No. _____

In The

Supreme Court of the United States

---------- ♦ ----------

Christopher Paul Rabalais

Petitioner

v.

Seth Leon

Respondent

---------- ♦ ----------

On Petition For Writ Of Certiorari

To The United States Court Of Appeals

For The Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

---------- ♦ ----------

Christopher Paul Rabalais, Petitioner Pro Se

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QUESTION PRESENTED

Is sports performance an excluded commodity under the Commodity Exchange Act?

PARTIES TO THE PROCEEDING BELOW

Petitioner is Christopher Paul Rabalais. Seth Leon is the respondent to the proceedings in the courts below whose judgments are sought to be reviewed. There are no other parties to the dispute in the courts below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, petitioner Christopher Paul Rabalais hereby states that this is an individual dispute and does not involve public or private corporate entities.

RULE 29.4(b) DISCLOSURE

Pursuant to Rule 29.4(b) of the Rules of the Supreme Court, petitioner Christopher Paul Rabalais hereby states that 28 U.S.C. § 2403(a) may apply and 3 copies of this petition are being served on the Solicitor General of the United States. The questions have not been certified.

RULE 29.4(c) DISCLOSURE

Pursuant to Rule 29.4(c) of the Rules of the Supreme Court, petitioner Christopher Paul Rabalais hereby states that 28 U.S.C. § 2403(b) may apply and 3 copies of this petition are being served on each of the 50 State Attorney Generals. The questions have not been certified.

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PETITION FOR A WRIT OF CERTIORARI

Christopher Paul Rabalais (Petitioner) respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Fifth Circuit by Judges Smith, Prado and Higginson dated November 19, 2012 is unpublished. (App., *infra*, 1a-5a)

2. No opinion was issued or published by the United States District Court for the Southern District of Texas (Houston) on April 4, 2012 when orally affirming the partial summary judgment by the United States Bankruptcy Court for the Southern District of Texas (Houston). (App., *infra*, 6a-17a)

3. The opinion of the United States Bankruptcy Court for the Southern District of Texas (Houston) granting partial summary judgment issued January 9, 2012 is unpublished. (App., *infra*, 18a-28a)

4. No opinion was issued or published by the Superior Court of the State of California, County of Los Angeles. Notice of Ruling was issued on November 17, 2009 (App., *infra*, 29a-32a)and the default judgment was issued on January 4, 2010. (App., *infra*, 33a-37a)

5. On November 6, 2008, the California Court issued a tentative ruling GRANTING the Petitioner's motion to set aside default. (App., *infra*, 38a-40a).

6. On April 28, 2008, the California Court granted relief, in part (App., *infra*, 41a-55a) to Petitioner' demurrer filed February 7, 2008.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on November 19, 2012. This Petition for a Writ of Certiorari is being mailed by United States Postal Service Priority Mail on or before Friday February 15, 2013 and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Commodity Exchange Act, 7 U.S.C. §1 *et seq.*, provides in relevant part:

> The term "excluded commodity" means—
>
> (i) an interest rate, exchange rate, currency, security, security index, credit risk or measure, debt or equity instrument, index or measure of inflation, or other macroeconomic index or measure;
>
> any other rate, differential, index, or measure of economic or commercial risk, return, or value that is—
>
> (I) not based in substantial part on the value of a narrow group of

commodities not described in clause (i); or

(II) based solely on one or more commodities that have no cash market;

(ii) any economic or commercial index based on prices, rates, values, or levels that are not within the control of any party to the relevant contract, agreement, or transaction; or

(iii) an occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or level of a commodity not described in clause (i)) that is—

(I) beyond the control of the parties to the relevant contract, agreement, or transaction; and

(II) associated with a financial, commercial, or economic consequence.

7 U.S.C. §1a (19).

Other relevant provisions of the Commodity Exchange Act (7 U.S.C. §7a-2(c)(5)(C)) are reproduced at App., *infra*, 64a.

The Professional and Amateur Sports Protection Act (28 U.S.C. §3701-3704) is reproduced at App., *infra*, 56a-59a.

The Wire Act (18 U.S.C. § 1084) is reproduced at App., *infra*, 60a-61a.

Relevant provisions of the Unlawful Internet Gambling Enforcement Act (31 U.S.C. § 5362) are reproduced at App., *infra*, 62a-63a.

INTRODUCTION

This case involves a novel market on sports performance that serves a commercial purpose and preserves integrity. The market was misunderstood by a state court, owing to sports performance being the underlying, and was mischaracterized as gambling. It is true that sports betting is a pure entertainment vehicle that does not serve any commercial purpose and undermines the integrity of the games through game fixing and point shaving. However, this does not imply that all contracts on sports performance suffer from these fatal flaws. When they don't, they belong to federally regulated capital markets as opposed to gambling markets which are generally regulated by the States. Congress preempted, through the Commodity Exchange Act, state gaming and bucket shop laws to prevent state overreach into capital markets. If left un-reviewed, the ruling below will reverse a century-old trend of increasing federal regulation of capital markets and provide the States with much more power than intended by the Congress.

The sports industry is one of the top ten largest industries in the U.S. and is entitled, just like every other industry, to risk management and price discovery tools, to be able to make commercial decisions. In addition, the sports leagues, the core of

the industry, have a responsibility to preserve the integrity of their games. Faced with the potential implementation of sports betting in the state of New Jersey, which would increase both legal and illegal betting, the sports leagues are currently fighting sports betting in the courts to preserve integrity. Recognizing the national importance, the U.S. decided to join the case.

Unlike sports betting, Petitioner's market helps the industry on both fronts. First, it allows the sports industry to manage performance and popularity related risks, both of which are major risks for the industry, and discovers prices on which commercial decisions can be made. Second, it preserves the integrity of the games by removing the incentives to fix games. Thus, the innovation is socially useful and belongs to capital markets.

More broadly, the ruling below is a blow to financial innovation, which is sorely needed. More risk management, not less, is necessary to decrease the systemic risks in the industry and prevent another financial crisis. However, there is a significant barrier: ancient common-law jurisprudence that defines gambling broadly and allows the States to creep into the territory of federally regulated capital markets. This overreach created substantial confusion in the courts in the past and continues to be the biggest threat as our nation enters a new phase of financial innovation.

Sports betting is pervasive and created the perception that any market based on sports performance would be socially harmful. This is fiction, but the power of this case as an ideal vehicle to clarify the boundaries between federally regulated

capital markets and state-regulated gambling is precisely vested in this very fiction. No resolution regarding any other financial innovation carries as high a potential of wide-ranging impact. The significance of sports extends well beyond the numbers; it is part of the social fabric that enriches our lives. The combination of sports performance and money used to be lethal only because nobody tried hard enough to turn these ingredients into socially responsible innovation. The clarification that contracts on sports performance, once structured appropriately, can be welfare-enhancing would change the dangerous "Occupy" mindset that resulted in a deep mistrust of our capital markets. Innovation paralysis and litigation jam is an intolerable future when our Nation is just trying to get back on its feet following a severe economic crisis. Immediate intervention by this Court is urgently needed and carries the potential to shape the course of financial innovation across the country in addition to re-securing our Nation's economic supremacy.

This case also provides a unique opportunity to clarify relevant federal statutes all at once. The Professional and Amateur Sports Protection Act does not define bet or wager and was passed to protect the integrity of sports. The Wire Act does not define bet or wager and was passed to curb organized crime. The Unlawful Internet Gambling Enforcement Act is an enforcement statute that does not change existing federal laws. Finally, relevant portions of the Dodd-Frank Act do not outlaw contracts on sports performance although Congress could have easily done so, had it wished. Unable to define bet or wager, these statutes play statutory ping pong by deferring to each other, but a contract on sports performance

that serves public interest and preserves integrity does not violate any of these statutes. Some of these federal statutes also defer to the state statutes, which themselves are preempted by the Commodity Exchange Act. With the leagues fighting the implementation of sports betting in the state of New Jersey and all other states looking in with the hope of creating additional revenue streams to reduce their budget deficits, these statutes become more relevant every day and this Court's timely intervention is urgently needed to not only fill the gaps in these statutes but also prevent an acceleration of related disputes that will clog the judicial system over the coming years.

