rule of reason. . . .' [Citation.] Price fixing, horizontal market divisions, tying arrangements, and group boycotts have emerged as practices that are generally illegal per se. [Citations.] [¶] 'But easy labels do not always supply ready answers.' [Citation.] Since the emergence of these per se categories, we have stressed that 'whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.' [Citation.]" (*All Care Nursing Service*, *supra*, at p. 746.)

b. *The Trial Court's Ruling*

Cardroom argued in the trial court that it could amend its second amended complaint to allege a conspiracy to violate antitrust laws. The trial court concluded "that no conduct prohibited under anti-trust laws has been, or can be, alleged." First, as to Cardroom's argument it alleged an antitrust conspiracy, the trial court found Cardroom did "not allege facts sufficient to render its conspiracy allegations plausible, nor has [Cardroom] articulated any reason why participation in such a conspiracy would be in Tiltware's interest. [Cardroom's] argument that Tiltware would receive money from converting fantasy online poker players to real money online poker players is simply too attenuated a theory to be actionable and is not supported by the allegations in the [second amended complaint] or the law."

The court further found that even if the conspiracy allegations were plausible, the alleged conspiracy "would not constitute a per se antitrust violation. Per se treatment is reserved for those types of restraints with which courts are sufficiently familiar that they have concluded that such restraints virtually always are anticompetitive, such as price fixing or market allocation. . . . [T]he alleged agreement between Tiltware and PokerStars is highly unusual and complex. The [c]ourt cannot conclude that it is so obviously anticompetitive as to warrant per se treatment."

The trial court found Cardroom also failed to allege an antitrust violation using rule of reason analysis. "First, [Cardroom] has failed to adequately plead a relevant market. The one market that is pleaded with particularity—real money, peer-to-peer online poker—contains no alleged geographic[al] boundaries. The [second amended complaint] also hints at a fantasy poker market, but it is unclear from the [second amended complaint] whether this market refers to the sale of fantasy poker playing opportunities to consumers or the sale of advertising on fantasy poker websites.

"Second, [Cardroom's] theory of anticompetitive effects is that Tiltware and PokerStars used their combined market power in the 'real money' online poker market, to coerce media companies into licensing Tiltware and/or PokerStars' software as a condition of Tiltware and/or PokerStars' purchase of airtime from media companies, thereby foreclosing these companies to [Cardroom]. This theory, however, would not require Tiltware and/or PokerStars to have seller-side market power in the 'real money' market, but instead would require one or both companies to have buyer-side market power in the market for the purchase of airtime from media companies. As [d]efendant pointed out at oral argument . . . , [Cardroom's] focus on the purchase of airtime for poker programs is an artificially limited market which is not defined in terms of the reasonable interchangeability of substitute products, i.e., other purchasers' non-poker programs or advertisements."

"Third, in the absence of such market power, any agreement between Tiltware and PokerStars, even if proven, could not have prevented [Cardroom] from bringing its own software to market. The success of other online poker business[es], such as Zynga, illustrates that Tiltware and PokerStars did not foreclose competition as a matter of law."

The trial court found Cardroom's "allegations are in the nature of coercive reciprocal dealing, which is analyzed in the same manner as tie-ins." This involves a party using its economic leverage in one market to gain an unfair advantage in another. The "'party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product,'" forcing buyers to buy the tied product in order to obtain the tying product. (Bold and underscoring omitted.) The trial court did not find such coercive reciprocal dealing was alleged here.

The court observed that in applying the rule of reason, the relevant inquiry is whether the challenged agreement promotes or suppresses competition. It noted that "[i]n selling airtime or advertising time to third parties, networks do not seek particular content (aside from socially acceptable restrictions), but instead are seeking to maximize revenue in the sale of such airtime. Here, when the relevant market is properly defined to recognize the reasonable interchangeability of the purchasers of airtime or advertising time without regard to the content of the programming or advertising being offered by the purchaser, it is clear that the networks, not [d]efendants, stand in superior economic bargaining power as sellers of network time. [Cardroom] does not allege the existence of a programming/ advertising relevant market, let alone that [d]efendants had economic power in the programming/advertising market in general (tying product being purchased) to coerce a sale of poker software (tied product in relevant market as to which [Cardroom] is seeking to compete). To the networks, the airtime they sell is fungible and the networks are not seeking a particular type of content to be advertised (here, implicitly, [d]efendant[s'] poker television programs and associated advertising). As such, there is no per se coercive reciprocal dealing involved. Given the vast array of potential advertisers and programmers available to any media company, allowing [Cardroom] to amend its complaint yet again to allege market power in a programming/advertising market would be futile."

The trial court added that "the agreed-upon exchange of the purchase of airtime in exchange for the sale of online poker software does not fail the rule of reason because there is a limited number of networks, and the requirement that one network use only [d]efendants' software (associated with [d]efendants' poker television programs), means that the other networks or media platforms are available to utilize other poker software, such as [Cardroom's], which would be a pro-competitive effect in terms of increasing the demand for [Cardroom's] poker software which is not subject to an exclusive license by another network. [Cardroom] does not allege that [d]efendants demanded exclusive licenses from all available networks or media platforms. Also, the allegation that Zynga had an exclusive arrangement with Facebook—with no allegation that Zynga used television programs as leverage to obtain such arrangement—is itself an admission that the purchase of network airtime was not a condition of obtaining fantasy poker licensing."

The court concluded that Cardroom failed to plead conduct prohibited by the antitrust laws and sustained the demurrers without leave to amend on that basis.

c. *Analysis*

The elements of a Cartwright Act claim are "'"(1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts. [Citations.]"'" (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 47; see *Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 373.) "'An antitrust claim must plead the formation and operation of the conspiracy and the illegal acts done in furtherance of the conspiracy. [Citation.] California requires a "high degree of particularity" in the pleading of Cartwright Act violations [citation], and therefore generalized allegations of antitrust violations are usually insufficient. [Citation.] . . . The absence of factual allegations of specific conduct in furtherance of the conspiracy to eliminate or reduce competition makes the complaint legally insufficient. [Citations.]' [Citation.]" (*Marsh v. Anesthesia Services Medical Group, Inc.* (2011) 200 Cal.App.4th 480, 493 (*Marsh*).)

Cardroom argues that "it was injured in two separate markets. In the first market, for software services for companies operating on-line real money poker abroad, the joint illegal and fraudulent money-processing activities gave [Full Tilt and

Pokerstars] such an overwhelming share of the market that [Cardroom's] single site software . . . was put at a fatal disadvantage." In the second market, the "U.S. based market for software and other services to sites offering fantasy poker, [Cardroom] was effectively barred from selling its software and services to the media conglomerate sites interested in fantasy poker because [Full Tilt and Pokerstars] required that such media companies utilize their '.net' fantasy software as the exclusive provider of free-to-play on-line poker. [Full Tilt] and PokerStars divided up the market between them by agreement."

i. *Per Se Violation*

According to Cardroom, "[t]he first question is whether joint, anticompetitive activities which are completely criminal are 'illegal per se' under anti-trust law." Cardroom answers this question in the affirmative, but it cites no authority to support its position that *any* allegation of criminal activity is sufficient to trigger an antitrust violation. It draws an analogy to two bars in a college town which agree to help each other violate the laws with respect to alcohol sales to minors, thereby gaining more business and hurting competitor bars which obey the law. Arguing that this collusion to increase sales and hurt the competition by violation of liquor control laws would always constitute a per se violation, Cardroom contends this court must find a per se violation of antitrust laws based on the allegation that Pokerstars and Full Tilt Poker jointly agreed to a criminal fee processing plan. Defendants counter that per se violations are reserved for specific anticompetitive schemes which have been reviewed by the courts and expressly held to constitute an antitrust violation in precedential decisions. Both parties concede there is no case directly on point. Accepting for purposes of argument that Cardroom's college town analogy presents a per se violation—even without the imprimatur of precedent—the factual allegations are not so clear here. We need not resolve the question of whether the trial court properly held there was no per se violation, however, because Cardroom cannot allege the requisite causal connection between the illegal conspiracy here and Cardroom's injury.