For all these reasons, this Court should grant certiorari.

STATEMENT OF THE CASE

A. Factual Background

In 2004, Petitioner created an off-shore trading platform where investors could buy and sell shares in the performance of athletes and sports teams. The market developed by the Petitioner was a pari-mutuel market mechanism where each athlete or team, designated by a unique ticker symbol, had a reserve that is funded by commissions generated by each transaction attaching to that ticker. A portion of the reserve was transferred from losers to winners based on the outcomes of sporting events. Subsequently, a de minimis amount was remitted from the reserves to the investors who had a long position in the winning athlete or team. In essence, popularity decided the amount of total reserves for

any given league or sports, and performance continuously redistributed the reserves among the teams or athletes within that league or sports. As a result, the market process produced popularity metrics for each league in the form of the amount of total reserves and perpetual prices for each athlete or team within that league.

In early 2006, Petitioner started seeking legal certainty for his performance-based market in the U.S. by engaging economic advisors and legal counsel. The Unlawful Internet Gambling Enforcement Act that passed in late 2006 increased the legal ambiguity. Petitioner made a business decision and decided to start winding down the performance market and began developing another financial product for the sports industry, which is not part of the dispute with the Respondent. During that transition, certain technological problems combined with unintentional market design errors resulted in certain payment issues for some customer accounts. One of the traders publicly announced that he notified the U.S. Securities and Exchange Commission, which started an investigation in 2009. After meeting with the Petitioner and reviewing certain business documents, the Commission decided to take no action. The Respondent, another trader, bypassed the agency route and instead sued the Petitioner in the Superior Court of the State of California in Los Angeles (California Court).

B. Procedural Background

1. On January 8, 2008, the Respondent filed suit against the Petitioner and a related entity in the California Court. On February 15, 2008, the Petitioner entered an appearance and filed a

demurrer to the California complaint (App., *infra*, 19a). In the demurrer, the Petitioner laid out, among other things, the terms and conditions of the market it developed. On April 28, 2008, the Debtor personally appeared and presented argument at a hearing conducted by the California Court on the demurrer, an order to show cause and a status conference. At that hearing, the Court sustained the demurrer with leave for the Respondent to file an Amended Complaint. *Ibid.*

On June 3, 2008, the Respondent filed his Second Amended Complaint. The Petitioner has not received a copy of the Second Amended Complaint and therefore was not able to answer it. On August 5, 2008, the California court entered a default against the Petitioner. On November 6, 2008, the California Court issued a tentative ruling GRANTING Petitioners' motion to set aside default on the basis of excusable neglect. (App., *infra*, 38a-40a). The tentative ruling is later reversed by the California Court. On October 27, 2009 and November 12, 2009, the California Court conducted a trial on the Respondent's request for entry of a default judgment. The Petitioner was prohibited from testifying by the California Court. The California Court, not understanding the market and being unable to offer a clear characterization, juggled a few improper scenarios:

> "[T]he fraud that's permeated this entire enterprise…On its face it seems to be a clear Ponzi scheme. *So it either seems like a Ponzi scheme or gambling or something other than a true investment platform*.…If it looks like a

> duck and walks like a duck, it's a Ponzi scheme." (emphasis added)

(App., *infra*, 3a)

Despite the comment, there was neither an express finding of fraud nor did the California Court issue an opinion. On November 17, 2009, the California Court issued a Notice of Ruling on Default Judgment. (App., *infra*, 29a-32a) The California Court awarded the Respondent the sum of $379,026.14 plus costs of $320 against the Debtor and his two co-defendants, jointly and severally. On January 4, 2010, the Respondent obtained a default judgment in the amount of $379,346.14 (no interest) from the California Court. (App., *infra*, 33a-37a)

2. On January 3, 2011 Petitioner filed for personal bankruptcy under chapter 7 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Texas in Houston and listed Respondent's default judgment in his Schedule F. (App., *infra*, 21a) On April 8, 2011 Respondent filed an adversary proceeding seeking to have his claims declared non-dischargeable. *Ibid.* On October 3, 2011, the Respondent filed for summary judgment. (App., *infra*, 22a) On November 2, 2011, the Petitioner filed his opposition to the summary judgment motion, *ibid.*, and asked to revisit the California Judgment on numerous grounds. On January 9, 2012, Judge David R. Jones of the Bankruptcy Court granted Respondent's motion in part (App., *infra*, 28a). Citing the *Rooker-Feldman* doctrine, the Bankruptcy Court found that;

> Under the *Rooker-Feldman* doctrine, a federal court lacks "jurisdiction to

> entertain collateral attacks on state court judgments…The United States Supreme Court is the only federal court permitted to review an issue previously determined by a state court in an action between the same parties. This Court is simply unable to revisit questions of the validity of the California Judgment as requested by the Debtor. (internal citations omitted)" (App., *infra*, 27a-28a)

3. On January 12, 2012, the Petitioner filed an appeal to the U.S. District Court. In his briefs, the Petitioner cited the broad definition of commodities in the law as well as the Economic Purpose Test and argued that the market he developed should be characterized as a commodity market. The petitioner also cited both the Wire Act and PASPA, and clearly distinguished his platform from sports betting. On April 4, 2012, District Judge Keith P. Ellison orally affirmed the bankruptcy decision due to the inability of revisiting the state judgment. "The federal system, you know, it's an odd slice of American jurisprudence. It's maybe 1 percent of what goes on nationwide in courts of law, and we've been reminded repeatedly how little we can do to remedy a state decision even if it's incorrect." (App., *infra*, 10a).

4. On April 13, 2012 Notice of Appeal was filed to the United States Court of Appeals for the Fifth Circuit. In his briefs, the Petitioner essentially offered the same arguments he has made in this petition. However, the Court of Appeals was not able to consider these arguments on their merits, either. On November 19, 2012, the United States Court of Appeals for the Fifth Circuit affirmed finding that

"Even assuming, *arguendo*, that the California court erred by describing ASM as gambling or a Ponzi scheme, the bankruptcy court correctly concluded that it could not revisit that characterization. Like the bankruptcy court, we lack the authority to review the decision of the California court." (App., *infra*, 5a)

5. This petition seeks review of the state court judgment, which was an improper determination of the market developed by the Petitioner. As the Bankruptcy Court noted, this Court is permitted to review an issue previously determined by a state court in an action between the same parties.

REASONS TO GRANT THE PETITION

I. Congress Intended Commodity Markets To Be Subject to Federal Regulation and Preempted Gaming and Bucket Shop Laws of the States

Sports betting, which most commonly takes the form of taking a position on the outcome of the game or the spread is universally categorized as gambling. There are good reasons behind this treatment. Such contracts are pure entertainment vehicles that do not serve a commercial purpose. The commercial risks associated with a single game, no matter how important, are insignificant in the long run. Sports betting does not produce socially useful price information either. The betting line provides a probabilistic assessment of a sporting event and can be viewed as a shadow price, but it is only used for entertainment, as opposed to commercial purposes. In any case, the price information is relevant for only

a very short period of time and disappears when the event is over.

Short-lived contracts that are tied to the outcome of a game or spread also face another insurmountable problem. They incentivize players, or influencers to shave points, throw games, or fix the outcomes jeopardizing the purity and integrity of sports. Congress passed the PASPA to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime. *Senate Report 102-248* (1991). An ongoing dispute regarding potential implementation of sports betting in the state of New Jersey highlighted the negative impact of sports betting on integrity. Implementation of the Sports Wagering Law will increase the total pool of gambling, "legal plus illegal," such that fans' negative perceptions attributed to game fixing and gambling will necessarily increase. *National Collegiate Athletic Association, et al.*, v *Christopher J. Christie, et al.*, Memorandum Opinion (2012).

The fact that no contracts based on performance or popularity that serve both a commercial purpose and protect the integrity of the game have been developed so far does not preclude the possibility. Both performance and popularity are major risk factors for a sports franchise. "The success of a sports business, like ours, is dependent upon the performance and/or popularity of its franchises." Madison Square Garden, Co, Form 10-K, filed 08/24/12 for the period ending 06/30/12. Similarly, various industry stakeholders have an interest in both performance and popularity measures that have commercial implications. "[P]oor performance by our endorsers … could adversely affect our brand and

result in decreased sales of our products." Nike, Inc, Form 10-K, filed 07/24/12 for the period ending 05/31/12. "[T]he relative popularity of various sports activities … affect the demand for our products." Id. Sports betting is a specific, entertainment-focused design that was not developed for commercial purposes; however, a genuine commercial need exists in the industry. The market developed by the Petitioner, which was mischaracterized by the California Court satisfied this need.

The Commodity Futures Trading Commission (CFTC) was created by Congress through the Commodity Futures Trading Commission Act (CFTC Act) of 1974, which also expanded the definition of a commodity to reflect the shifts in the U.S. economy away from its agricultural roots. The CFTC Act of 1974 also introduced the public interest standard for designation of commodity futures contracts and included an Economic Purpose Test, which permitted listing and trading of contracts that could be used for hedging and price basing on a more than occasional basis.

The legislative history of the CFTC Act of 1974 also makes it clear that Congress intended to preempt state jurisdiction over the transactions that the Act covers. Purcell and Valdez, *The Commodity Futures Trading Commission Act of 1974: Regulatory Legislation for Commodity Futures Trading in a Market-Oriented Economy*, 21 S. Dakota L.Rev. 555, 573 (1976). Such preemption is explicit in the Commodity Exchange Act, as amended. 7 U.S.C. §16(e).

The Commodity Futures Modernization Act (CFMA) of 2000 retained the broad definition of

commodity but introduced additional categories, including excluded commodities to further modernize the Commodity Exchange Act and reflect an increasing need for risk management.

The CFMA of 2000 also repealed the Economic Purpose Test. Recently, however, the CFTC acknowledged that "[It] may be relevant to analyzing the findings and purposes discussed in … the Act." *Concept Release on the Appropriate Regulatory Treatment of Event Contracts,* Federal Register, Vol. 73 No. 89, May 7, 2008, Notices. Moreover, at least for the event contracts, the Congress intended to restore this power to the CFTC. "[T]he legislative history … indicates Congress's intent to restore, for the purposes of that provision, the economic purpose test that was used by the Commission to determine whether a contract was contrary to the public interest … prior to its deletion by the Commodity Futures Modernization Act of 2000." *Order Prohibiting The Listing Or Trading of Political Event Contracts*, CFTC, April 2, 2012. Therefore, both hedging and price basing remain important criteria to determine whether any proposed contract satisfies the public interest standard.

Integrity also is a key factor in determining whether a novel contract is contrary to the public interest. "The CFTC also has discretion to consider other factors in addition to the economic purpose test in determining whether an event contract is contrary to the public interest. In the case of political event contracts, the CFTC evaluated how the proposed contracts impact the integrity of elections." Id.

Petitioner's market provided the sports industry with a tool to manage performance and

popularity related risks and produced perpetual prices, on the basis of which commercial decisions can be made. In addition, Petitioner's market enhanced the social good by preserving the integrity of the games by removing the incentives to fix them. This is accomplished by designing the payments to be de minimis, or even zero. Instead, contract holders can benefit from a combination of minimal price appreciation and deferred distributions from the reserves. This particular design is crucial because it comports with both the letter and spirit of the law that aims to prevent manipulation in futures markets to the detriment of public interest.

With a broad definition of the commodity combined with preemption, Congress intended to prevent States from overreaching and using gambling statutes to regulate capital markets while generally leaving regulation of gambling to the states. With respect to contracts that have a performance trigger, the only configuration known to date, sports betting, is developed solely for entertainment purposes. As a result, sports betting is universally recognized as gambling. By extension, all contracts on sports performance are likely to be perceived as gambling and the California Court made this exact mistake. At the same time, the fact that sports performance is perceived at the margin in the universe of all possible commodities is precisely the reason why this case is an ideal vehicle to draw the boundaries between state regulated gambling and federally regulated capital markets. While the boundary question could arise through other financial innovation, no other dispute involving a novel financial contract would be so polarizing and powerful to draw the boundaries between state and

federal regulation. Consequently, the clarification of these issues by this Court would deliver the maximum impact. Therefore this Court should grant certiorari.

II. The Issue Is of National Importance Both For The Sports Industry and The Futures Industry

A. If The Ruling Below Stands, The Sports Industry Will Be Deprived of Managing Its Risks, Discovering Prices, and Preserving Integrity.

The estimated size of the entire sports industry in 2008 was predicted to be $441.1 billion making it one of the top ten largest industries in the United States. *Research, Education and the Sports Industry*, Center for Sports Business and Research, Penn State, Smeal College of Business. The sports industry is twice the size of the U.S. auto industry and seven times the size of the movie industry. *Ibid.* Besides, sport is an important fabric of our society that extends beyond pure numbers. It builds communities, enhances moral values and enriches our lives.

Popularity and performance are two major risk factors for the sports industry, which, like any other industry, has the right of access to risk management and price discovery. For innovation in these markets to flourish, however, it should be clear to all market participants that sports markets on performance and popularity, as long as they satisfy the public interest standard, belong to capital markets and are protected from state overreach.

Sports betting has been so pervasive for so long, it is natural to think no contract on sports performance can ever serve a commercial purpose or preserve integrity. This is pure fiction. Immediate intervention by this Court is needed to distinguish sports betting contracts that do not satisfy a commercial purpose and harm the integrity from contracts on sports performance that provide a means for managing and assuming risks, provide price discovery for commercial purposes, and preserve integrity. If the ruling below stands, the sports industry, an important part of the economy would be deprived of these socially useful contracts as well as a genuine opportunity to preserve the integrity of the game.

B. Immediate Intervention by This Court Is Needed to Foster Innovation, Reduce the Probability of Another Crisis and Prevent Costly Litigation.

Future markets are a major driver of the American economy. By enacting the CFMA of 2000, Congress sought "to promote innovation for futures and derivatives and to reduce systemic risk by enhancing legal certainty in the markets for certain futures and derivatives" *House Report 106–711 (Part 3)*, September 6, 2000. The only way to achieve this goal is to promote responsible financial innovation. Better financial instruments, not less activity in finance, is what we need to reduce the probability of financial crises in the future. *Finance and the Good Society*, Robert J Shiller (2013).

As our nation faces a big wave of financial innovation, one big question continues to loom. How can one enforce financial transactions against

challenges that they are unenforceable gambling contracts under state law? The 19th century courts were clogged trying to answer this very question. After decades of confusion in the courts, this Court ruled that the contracts for the sale of cotton for future delivery were not gambling contracts within the meaning of the New York statute against wagers. *Bibb* v *Allen et al.*, 149 U.S. 481 (13 S.Ct. 950, 37 L.Ed. 819). The complementary question whether contracts that are settled via payment of differences constitute gambling is resolved 12 years later by this Court. "Set-off has all the effects of delivery… The fact that contracts are satisfied in this way by set-off and the payment of differences detracts in no degree from the good faith of the parties". *Board of Trade* v. *Christie Grain and Stock Company*, 198 U.S. 236, 25 S.Ct. 637, 49 L.Ed. 1031 (1905).

The problem, at the core, has always been the inability to define gambling. This inability resulted in overly broad definitions of gambling and the necessity of continuous revisions to the exemption of legitimate financial contracts. In other words, the law is always backward-looking. Acknowledging that shortcoming, Congress responded with defining commodities broadly, continuously refining it as markets evolved and preempting state laws with the goal of protecting capital markets from state overreach.

Preemption, however, has been difficult to deal with and created mass confusion. Many courts rejected preemption. See, e.g., *Kerr* v. *First Commodity Corp. of Boston*, 735 F.2d 281 (8th Cir.1984). Other courts recognized and enforced it. See, e.g. *Conaway*, holding that "Thus this court

finds that the Alabama gambling statutes, if construed to require actual delivery, would directly conflict with the federal purpose of fostering the markets in that they would destroy the markets in this state, and that Congress has preempted the field." *Paine, Webber, Jackson & Curtis, Inc.* v. *Conaway*, 515 F.Supp. 202 (N.D.Ala.1981).