As with a claim under RICO, "'[t]he plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. [Citation.] . . . An "antitrust injury" must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders [the] defendants' acts unlawful. [Citations.]' [Citation.]" (*Morrison v. Viacom, Inc.* (1998) 66 Cal.App.4th 534, 548); accord, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 487-489 [97 S.Ct. 690, 50 L.Ed.2d 701]; *Solinger v. A&M Records, Inc.* (9th Cir. 1978) 586 F.2d 1304, 1310-1312.) "[T]he antitrust injury requirement applies to cases alleging conduct that is per se unlawful as well as to cases governed by the rule of reason. In *Atlantic Richfield Co. v. USA Petroleum Co.* (1990) 495 U.S. 328 [110 S.Ct. 1884, 109 L.Ed.2d 333] . . . , the United States Supreme Court explained the point as follows: 'Actions *per se* unlawful under the antitrust laws may nonetheless have *some* procompetitive effects, and private parties might suffer losses therefrom. [Citations.] Conduct in violation of the antitrust laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior. The need for this showing is at least as great under the *per se* rule as under the rule of reason.' (495 U.S. at pp. 342-344, fn. omitted.)" (*Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, *supra*, 198 Cal.App.4th at pp. 1378-1379, fn. omitted.) The frequently stated "standing to sue" requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the "target area" of the antitrust violation, and not by one incidentally injured thereby. (*Saxer v. Philip Morris, Inc*. (1975) 54 Cal.App.3d 7, 23, 26; *Program Engineering v. Triangle Publications* (9th Cir. 1980) 634 F.2d 1188, 1191.)

Cardroom's theory of a Cartwright violation based *solely* on a claimed per se violation fails on the showing of proximate cause. The per se violation alleged here, as best we can discern from the often internally contradictory allegations in the complaint, is that defendants "used their dominant position in real-money play, maintained by criminal activities, to require their software system" be used in fantasy play, shutting out Cardroom's software system. The claim that because of their illegal activities, defendants were able to obtain many poker players to use their real money sites and, as a result, interfered with Cardroom's ability to sell its software to third parties for use in fantasy poker is simply too attenuated to meet the requisite proximate cause. Also too attenuated is its alternate theory of harm: that "the joint illegal . . . money-processing activities gave the two companies such an overwhelming share of the market that [Cardroom's] single site software, which is the same kind as

Pokerstars and shares the same technology base as [Full Tilt Poker], was put at a fatal disadvantage." (See, e.g., *Marsh*, *supra*, 200 Cal.App.4th at p. 494 ["[a]t the pleadings stage, mere conclusory allegations of 'manifestly anticompetitive' conduct may be deemed insufficient as a matter of law, 'where there exists "no tenable *per se* . . . theory"'"], quoting *Bert G. Gianelli Distributing Co. v. Beck & Co.* (1985) 172 Cal.App.3d 1020, 1044, 1049, disapproved on other grounds in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 394, fn. 2].

ii. *Rule of Reason Analysis*

Having properly rejected a per se violation, the trial court analyzed Cardroom's antitrust theory under the "rule of reason," which inquires whether the challenged agreement harms competition more than it helps, considering "'the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.' [Citations.]" (*In re Cipro Cases I & II* (2015) 61 Cal.4th 116, 146.)[8] The agreement challenged here is

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[8] As explained recently by the California Supreme Court, the appropriate analysis is a nuanced one for claims under the Cartwright Act, with the per se and rule of reason approaches being "but useful tools the courts have developed over time to carry out the broad purposes and give meaning to the general phrases of the antitrust statutes. [Citation.] It is consistent with the common law tradition at the root of our antitrust laws to describe, as the United States Supreme Court now has, the analytic approach as involving a continuum, with . . . 'the circumstances, details, and logic' of a particular restraint [citation] dictating how the courts that confront the restraint should analyze it. In lieu of an undifferentiated one-size-fits-all

that defendants agreed to buy airtime from one or more networks to show and advertise their poker programs on the condition that those networks agree to exclusively use defendants' software for fantasy poker play offered on the networks' websites.

As initially presented to the trial court, Cardroom claimed defendants' agreement with the networks constituted a "coercive reciprocal deal." "A reciprocal dealing arrangement exists when two parties face each other as both buyer and seller. One party offers to buy the other party's goods, but only if the second party buys other goods from the first party." (*Spartan Grain & Mill Co. v. Ayers* (5th Cir. 1978) 581 F.2d 419, 424 (*Spartan Grain*).) "Coercive reciprocity presupposes the existence of economic leverage in one market to gain an unfair advantage in another, while mutual reciprocity occurs when both parties stand on equal footing with respect to purchasing power yet they agree to purchase from one another." (*Betaseed, Inc. v. U And I Inc.* (9th Cir. 1982) 681 F.2d 1203, 1216.) On appeal, Cardroom asserts that the alleged antitrust violation should be viewed as a "mutual reciprocal tie-in." Presumably, Cardroom seeks to avoid the requirement that it plead an economic advantage in one market, as required for coercive dealings, or hopes to take advantage of case law stating that tie-in arrangements are per se illegal. (*See, e.g., Hirsh v. Martindale-Hubbell, Inc.* (9th Cir. 1982) 674 F.2d 1343.)