The challenge generally has been to distinguish fraud, which may supersede federal preemption from mislabeling legitimate financial transactions as gambling. "Although there is no federal interest in whether a state prevents fraudulent commodity transactions, there unquestionably is a federal interest in whether a state brands commodity transactions as "gambling". *Id.* This case is the latter, because, as the Respondent also conceded, there was no finding of fraud by the California Court. In addition, while an injured person may choose to sue in a court rather than before the commission, it is clear that the regulatory agencies are better equipped to deal with these issues. In an antitrust context involving similar issues, this Court held that the antitrust action should be stayed until the administrative officials have had an opportunity to act. *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973). See also *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973). In fact, in the current case, another participant, instead of suing in the court, took the issue to the Securities Exchange Commission, which, upon investigation, decided to take no action against the Petitioner. Thus, the State Court's decision is in conflict with *Ricci* and *Deaktor*.

Innovation needs to run its course without unnecessary and unsolicited intervention from the States. "A state should not treat commodity transactions as "gambling" because such treatment could destroy the market." See *Sinclair & Co., Inc.* v. *Gurule*, 757 P.2d 225, 114 Idaho 362 (Idaho App., 1988). If the ruling below stands, however, State Courts will continue to attack socially useful innovation based on gambling statutes. Absent immediate clarification by this Court, our nation will enter into another period where the courts are clogged with decisions that are inconsistent and conflicting with each other. Under the paradigm created by the ruling below, it would take just one disgruntled market participant to go on a fishing expedition in any state court to secure a ruling and prevent federal courts revisiting the issue through the *Rooker-Feldman* doctrine even when a regulatory agency, which is far better equipped to deal with these issues, has not reacted yet or worse, has not reacted *by choice.* This is a sure way of stopping financial innovation and making our Nation more vulnerable to another crisis. Immediate intervention and timely clarification by this Court is urgently needed to prevent this intolerable future.

III. PASPA, Wire Act, UIGEA and relevant provisions of the Dodd-Frank Act should be clarified by this Court

There are at least four federal statutes that are relevant to the question presented; the PASPA, the Wire Act, the UIGEA and section 745 of the Dodd-Frank Act. Neither of these statutes is self-contained, and there is a fair amount of statutory cross-referencing. Critically, a contract on sports

performance is not outlawed by any of them nor was there any legislative intent to do so.

PASPA prohibits a person or governmental entity from "authorizing … betting, gambling or wagering" on amateur and professional sporting events. 28 U.S.C. § 3702. PASPA, however, does not define the term betting, wagering, or gambling. Moreover, the legislative history makes it clear that Congress enacted PASPA "to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime." *Senate Report 102-248* (1991). In current litigation, PASPA's constitutionality is being challenged by the State of New Jersey but the District Court concluded that Leagues have standing to proceed with the case due to integrity issues. "The implementation of the Sports Wagering Law will increase the total pool of gambling, "legal plus illegal," such that fans' negative perceptions attributed to game fixing and gambling will necessarily increase." *National Collegiate Athletic Association, et al.*, v *Christopher J. Christie, et al.*, Memorandum Opinion (2012). Recognizing its federal importance, the U.S. recently joined the case to defend PASPA's constitutionality.

Taking a position on the outcome of the games as well as point-spreads are just two specific, if common, designs on sports performance that creates incentives that harm the integrity of sports, the main reason behind the enactment of PASPA. This does not imply that all contract designs on sports performance suffer from the same fatal flaw and this Court's review is important to clarify that distinction.

The Wire Act is the main federal statute that outlaws bets or wagers that cross state lines. 18 U.S.C. § 1084. Critically, however, the Wire Act does not define a bet or wager.

This Court previously decided to pass an opportunity to clarify certain aspects of the Wire Act. *U. S.* v. *Cohen*, 260 F.3d 68 (2nd Cir. 2001), *cert. denied* 536 U.S. 922 (2002). In *Cohen*, however, the characterization of the contract was not in question, only whether the act of the petitioner is protected under the Safe Harbor of the Wire Act. This petition is clearly distinguished because a much more fundamental issue that has implications for our capital markets is at stake, namely what constitutes a bet when the underlying is sports performance.

The UIGEA was an attempt to clarify the Wire Act. Unlike the Wire Act, the UIGEA does define a bet, but it criminalizes it only if it is connected with unlawful internet gambling that violates any federal or state law. 31 U.S.C. § 5362. Essentially, it is an enforcement statute that does not alter the definition of federal or state laws. In any event, the statute expressly excludes securities and commodities from the definition of bet or wager. 31 U.S.C. § 5362 (1)(E)(2006). As such, the Wire Act and the UIGEA, read together, clearly delineate bets on sporting events for entertainment purposes from those from contracts on sports performance that do serve a commercial purpose.

Recently, following different interpretations and court splits regarding whether the Wire Act applies to sporting events or gambling in general, the Justice Department clarified that that the Act covers

only bets on sporting events, and not online gambling unrelated to sporting events. U.S. Dep't of Justice, Office of the Legal Counsel, *Whether Proposals By Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, 35 Op. O.L.C. 1 (2011). The question what a bet is, however, is still unanswered. At the same time, legislative history indicates that the Congress passed the Wire Act to curb organized crime, *id.*, as opposed to banning a socially useful financial tool that will help the industry immensely. With the Commodity Exchange Act, Congress clearly intended a contract to be evaluated on its merits, as opposed to the underlying. With sports performance in that role, perception trumped merit in this case. No other case would ever showcase this fallacy better than this one, and therefore, this Court should use this case as an opportunity to clarify the statutes.

Certain provisions of the Dodd-Frank Act that amended the Commodity Exchange Act are also relevant. 7 U.S.C. §7a-2(c)(5)(C)(i) (app., *infra*, 63a), which provides a list to rule out events contracts that may be contrary to the public interest. Legislative history includes the example of a Super Bowl "event contract" as a contract that would not serve any commercial purpose. Critically, however, Congress, while including "gaming" in the list, did not include sports performance, or sporting events. Had the Congress wished to outlaw all contracts on sports performance, it could have easily done so by explicitly including it in the list. The argument that "gaming", 7 U.S.C. §7a-2(c)(5)(C)(i)(V), (app., *infra*, 63a), would contain sporting events is unpersuasive. As this Court found, "[Congress] could easily have

narrowed the sweep of the definition by inserting a single word. *United States* v. *Turkette*, 452 U.S. 576 (1981). By not doing so, Congress acknowledged that some contracts with a sports performance underlying can serve public interest. In addition, Congress "does not, one might say, hide elephants in mouse holes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457 (2001). In a poker case involving similar definitional issues, the Court found that "Poker is, for the purposes of this case, an elephant—or perhaps an eight hundred pound gorilla—that Congress would have been unlikely to ignore". *United States* v. *DiCristina*, No. 11-CR-414, 2012 U.S. Dist. LEXIS 118037 (E.D.N.Y.). Sports betting is arguably the biggest "elephant" in the gambling world, one Congress certainly wouldn't ignore. Instead, the silence by the Congress is intended to rule out a sweeping statutory application, which would have blocked, unfairly, contracts on sports performance that serve a commercial purpose.

The clause "activity that is unlawful under any Federal or State law", 7 U.S.C. §7a-2(c)(5)(C)(i)(I), (app., *infra*, 63a), also fails to rule out sporting events. If the clause is meant to attack contract underlyings that are unlawful, such as terrorism and assassination, which are items that are specifically enumerated in the statute, sports performance clearly does not belong, because it is not an unlawful activity. Alternatively, Congress may have intended outlawing the contract based on another statute. This alternative reading is not helpful either, as this statutory interpretation would be just another example of the significant issues presented in this petition, namely, where to draw the jurisdictional boundaries between federal and state

regulation and when federal preemption would apply.

Ultimately, the common element in all of these provisions is the statutory ping pong they play. The vicious circle of cross-referencing between various federal statutes can, and should be broken by this Court by granting review. The ongoing high-profile dispute between the Leagues and the state of New Jersey, which is now joined by the U.S., is the beginning of many potential disputes that will arise regardless of the outcome. In the event the PASPA is determined to be unconstitutional, all states will follow suit and will implement their own betting schemes. "Without Federal legislation, sports gambling is likely to spread on a piecemeal basis and ultimately develop an irreversible momentum." *Senate Report 102-248* (1991). If PASPA remains intact, the states will then devise alternating schemes and the definition of a bet or wager will be called into question regularly. Either way, the transactions will inevitably cross state lines and be potentially subject to the Wire Act, among other statutes, which will lead to time-consuming litigation. This Court's timely intervention is urgently needed to clarify a fundamental gap of the statutes by delineating contracts that satisfy the public interest and preserve integrity versus those they don't.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

_____

Christopher Paul Rabalais

Petitioner Pro Se

6942 FM 1960 Road East #384

Humble, Texas 77346

(202) 294-5308

February ____, 2013

APPENDIX – A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

F I L E D

November 19, 2012

Lyle W. Cayce
Clerk

No. 12-20255
Summary Calendar

In the Matter of: CHRISTOPHER PAUL RABALAIS,

Debtor.

CHRISTOPHER PAUL RABALAIS,

Appellant,

versus

SETH LEON,

Appellee.

Appeal from the United States District Court
for the Southern District of Texas
No. 4:12-CV-102

Before SMITH, PRADO, and HIGGINSON, Circuit Judges

PER CURIAM:*

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*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 12-20255

Christopher Rabalais, pro se, appeals the judgment of the district court affirming the bankruptcy court's grant in part of Seth Leon's motion for summary judgment. Because Rabalais points to no reversible error by either court, we affirm.

I.

Rabalais founded and served as President and CEO of AllSportsMarket ("ASM"), a website where investors could buy and sell shares in the performance of athletes and sports teams. Leon deposited $31,000 on the website and, by a series of successful trades, eventually accumulated $400,000.

When he attempted to withdraw his funds, he discovered that most of his money was gone. Leon sued Rabalais, ASM, and a related entity in California state court, alleging fraud, deceit, and other claims. Although Rabalais appeared and filed a demurrer on Leon's original complaint, he did not answer Leon's second amended complaint. Therefore, the court entered a default against him, which Rabalais, though counsel, requested the court to vacate. Leon then filed a request for entry of default judgment, to which Rabalais filed an opposition, substituting himself for counsel, pro se.

The California court conducted a two-day trial on Leon's request; Rabalais did not appear. Leon presented evidence of fraud committed by Rabalais. After hearing testimony and evidence, the court specifically inquired as to the basis of Rabalais's individual liability for fraud and found there was ample evidence, commenting:

> [T]he fraud that's permeated this entire enterprise ... On its face it seems to be a clear Ponzi scheme. So it either seems like a Ponzi scheme or gambling or something other than a true investment platform…. If it looks like a duck and walks like a duck, it's a Ponzi scheme.

The court then issued a Notice of Ruling on Default Judgment. It awarded Leon $379,026.14 plus costs of $320 against Rabalais and his two co-defendants, jointly and severally. On January 4, 2010, the California court entered a judgment against Rabalais in the amount of $379,346.14. Rabalais did not appeal.

Rabalais filed a petition under chapter 7 of the Bankruptcy Code on January 3, 2011, and listed the California state judgment in his Schedule F. Leon filed an adversary proceeding to determine the dischargeability of Rabalais's debt and then a motion for summary judgment. The bankruptcy court granted Leon's motion in part in February of this year, holding that the debt was not dischargeable, because the money had been obtained by false pretenses, false representations, and actual fraud under 11 U.S.C. § 523(a)(2). In particular, the court found that collateral estoppel compelled it to grant summary judgement for Leon, because the question of Rabalais's fraud was actually litigated and necessarily decided in the California court. Furthermore, although Rabalais raised numerous objections to the California proceedings, the bankruptcy court found that the *Rooker-Feldman* doctrine prevented it from considering them. Rabalais appealed to the district court, which affirmed, whereupon he appealed to this court.

II.

Rabalais does not allege that the bankruptcy court or the district court erred in law or fact. Instead, he argues that the California court improperly determined that ASM was either gambling or a Ponzi scheme. He urges this court to use his case as a vehicle to clarify what gambling is.

Even assuming, *arguendo*, that the California court erred by describing ASM as gambling or a Ponzi scheme, the bankruptcy court correctly concluded that it could not revisit that

characterization. Generally speaking, bankruptcy courts may not sit as appellate courts and revisit the merits of state court decisions. *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *D.C. Ct. App. v. Feldman*, 460 U.S. 462 (1983). Under the *Rooker-Feldman* doctrine, federal courts "lack jurisdiction to entertain collateral attacks on state court judgments." *Liedtke v. State Bar of Tex.*, 18 F.3d 315 (5th Cir. 1994). A state court judgment is "attacked" when the losing party in a state court action seeks "what in substance would be appellate review of the state judgment." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). Rabalais's "attack" on the California court's decision making ought to have been raised on appeal in the California court system, not before a federal bankruptcy court. Like the bankruptcy court, we lack the authority to review the decision of the California court.

This court construes *pro se* briefs liberally, but even they must contain reasons why the appellant is entitled to his requested relief. *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). Rabalais has not briefed for this court any reason to reverse the judgment of the district court, which is therefore AFFIRMED.

APPENDIX – B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

APPELLANT	. C.A. NO. H-12-102
	. HOUSTON, TEXAS
CHRISTOPHER PAUL RABALAIS	.
	.
VS.	.
	.
APPELLEE	. APRIL 4, 2012
SETH LEON	. 1:30 P.M. to 1:47 P.M.

TRANSCRIPT of HEARING
BEFORE THE HONORABLE KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE APPELLANT: MR. CHRISTOPHER PAUL RABALAIS PRO SE

FOR THE APPELLEE: MR. JACK W. HIGDON
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* MR. DANIEL E. RHYNHART
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OFFICIAL COURT REPORTER: MS. KATHY L. METZGER
U.S. Courthouse
515 Rusk
Room 8004
Houston, Texas
77002
713-250-5208

* Appearing by phone

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

PROCEEDINGS

THE COURT: Thank you. Please be seated.

Okay. Good afternoon and welcome. We'll turn to -- is it Rabalais? Is that the correct pronunciation?

MR. RABALAIS: Yes, Your Honor.

THE COURT: Versus -- and is it "Leown" or "Leon"?

MR. RHYNHART: It's Seth Leon, Your Honor.

THE COURT: Okay. My apologies for any mistakes on the name. Okay. I've reviewed the writings that

have been submitted. We have it on a bankruptcy appeal. And, Mr. Rabalais, since you're the appellant, you get to start.

MR. RABALAIS: Okay. First -- can you hear me okay?

THE COURT: I can hear you fine. Oh, no, I'm sorry, though. On the phone, the only microphone that works well is the one at the roster. I apologize.

MR. RABALAIS: Okay

THE COURT: Can you hear us all right, Mr. Leon?

MR. RHYNHART: I'm sorry. This is Dan Rhynhart, Your Honor, from Blank Rome on behalf of Seth Leon.

THE COURT: okay.

MR. RHYNHART: And thank you very much for permitting me to attend by telephone.

THE COURT: Not at all. Any evidentiary hearing, it's fine. I'm sorry I'm not doing better on the names today. My apologies. Okay. Carry on. Carry on.

MR. RABALAIS: Okay. First, Your Honor, thank you very much for setting this hearing. I really appreciate it.

THE COURT: Not at all. Not at all. Good to have you here.

MR. RABALAIS: Basically I've laid out to the best of my ability the arguments in the papers. --

THE COURT: Yes, you did.

MR. RABALAIS: -- that you've read. I'm not a legal professional, so, you know, I apologize for any mistakes that I've made. I've done, you know, the absolute best I can in a short time.

THE COURT: I understand. I understand.

MR. RABALAIS: I'm here to - - basically I feel that the granting of the summary judgment on the moving papers was an error in the bankruptcy court, because of the reasons that I laid out.

THE COURT: You set forth, yeah.

MR. RABALAIS: Yes, sir. And at the end of the day, what I would really like as a resolution is to apply the correct amount of Mr. Lean's claim against the intellectual property that we developed. Because having it threaten me personally is just -- first of all, I don't think that it's in anybody's interest if that happened. If I am not able to even so much as sit at a chair or work on my desk and type on a computer under the threat of enforcement of that judgment and a sheriff's sale of my exempt property there's no way anybody is ever going to be paid anything.