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rule of reason, courts may 'devise rules . . . for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.' [Citations.]" (*In re Cipro Cases I & II*, *supra*, 61 Cal.4th at p. 147.)

Case law, however, has made clear that not all tie-in arrangements are illegal and for any type of tie-in or reciprocal deal, the plaintiff must still plead a relevant market and that the defendant possess sufficient economic power in that market to "appreciably restrain free competition in the market for the tied product." (*Betaseed, Inc. v. U And I Inc.*, *supra*, 681 F.2d at pp. 1219, 1222, fn. 35.) Further, under either theory, Cardroom must meet certain basic pleading requirements for antitrust violations generally and for illegal tie-in agreements specifically.

For example, Cardroom challenges the trial court's ruling on the ground "[t]he concept of 'adequate pleading of markets' comes from federal anti-trust pleading. There is no requirement under California law to 'adequately plead a market' or to plead the market 'with particularity.'" Cardroom cites no authority in support of its position, and the law is contrary. California law places the burden of defining a relevant market on the plaintiff. (See, e.g., *Marsh, supra*, 200 Cal.App.4th at p. 495 ["'it is [the] plaintiff's burden to make the required showing of a '"substantially adverse effect on competition in the *relevant* market"'"], italics added.)

Cardroom also takes issue with the trial court's finding that it had to allege that defendants had sufficient market power in their dealings with the networks. Again, Cardroom does not cite any legal authority in support of its argument. Contrary to its assertion, California law does have specific pleading requirements with respect to antitrust claims alleging illegal tying arrangements; the plaintiff must plead: "'(1) a tying agreement, arrangement or condition existed whereby the sale of the tying product was linked to the sale of the tied product; (2) the party had sufficient economic power in the tying market to coerce the purchase of the tied product; and (3) a substantial amount of sale was effected in the tied product.' [Citation.]" (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 184; accord, *SC Manufactured Homes, Inc. v. Liebert* (2008) 162 Cal.App.4th 68, 85 ["Linking the sale of one product to another is not always illegal. Rather, the modern approach focuses on whether the seller has sufficient economic power with respect to the tying product and market to restrain competition in the tied product market"].) "A tying arrangement is illegal only if customers are forced to buy the tied product as a result of the seller's exploitation of its control over the tying product, resulting in anticompetitive consequences. Otherwise, the buyer can simply walk away and turn to another seller." (*SC Manufactured Homes, Inc., supra*, at p. 85.)

Betaseed, Inc. v. U And I Inc., *supra*, 681 F.2d 1203, on which the trial court relied, incorporates the same principles. As the court explained in *Betaseed:* "Tying arrangements, which involve a seller's refusal to sell one product (the tying product) unless the buyer also purchases another (the tied product) are presumptively illegal if certain elements exist. [Citation.] These elements are: 1) there must be in fact a tying arrangement between two distinct products or services; 2) there must be some modicum of coercion shown—that is a showing of an onerous effect on an appreciable number of buyers coupled with a demonstration of sufficient economic power in the tying market; 3) the defendant must have sufficient economic power in the tying market to impose significant restrictions in the tied product market; and 4) the amount of commerce in the tied product market must not be insubstantial. [Citation.]" (*Id.* at p. 1215.)

Cardroom has never defined the markets for either the tied or tying product. In its opening brief and at oral argument, Cardroom maintained that it did not need to articulate a market or that the entire market concept is irrelevant in this case due to the unique nature of the Internet. We do not understand how the existence of the Internet relieves Cardroom of the obligation to establish that defendants had power with respect to a specific market which gave them improper leverage in another market.

Cardroom also has not alleged defendants had sufficient economic power in the purchase of advertising or programming time from the various sports networks such that it could exploit that power to impose on those networks the requirement that they buy the allegedly tied product, in this case software to be used on the networks' website for fantasy poker play. It maintains that it need not allege that defendants had market power with respect to any product in order to bring a claim for illegal tying under the Cartwright Act. The only case it cites in support of its theory is *Spartan Grain*, *supra*, 581 F.2d 419. Cardroom's reliance on *Spartan Grain*, however, is unavailing, as the court there also required allegations of substantial market power.

In *Spartan Grain*, the court explained that the labels "reciprocal dealing" and "tie-ins" "refer to similar phenomena. In each case one side of a transaction has special power in the market place. It uses this power to *force* those with whom it deals to make concessions in another market. In tying arrangements, a seller with economic power forces the purchaser to purchase something else to obtain the desired item. In reciprocal dealings a buyer with economic power *forces* a seller to buy something from it to sell its goods. In both cases the key is the extension of economic power in one market to another market." (*Spartan Grain*, *supra*, 581 F.2d at p. 425, italics added.)

Further, *Spartan Grain* distinguished the situation where a party is able to offer the arrangement because of factors other than its economic power, such as the uniqueness of its product or its willingness to accept a lesser profit or incur greater risks; in such situations, there is no economic advantage which makes the arrangement illegal. (*Spartan Grain*, *supra*, 581 F.2d at pp. 426-427; see also *U. S. Steel Corp. v. Fortner Enterprises* (1977) 429 U.S. 610, 621-622 [97 S.Ct. 861, 51 L.Ed.2d 80]; accord, *Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 542 [illegal per se tying arrangement requires that a party have "sufficient economic power in the tying market to coerce the purchase of the tied product"].)

In short, Cardroom must be able to allege defendants used their "economic power in one market to restrict competition in another market." (*Betaseed, Inc. v. U And I Inc.*, *supra*, 681 F.2d at p. 1216.) Cardroom must be able to allege that defendants denied competitors such as Cardroom free access to market their poker software, not because defendants had a better or more desirable "product," but because of their economic power in the programming/advertising market, forcing media companies "to forego their free choice between competing products." (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.*, *supra*, 101 Cal.App.3d at p. 542.)

As the trial court determined, and we concur, Cardroom does not and cannot allege that defendants had sufficient buyer-side market power in the purchase of airtime that they could force the networks to agree to exclusive licensing of their software for the provision of fantasy poker play on network websites. We concur with the trial court's analysis on this issue: "In selling airtime or advertising time to third parties, networks do not seek particular content (aside from socially acceptable restrictions), but instead are seeking to maximize revenue in the sale of such airtime. Here, when the relevant market is properly defined to recognize the reasonable interchangeability of the purchasers of airtime or advertising time without regard to the content of the programming or advertising being offered by the purchaser, it is clear that the networks, not [d]efendants, stand in superior economic bargaining power as sellers of network time. [Cardroom] does not allege the existence of a programming/advertising relevant market, let alone that [d]efendants had economic power in the programming/advertising market in general (tying product being purchased) to coerce a sale of poker software (tied product in [the] relevant market as to which [Cardroom] is seeking to compete)."

Arguably, Cardroom could have alleged that defendants had market power in the specialized and smaller market of *selling* televised poker programs to the networks. Despite presenting three versions of its complaint, and having ample opportunity to amend during the two-year life of this case, Cardroom did not advance this theory. Given that Cardroom now has had three opportunities to allege an applicable market, and still presents no clear statement of a viable market or market power, further amendment is deemed futile. (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 618-619.) """The assertion of an abstract right to amend does not satisfy [the plaintiff's] burden.""" (*Id*. at p. 619.)

We agree with the trial court's conclusion that Cardroom failed to plead conduct prohibited by the antitrust laws. It properly sustained the demurrers to the Cartwright Act and Florida Antitrust Act causes of action.[9] (*Lee v. Hanley*, *supra*, 61 Cal.4th at p. 1230.) Because Cardroom does not indicate how it can allege Full Tilt and Pokerstars had economic power in the relevant market, leave to amend properly was denied. (*Rossberg v. Bank of America, N.A.*, *supra*, 219 Cal.App.4th at p. 1491; *AREI II Cases*, *supra*, 216 Cal.App.4th at p. 1020.)

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[9] Cardroom contends that the "analysis under the Florida Antitrust Act is similar, but not the same, as under the Cartwright Act," but provides no legal authority to support this contention or to explain the distinction it sought to draw. Cardroom's request that it be "allowed to amend its complaint to allege not only that [d]efendants had market power in the provision of poker-related television programming featuring professional poker players . . . , but that Fox Sports, ESPN and others have market power in sports-related television programming and Internet sites, including fantasy poker" continues to beg the question, whether any of the conduct alleged violates the anti-competitive prohibitions of Florida law. "'To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. [Citations.]' [Citation.] 'Mere suggestions of error without supporting argument or authority other than general abstract principles do not properly present grounds for appellate review.' [Citation.] 'Hence, conclusory claims of error will fail.' [Citation.]" (*Multani v. Witkin & Neal* (2013) 215 Cal.App.4th 1428, 1457; accord, *Rojas v. Platinum Auto Group, Inc.* (2013) 212 Cal.App.4th 997, 1000, fn. 3.)