THE COURT: Well those are all policy arguments, but I need --we need to focus on whether there was legal error committed or whether any of the findings of fact is a clear error. I mean, the consequences of a judgment are harsh, no doubt about that, but I'm not going to be able to overturn the bankruptcy court's ruling on the basis simply that it's a harsh result. I need to talk about a legal mistake or a clear error of fact.

MR. RABALAIS: Okay. Well, I don't have anything to add to what I've written.

THE COURT.- Okay That's fine.

MR. RABALAIS: That's all I've got it.

THE COURT: All right. All right. Mr. Rhynhart, anything you want to say?

MR, RHYNHART: Your Honor, we're happy to rest on the papers if that would be sufficient for you, but from our point of view, Judge Jones in the bankruptcy court came to the right decision, didn't make any legal errors or factual errors, and it was proper to apply collateral estoppel --

THE COURT: Well, that's my biggest problem with this case. We're pivoting off of a state course decision that wasn't appealed, and that is what troubles me. I don't know why the bankruptcy court could overturn that judgment or reach a different judgment himself. That's where I am.

Maybe, Mr. Rabalais, if you could address that.

Do you have anything else you want to say,Mr. Rhynhart?

MR. RHYNHART: No, that's fine. Thank you, Your Honor.

THE COURT: Anything you want to say on that particular point?

The federal system, you know, it's an odd slice of American jurisprudence. It's maybe 1 percent of what goes on nationwide in courts of law, and we've

been reminded repeatedly how little we can do to remedy a state decision even if it's incorrect.

MR. RABALAIS: I've read extensively on that point.

THE COURT: I can tell you have, yeah.

MR. RABALAIS: And it's not impossible, but it's extremely difficult. I guess I would offer up the procedural errors in the bankruptcy court. Could they be offered up as a reason for reversal?

THE COURT: Well, they can be, yeah.

MR. RABALAIS: I mean, there was no pretrial statement. That's clearly on the trial setting order. There was no oral argument on the motion for summary judgment that was on the trial setting order. Those things didn't happen. Leon didn't file a pretrial statement. And the last time I checked and according to the rules - - I mean, you've got to follow the rules and I followed them, absolutely.

THE COURT; Did you object at the time that the rules weren't being followed?

MR. RABALAIS: I didn't have a chance. The pretrial statement was due on December 4th. The trial was set for the week of December 26. The pretrial hearing, I believe, was a few days ahead of that. And I received telephone notification that there was not going to be a pretrial hearing. No further explanation, just it's not going to happen, and then the next thing I got was the signing of the summary judgment order. So, I did -- my objection came in the form of this appeal, Your Honor. There was no time for me to do that.

THE COURT: Okay. Let me hear from the appellee on that.

MR. RHYNHART: Sure. Thank you, Your Honor. There were two -- there was a little bit of confusion on when the pretrial statement was due, because there were -- there was a form scheduling order that was provided by Judge Jones, but there was also an attachment to that for the pretrial conference itself that said that the pretrial statements could be presented at the conference. And we were following that. And the conference was canceled when summary judgment was entered. So, that was the reason we didn't file a pretrial statement. There was no pretrial conference. And to my understanding, the judge's decision not to have oral argument on summary judgment is at his discretion.

THE COURT: Well, that definitely is at his discretion. You're saying the pretrial protocol would have been necessary only if there was going to be a trial, is that what you're saying?

MR. RHYNHART: That's correct. Once summary judgment was entered, the judge took the pretrial conference off the docket.

THE COURT: Let me just interrupt. Sir, are you here to participate in this case?

MR. HIGDON: Your Honor, I'm local counsel, Jack Higdon, with the same firm as Mr. Rhynhart on the phone.

THE COURT: Okay. That's fine.

MR. HIGDON: Sorry.

THE COURT: Okay. Did you hear that? Mr. Higdon is here with us.

MR. RHYNHART: Right. Mr. Higdon was there to introduce me to the Court, Your Honor, because I've been admitted pro hac vice and --

THE COURT: No, that's fine. I just didn't want to leave him out if he had something different to say. That's fine, absolutely fine.

MR. RHYNHART: Appreciate it. Thank you.

MR. RABALAIS: Your Honor, what Mr. Rhynhart just said is not in the record.

THE COURT: What's not?

MR. RABALAIS: There's no modifying order to the trial setting order and the pretrial statement was due --it was set in that trial setting order, I can give you the docket number, in April of 2011.

THE COURT: Well, I think Judge Jones follows the procedure I follow, which is we set forth a timetable that has things like designation of expert and designation of countervailing expert and deadline for pretrial order and deadline for dispositive motions. But if it's going to go away on a dispositive motion you don't actually have to comply with the latter part of the timetable because it's been rendered unnecessary.

MR. RABALAIS: But, Your Honor, the motion for summary judgment was signed after the pretrial statement was due. That took place, I believe, in January of this year. I would have no way of having known that it was not due because the motion for

summary judgment was pending. That was not in the record anywhere.

THE COURT: Well, you had no way of knowing that what was not due?

MR. RABALAIS: That I would -- since there was a pending motion for summary judgment, that I was not responsible for filing the pretrial statement.

THE COURT: So, you did file it?

MR. RABALAIS: Absolutely, Your Honor.

THE COURT: Well, but that doesn't really bear on whether the judge made a correct decision on your motion --on this motion. I'm sorry you went to unnecessary work, but --

MR. RABALAIS: I --

THE COURT: -- I'm sorry you went to unnecessary work, but that doesn't impinge on the correctness of his decision, does it?

MR. RABALAIS: On its face, no, Your Honor, it wouldn't. But isn't it a violation of the process that was laid out? I mean, I had no other knowledge of any -- I mean, I followed the process as it was laid out, like it was in stone.

THE COURT: Well, did you receive the motion for summary judgment?

MR. RABALAIS: Yes, and I responded to it.

THE COURT: and you knew it was pending?

MR. RABALAIS: Yes, Your Honor.

THE COURT: And you got a chance to respond to it?

MR. RABALAIS: Yes, Your Honor.

THE COURT: Then I'm not sure it matters that you went to unnecessary effort on the pretrial order. I'm not sure why that --

MR. RABALAIS: Well, there was no oral argument. There was no pretrial -- I mean, the sequence of events was, he filed the motion for summary judgment when it was due according to the same trial setting order, like I think it was October 3rd. I responded to it 30 days later, which was November 3rd. December 3rd or 4th -- 2nd or 3rd was when the pretrial statement was due, a joint pretrial statement was due. I didn't get any communication. So, I filed it by myself. The next notification that I get is a cancellation by phone 72 hours ahead of the pretrial hearing, saying there's no pretrial hearing, and that's it until January, whenever the -- January 9th, when the summary judgment motion was forwarded to me. So, I guess I understand that it doesn't affect that decision, but Leon didn't follow the rules as they were laid down to me and I don't understand how that's not an error, Your Honor.

THE COURT: Well, there's such a thing as harmless error. What we're looking for now is whether there was any error committed in the decision to award summary judgment to Mr, Leon. And the fact that there may have been some confusion about what other dates pertain to the briefing does not seem to me to suggest there was error in what Judge Jones ruled. I mean, I'm --

MR. RABALAIS: I understand the separation. I just -- I can't see how that's not material, I guess, I mean..

THE COURT: That you thought we're going to follow the other --

MR. RABALAIS: Of course. I mean, that's how I got burned in California, is by not answering the complaint mailed to the wrong address. So, I learned from that, pay very, very, very careful attention to these deadlines and dates.

THE COURT: Well, that's always good policy. And if Judge Jones had reached the other conclusion, that summary judgment should not have been granted, you would have had to comply with all those other dates and deadlines.

MR. RABALAIS: How was I supposed to know that? I just --- where do these other alternative rules appear? I'm very unclear on this.

THE COURT: Well, I don't think you're being hurt because you didn't follow any rules. You followed some perhaps unnecessarily and I'm sorry for that, but it wasn't as if you didn't follow the rule that contributed to a negative decision against you. I'm not seeing that.