B. *Whether the Trial Court Erred in Sustaining Gordon's Demurrer on Independent Grounds*

Gordon demurred to Cardroom's second amended complaint, joining in the arguments made by Tiltware and filing a separate demurrer challenging specific allegations and claims as to Gordon. The trial court sustained without leave to amend the Tiltware demurrer in which Gordon joined. In light of our conclusion that Cardroom failed to state a cause of action for either RICO or antitrust violations and the trial court properly sustained the demurrer filed by Tiltware on that basis, we need not consider whether the court erred in sustaining Gordon's demurrer on additional independent grounds. (*Guilliams v. Hollywood Hospital* (1941) 18 Cal.2d 97, 104; cf. *Safari Associates v. Superior Court* (2014) 231 Cal.App.4th 1400, 1413, fn. 8.)

C. *Whether the Specially Appearing Defendants Have Waived Their Jurisdictional Objections by Consenting to Entry of Judgment*

Cardroom contends that the specially appearing defendants waived their objections to personal jurisdiction by "agree[ing] to an order denying all motions to quash as moot and dismissing the case with prejudice as to them." We disagree.

"A defendant submits to the court's jurisdiction by making a general appearance in an action. [Citation.] A general appearance is one in which the defendant participates in the action in a manner which recognizes the court's jurisdiction. [Citation.] If the defendant raises an issue for resolution or seeks relief available only if the court has jurisdiction over the defendant, then the appearance is a general one. [Citation.]" (*Factor Health Management v. Superior Court* (2005) 132

Cal.App.4th 246, 250; accord, *In re Vanessa Q.* (2010) 187 Cal.App.4th 128, 135.)

The trial court, in its order sustaining the demurrers to Cardroom's second amended complaint without leave to amend, stated: "The [d]ourt holds that all [m]otions to [q]uash filed by the parties are moot because the [d]emurrers are sustained without leave to amend and the case dismissed." Cardroom claims that "[t]he potential act of waiver was the failure to object to the trial court's entry of judgment of dismissal." We disagree that the failure to object to dismissal of an action following the sustaining of another party's demurrer without leave to amend for failure to state a cause of action constitutes a general appearance in the action.

Personal jurisdiction may be conferred by "'various acts which, under all of the circumstances, are deemed to confer jurisdiction of the person.'" (*Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1147; see, e.g., Code Civ. Proc., § 1014.) It may be conferred if a defendant "seeks relief on any basis other than lack of personal jurisdiction." (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1037; accord, *Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 52.) That is, "'"[i]f the defendant '*raises any other question, or asks for any relief* which can only be granted upon the hypothesis that the court has jurisdiction of his person, his appearance is general . . . .' [Citation.]" [Citation.]' [Citation.] Thus, if a defendant seeks any affirmative relief on the merits, the application may be deemed a general appearance. [Citations.]" (*Dial 800*, *supra*, at pp. 52-53.) However, "[i]f the defendant confines its participation in the action to objecting to lack of jurisdiction over the person, there is no general appearance. [Citations.]" (*Id*. at p. 52; accord, *Canaan*

Taiwanese Christian Church v. All World Mission Ministries (2012) 211 Cal.App.4th 1115, 1126-1127.)

The specially appearing defendants did not seek affirmative relief in this case by acquiescing in the trial court's holding "that all [m]otions to [q]uash filed by the parties are moot because the [d]emurrers are sustained without leave to amend and the case dismissed." Thus, they did not make a general appearance in the action by failing to object to the dismissal of the action.

Having objected to the court's jurisdiction over them, however, the specially appearing defendants may not benefit from the court's subsequent decision to grant substantive relief to the appearing defendants. Code of Civil Procedure section 581, subdivision (h), provides that a dismissal pursuant to a motion to quash for lack of jurisdiction under Code of Civil Procedure section 418.10 is without prejudice. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶ 11:111.1, p. 11-57.)