MR. RABALAIS: Well, would the lack of an oral argument have been any --

THE COURT: No, oral --in fact, I think I'm pretty unusual in giving oral argument on an appeal from bankruptcy. Most summary judgment motions in this court do not have oral argument.

MR. RABALAIS: I understand that, Your Honor. I don't have anything to contribute to the factual and legal arguments that are not contained in the pleadings you have, Your Honor.

THE COURT: Well, I'm very sorry but I'm going to have to affirm Judge Jones. I'm sorry. I'm never happy to see other people displeased with the way our system works. We'll be in recess.

MR. RABALAIS: Thank you.

MR. RHYNHART: Thank you, Your Honor.

THE COURT: Good luck to you.

(concluded at 1:47 p.m.)

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled cause, to the best of my ability

/s/ Kathy L. Metzger _____ 5/20/12
Kathy L. Metzger Date
Official Court Reporter

APPENDIX – C

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES BANKRUPTCY COURT
Southern District of Texas
ENTERED
01/09/2012

IN RE:	§	CASE NO: 11-30088
CHRISTOPHER	§	CHAPTER 7
PAUL RABALAIS;	§	
aka RABALAIS;	§	
dba CLEAR VISION	§	
ADVISORY	§	
	§	
Debtor(s).	§	**DAVID R. JONES**
	§	
	§	
SETH LEON	§	
	§	
Plaintiff(s),	§	
	§	
vs.	§	**ADVERSARY**
	§	**NO. 11-03167**
CHRISTOPHER	§	
PAUL RABALAIS	§	
	§	
Defendant(s).	§	

MEMORANDUM OPINION REGARDING PLAINTIFF SETH LEON'S MOTION FOR SUMMARY JUDGMENT
(Docket No. 16)

For the reasons set forth below, the Court grants Plaintiff Seth Leon's ("Leon") motion for summary judgment in part. Leon's claims against Christopher Paul Rabalais (the "Debtor") in the amount of $379,346.14 arising out of a California state court judgment are not dischargeable pursuant to 11 U.S.C. § 523(a)(2).

Background

1. On January 8, 2008, Leon filed suit against the Debtor and a related entity in the Superior Court of the State of California of Los Angeles, *Leon v. Allsports Markets, Inc., et al.*, Cause No. SC096638. In his complaint, Leon asserted claims against the Debtor for fraud, deceit, false advertising and violation of California's consumer protection statute. *Second Amended Complaint (the "California Complaint"), Leon's Exhibit A.*

2. On February 15, 2008, the Debtor entered an appearance and filed a demurrer to the California Complaint.

3. On April 28, 2008, the Debtor personally appeared and presented argument at a hearing conducted by the California Court on the demurrer, an order to show cause and a status conference. At that hearing, the Court sustained the demurrer with leave for Leon to file an Amended Complaint.

4. Leon filed his Second Amended Complaint on June 3, 2008. In the Second Amended Complaint, Leon asserted claims against the Debtor for (i) fraud and deceit under the California civil code; (ii) fraud under the California Unfair Business Practices Act; (iii) false advertising; (iv) false statements under the California Consumers Legal Remedies Act; (v) promissory estoppel; and (vi) unjust enrichment.

5. The Debtor did not answer the California Complaint. On August 5, 2008, the California Court entered a default against the Debtor. On September 30, 2008, counsel for the Debtor appeared on the Debtor's behalf and requested that the California Court vacate the default.

6. On February 9, 2009, Leon filed his request for entry of default judgment. The Debtor filed an opposition to Leon's request for entry of judgment on February 17, 2009.

7. On March 25, 2009, the Debtor filed a substitution of counsel, withdrawing the appearance of his counsel and substituting himself *pro se*.

8. On October 27, 2009 and November 12, 2009, the California Court conducted a trial on Leon's request for entry of a default judgment. The Debtor did not appear at trial. Leon testified at the trial and presented evidence of fraud and misrepresentation committed by the Debtor.

9. After hearing testimony and evidence, the California Court specifically inquired as to the basis of the Debtor's individual liability for fraud and misrepresentation. After hearing the evidence, the California Court found that there was ample

evidence of fraud and misrepresentation by the Debtor. *Transcript, Plaintiff's Exhibit E, at pp. 51, lines 8-18*. The Court further commented that the requested judgment was supported by:

> [T]he fraud that's permeated this entire enterprise... On its face it seems to be a clear Ponzi scheme. So it either seems like a Ponzi scheme or gambling or something other than a true investment platform… If it looks like a duck and walks like a duck, it's a Ponzi scheme.

Transcript, Plaintiff's Exhibit E, at pp. 52-53.

10. On November 17, 2009, the California Court issued a Notice of Ruling on Default Judgment. The California Court awarded Leon the sum of $379,026.14 plus costs of $320 against the Debtor and his two co-defendants, jointly and severally. On January 4, 2010, the California Court entered a judgment against the Debtor in the amount of $379,346.14 (the "California Judgment").

11. The Debtor did not appeal the California Judgment.

12. The Debtor filed a petition under chapter 7 of the Bankruptcy Code in this Court on January 3, 2011. The Debtor listed the California Judgment in his Schedule F.

13. On April 8, 2011, Leon filed this adversary proceeding seeking to have the claims represented by the California Judgment declared non-dischargeable pursuant to 11 U.S.C.§§ 523(a)(2) and (4).

14. Leon filed his motion for summary judgment on October 3, 2011. *Docket No. 16*. The Debtor filed his opposition to the motion for summary judgment on November 2, 2011. *Docket Nos. 17 and 18*.

Summary Judgment Standard

15. Summary judgment should be granted "if the pleadings, the discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P.56(c); *Gray Law LLP v. Transcon. Ins. Co.*, 560 F.3d 361, 365 (5th Cir. 2009). Federal Rule of Bankruptcy Procedure 7056 incorporates Rule 56 in adversary proceedings. A party seeking summary judgment must demonstrate: (i) an absence of evidence to support the non-moving party's claims or (ii) an absence of a genuine issue of material fact. *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009); *Warfield v. Byron*, 436 F.3d 551, 557 (5th Cir. 2006). A genuine issue of material fact is one that could affect the outcome of the action or allow a reasonable fact finder to find in favor of the non-moving party. *Brumfield v. Hollins*, 551 F.3d 322, 326 (5th Cir. 2008). The court is to view the facts and evidence in the light most favorable to the non-moving party. *Campo v. Allstate Ins. Co.*, 562 F.3d 751, 754 (5th Cir. 2009). "The moving party bears the burden of establishing that there are no genuine issues of material fact." *Norwegian Bulk Transp. A/S v. Int'l Marine Terminals P'ship*, 520 F.3d 409, 412 (5th Cir. 2008).

Issue Presented

16. In this adversary, Leon seeks a summary judgment based on the entry of the California Judgment by the California Court. Thus, there are no genuine factual issues. Rather, the parties dispute the effect of the California Judgment. The Court must therefore address whether the findings and conclusions by the California Court based on the testimony and evidence adduced are sufficient to support a claim under 11 U.S.C. § 523 and estop the Debtor from asserting otherwise.

17. Leon asks this Court to find that its claims against the Debtor are nondischargeablepursuant to 11 U.S.C. §§ 523(a)(2) and (4) as a matter of law. For the reasons set forth below, the Court finds that Leon's claims are non-dischargeable pursuant to 11 U.S.C. § 523(a)(2). This Court therefore declines to consider whether Leon's claims are also nondischargeable under 11 U.S.C. § 523(a)(4).

Analysis

18. Leon seeks to have his claims determined to be non-dischargeable under 11 U.S.C. §§ 523(a)(2) and (a)(4). In prosecuting a claim under § 523(a), Leon has the burden of proof. To prevail, Leon must establish each of the requisite elements by a preponderance of the evidence.

19. The exceptions to discharge contained in § 523(a) are to be narrowly construed in the debtor's favor. *In re Miller*, 156 F.3d 598, 602 (5th Cir. 1998)

20. In his complaint, Leon first seeks to have his claims declared non-dischargeable pursuant to §

523(a)(2)(A). In order to prevail, § 523(a)(2)(A) requires a creditor to establish:

> That the debtor made the representations; (2) at the time they [the representations] were made the debtor knew they were false; (3) the debtor made the representations with the intention and purpose to deceive the creditor; (4) the creditor relied on the representation; (5) the creditor sustained losses as a proximate result of the representations.