The parties have not cited the court to any California case to hold that a trial court may dismiss with prejudice defendants who have not appeared or as to whom it has granted a motion to quash for lack of jurisdiction. While Code of Civil Procedure section 581, subdivision (m), does provide that "[t]he provisions of this section shall not be deemed to be an exclusive enumeration of the court's power to dismiss an action or dismiss a complaint . . . ," under well-established rules of statutory construction that section cannot be read to contradict the provisions in another more specific section of the same statute, here subdivision (h) of section 581. (See, e.g., *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159-1160.)

Certain of the specially appearing defendants urge this court to adopt federal case law, which allows a trial court to enter judgment in favor of specially appearing or unserved defendants where an appearing defendant successfully challenges the legal sufficiency of the pleadings. But numerous decisions of this court have concluded that, while amendments to Code of Civil Procedure section 418.10 in 2002 intended to conform California law in some respects to federal law, the Legislature did not intend to do away with the distinction between special and general appearances. (See, e.g., *Air Machine Com SRL v. Superior Court* (2010) 186 Cal.App.4th 414, 427.) As the court explained in *Air Machine,* in amending Code of Civil Procedure section 418.10 the "'Legislature intended to conform California law to federal procedures only with respect to preliminary objections to a complaint, not in other areas.' [Citations.]" (*Ibid.*) In that case, the court declined to find a defendant had made a general appearance when it served a settlement demand under Code of Civil Procedure section 998 after filing a special motion to quash, rejecting the plaintiff's argument that Code of Civil Procedure section 418.10 should track federal rules. (*Air Machine*, *supra*, at p. 428; accord, *State Farm General Ins. Co. v. JT's Frames, Inc.* (2010) 181 Cal.App.4th 429, 444 ["If the Legislature intended attacks on jurisdiction in California to track federal procedure in all respects, it would have adopted far more extensive revisions to the Code of Civil Procedure and particularly to [§] 418.10. The Legislature could not have intended to 'implied[ly] invalidat[e] . . . literally decades of established practice' sub silentio"]; *Roy v. Superior Court* (2005) 127 Cal.App.4th 337, 343 ["It should be apparent that federal practice with respect to challenges to personal jurisdiction is very different from established California procedure"].)

Given these precedents, we decline to follow the Ninth Circuit's decision in *Abagninin v. AMVAC Chemical Corp.* (9th Cir. 2008) 545 F.3d 733, or the district court opinions cited by the various non-appearing defendants in their briefs on appeal. Code of Civil Procedure section 581, subdivision (h), requires dismissal without prejudice of those defendants who decided to contest jurisdiction and prevailed; we see no reason to fashion a contrary rule given the recognized differences between California and federal procedural law relating to special appearances.

Our ruling reversing the dismissal with prejudice applies to all of the defendants who filed a motion to quash under Code of Civil Procedure section 418.10, even if they concurrently filed a joinder in an appearing defendant's demurrer, since subdivision (e)(1) of Code of Civil Procedure section 418.10 expressly provides that a demurrer does not constitute a general appearance when filed at the same time as a motion to quash, unless the motion to quash is denied. Pursuant to this provision, therefore, if a party files a motion to quash for lack of jurisdiction "before or simultaneously with an act that would otherwise constitute a general appearance, under subdivision (e) of section 418.10 [of the Code of Civil Procedure] that party will *not* be deemed to have 'generally appeared' in the action, but instead will be deemed to have 'specially appeared' and not waived the party's jurisdictional challenge." (*Air Machine Com SRL v. Superior Court*, *supra*, 186 Cal.App.4th at p. 426; accord, *Roy v. Superior Court*, *supra*, 127 Cal.App.4th at p. 345 ["Nothing could be clearer: a defendant may move to quash coupled with *any* other action without being deemed to have submitted to the court's jurisdiction"].)

Thus, the order of dismissal with prejudice must be reversed and an order of dismissal without prejudice should be entered as to Friedman, Juanda, Lederer, Scheinberg, Oldford Group, Ltd., Seidel, Bloch, Pocket Kings, Ltd. and Ivey.

D. *Whether the Judgment Is Void as to Lindgren Due to the Automatic Bankruptcy Stay*

Cardroom contends the judgment is void as to Lindgren due to the automatic stay in his bankruptcy proceedings. Cardroom may not raise this contention on appeal.

California courts have recognized that the violation of an automatic bankruptcy stay is not "a sword in the hands of 'nondebtor entities.'" (*Danko v. O'Reilly* (2014) 232 Cal.App.4th 732, 748.) "'It is fundamental under federal bankruptcy law that the automatic stay operates for the benefit of the debtor and trustee only, and gives other parties interested in property affected by the automatic stay no substantive or procedural rights. [Citations.] *If the debtor or trustee chooses not to invoke the protections of the automatic stay, no other party may attack any act in violation of the automatic stay*.' [Citations.]" (*Ibid*.) Our Supreme Court stated in *Beck v. Unruh* (1951) 37 Cal.2d 148, 153 "that a party other than the debtor or the trustee "'is not in a position to complain of the flaunting of the claimed authority of the bankruptcy court which that court did not choose to exercise . . . .'" [Citation.] The Ninth Circuit agreed, in strikingly similar terms: 'Language from many cases indicates that, if the trustee does not seek to enforce the protections of the automatic stay, no other party may challenge acts purportedly in violation of the automatic stay.' (*In re Pecan Groves of Arizona* (9th Cir. 1991) 951 F.2d 242, 245.)" (*Danko*, *supra*, at p. 748.) Thus, Cardroom may not challenge the judgment of dismissal as to Lindgren based on the automatic bankruptcy stay.

E. *Whether the Trial Court Properly Entered the Order of Dismissal in Favor of the Defendants Who Filed Joinders Only*

Cardroom contends the order of dismissal must be reversed as to those defendants who appeared and filed joinders in the demurrers of other defendants, rather than filing demurrers of their own. We disagree in principle, as set forth below, although our ruling today applies to only one defendant, Gordon, as far as we can determine. Gordon made a general appearance and joined the demurrer brought by Tiltware and Ferguson.

In *Decker v. U.D. Registry, Inc.* (2003) 105 Cal.App.4th 1382, on which Cardroom relies, one of the defendants did not file his own special motion to strike under Code of Civil Procedure section 425.16 but filed a joinder in the motion of another defendant. The court stated: "The joinder is not in the form of a motion and does not present any evidence or argument. In the analogous situation of a motion for summary judgment, we concluded a notice of joinder does not alone constitute a motion. (*Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 46-47 . . . .) We hold the same is true for a special motion to strike . . . ." (*Decker*, *supra*, at p. 1391.)

Decker has been rejected convincingly by Division Four of this court in *Barak v. The Quisenberry Law Firm* (2006) 135 Cal.App.4th 654. The court explained: "A special motion to strike differs significantly from a motion for summary judgment in one procedural aspect. In order to establish a prima facie case for summary judgment, a moving party defendant must present admissible evidence establishing a complete defense to the claim or that [the] plaintiff will be unable to prove an essential element of the claim. [Citation.] Only then is the opposing party required to present admissible evidence in opposition. [Citation.] When a party merely joins in a motion for summary judgment without presenting its own evidence, the party fails to establish the necessary factual foundation to support the motion. In order to trigger a response from a plaintiff in a special motion to strike, a moving defendant need only demonstrate that the action arises out of protected First Amendment activity. [Citation.] Here, [the] appellant's complaint alleges malicious prosecution which qualifies for treatment under [Code of Civil Procedure] section 425.16 as a matter of law. [Citation.] Thus, it was not necessary for [the joindering defendant] to present admissible evidence to shift the burden to [the] appellant to provide opposition." (*Id*. at p. 661.)

Similarly on demurrer, the question is whether [Cardroom's] complaint states a cause of action as a matter of law. (*Jenkins v. JPMorgan Chase Bank, N.A.*, *supra*, 216 Cal.App.4th at p. 506.) No presentation of evidence is required on defendants' part. Where, as here, the theories of liability are the same as to all defendants, the demurrers challenge all causes of action, and the complaint does not state a cause of action as a matter of law, we see no reason why the judgment of dismissal should not include defendants who joined in the demurrers filed by other parties. The result would have been the same had these defendants filed demurrers rather than notices of joinder in the demurrers of the other parties. (*Barak v. The Quisenberry Law Firm*, *supra*, 135 Cal.App.4th at pp. 661-662.)

Thus, the court properly dismissed the case with prejudice as to those defendants who did not file a motion to quash under Code of Civil Procedure section 418.10 but joined in the demurrers filed by Tiltware and Ferguson.

DISPOSITION

The order is affirmed except as to defendants Friedman, Juanda, Lederer, Scheinberg, Oldford Group, Ltd., Seidel, Bloch, Pocket Kings, Ltd. and Ivey. The order is reversed as to those defendants, and the trial court is directed to enter a new order as to those defendants dismissing the action without prejudice. All defendants are awarded their costs on appeal.

KEENY, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.