In re Bercier, 934 F.2d. 689, 692 (5th Cir. 1991).

21. While this Court has the exclusive jurisdiction to determine the dischargeability of a debt under 11 U.S.C. § 523, collateral estoppel may bar relitigation of issues relevant to dischargeability. *In re Gober*, 100 F.3d 1195, 1201 (5th Cir. 1996). For the purposes of § 523(a), a bankruptcy court may grant summary judgment based on the collateral estoppel effectof a state court judgment. *Garner v. Lehrer (In re Garner)*, 56 F.3d 677 (5th Cir. 1995). The fact that a debtor did not present itself at trial does not prevent collateral estoppels from being considered. *Harrison v. Kiwi Services, Inc. (Matter of Harrison)*, 180 FED. APPX. 485 (5th Cir. 2006) (finding that collateral estoppel applied to finding of non-dischargeability under § 523 where default judgment was entered after debtor had appeared, but failed to defend at trial where testimony was provided to support the judgment).

22. The preclusive effect of a state court judgment is determined by the preclusion law of the

state in which it is rendered. Under California law, a number of requirements must be met before a default judgment can be given collateral estoppel effect. *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240 (9th Cir. 2001). First, adequate notice must have been provided. A defendant must have been served or have actual knowledge of the existence of the litigation. *Id.* at 1246, n.5. Next, the matter must have been "actually litigated." *Harmon*, 250 F3d at 1247. A matter is "actually litigated" in the context of a default where there is a record of the trial court considering evidence and necessarily making a factual finding in order to enter the judgment. Harmon, 248 F.3d 1248, n. 9; *In re Younie*, 211 B.R. 367, 373 (B.A.P. 9th Cir. 1998). Finally, the court must consider the policies in applying the doctrine such as preservation of the integrityof the judicial system, judicial economy, and the protection of the litigants from harassment by vexatious litigation. Where the court does not find that the state court proceeding violated due process then a bankruptcy court should apply the doctrine of collateral estoppel. *Baldwin*, 249 F.3d 919, 920 (9th Cir. 2001).

23. The law of California, like that of Texas, permits a default judgment to serve as collateral estoppel. The Court may look to the state court transcript in determining whether collateral estoppel applies. *Harrison*, 180 FED. APPX. at 487; *Silva v. Smith's Pacific Shrimp (In re Silva)*, 190 B.R. 889 (B.A.P. 9th Cir. 1995); *Garner*, 56 F.3d at 679. In determining whether collateral estoppel is appropriate, the bankruptcy court should not rely just on the judgment itself, but should also look to the record of the state proceeding. *Harold V. Simpson*

and Co. v. Shuler (In re Schuler), 722 F.2d 1253, 1256 (5th Cir. 1984).

24. In the instant case, although the Debtor did not answer the California Complaint, the Debtor filed a demurrer, personally appeared at a substantive hearing, moved to vacate the default judgment and filed a notice of appearance *pro se*. It is undeniable that the Debtor had knowledge of the California Litigation.

25. The California Complaint and record reflect Leon's allegations of the Debtor's fraudulent conduct and the presentation of testimony and evidence supporting a finding of fraud and misrepresentation under California law. The elements for fraud under 11 U.S.C. § 523(a)(2) have been found to mirror the elements for fraud under California law. *Tobin v. Sans Souci Ltd. P'ship (In re Tobin)*, 258 B.R. 199 (9th Cir. 2001); *In re Hashemi*, 104 F.3d 1122, 1125 (9th Cir. 1997). The California Court was presented with evidence and testimony to support each of the claims for fraud and misrepresentation asserted by Leon. The California Court found that fraud permeated the business which was managed by the Debtor and that the Debtor's liability to Leon was based on misrepresentations made by the Debtor. The transcript is extensive and reflects that the California Court considered testimony and evidence and found the existence of fraud by the Debtor. *Transcript, Leon's Exhibit E, p. 51-53*. This Court is unable to discern any basis for the Debtor's liability other than his fraudulent conduct. No genuine argument exists that the question of the Debtor's fraud was actually litigated or that the California

Court necessarily determined that the Debtor defrauded Leon.

26. Finally, the Court must determine if public policy supports the application of collateral estoppel. This Court is mindful of the importance of providing a debtor a "fresh start." The impact of a finding of non-dischargeability of a debt under § 523 of the Bankruptcy Code is severe. Therefore, it is only with the greatest caution that this Court will make such a determination, particularly on a summary basis.

27. The Debtor asks this Court in both his answer and response to the summary judgment motion to revisit the California Judgment on numerous grounds. This Court is prohibited from doing so. Generally speaking, a bankruptcy court may not sit as an appellate court and revisit the merits of a case tried in the state court. *Rooker v. Fidelity Trust Co.*, 263 U`.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Under the *Rooker-Feldman* doctrine, a federal court lacks "jurisdiction to entertain collateral attacks on state court judgments." *Liedtke v. State Bar of Tex.*, 18 F.3d 315, 317 (5th Cir. 1994). A state court judgment is "attacked" for purposes of *Rooker-Feldman* where the losing party in a state court action seeks "what in substance would be appellate review of the state judgment." *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994). The United States Supreme Court is the only federal court permitted to review an issue previously determined by a state court in an action between the same parties. *Williams v. Swenson (In re Williams)*, 280 B.R. 857, 863 (B.A.P. 9th Cir. 2002). This Court is

simply unable to revisit questions of the validity of the California Judgment as requested by the Debtor.

Conclusion

For the reasons set forth above, the Court grants Seth Leon's motion for summary judgment in part. Leon's claims are non-dischargeable under 11 U.S.C. § 523(a)(2). The Court declines to consider whether the claims are also non-dischargeable under 11 U.S.C. § 523(a)(4). A separate judgment consistent with this Memorandum Opinion will be issued.

SIGNED: January 9, 2012.

s/ David R. Jones
DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

APPENDIX – D

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 11/17/09	**DEPT.** WEN
HONORABLE CRAIG D. KARLAN #20 JUDGE HONORABLE JUDGE PRO TEM	F. HINOJOSA DEPUTY CLERK ELECTRONIC RECORDING MONITOR
J. MORGAN, CT ASST Deputy Sheriff	NONE Reporter

9:00 am	SC096638		
		Plaintiff Counsel	
	SETH LEON		N/A
	VS	Defendant Counsel	
	ALLSPORTSMARKET, INC., ET AL		

NATURE OF PROCEEDINGS:

NOTICE OF RULING ON DEFAULT JUDGMENT;

In this matter heretofore submitted on November 12, 2009, the Court renders its decision as follows:

Judgment is entered in the favor of the plaintiff Seth Leon and against defendants Chris P. Rabalais, Allsportsmarket, Inc., and Soluciones Globales Optimas, S.A., jointly and severly, in the amount of $379,026.14 and costs of $320.00.

Counsel for the plaintiff is to submit a proposed judgment.

CLERK'S CERTIFICATE OF MAILING/NOTICE OF ENTRY OF ORDER

I, the below named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that this date I served Notice of Entry of the above minute order of 11/17/2009 upon each party or counsel named below by depositing in the United States mail at the courthouse in Santa Monica, California, one copy of the original entered herein in a separate sealed envelope for each, addressed as shown below with the postage thereon fully prepaid.

Date: November 17, 2009

MINUTES ENTERED
11/17/09
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 11/17/09	**DEPT.** WEN
HONORABLE CRAIG D. KARLAN #20 JUDGE HONORABLE JUDGE PRO TEM	F. HINOJOSA DEPUTY CLERK ELECTRONIC RECORDING MONITOR
J. MORGAN, CT ASST Deputy Sheriff	NONE Reporter

9:00 am	SC096638		
		Plaintiff Counsel	
	SETH LEON		N/A
	VS	Defendant Counsel	
	ALLSPORTSMARKET, INC., ET AL		

NATURE OF PROCEEDINGS:

John A. Clarke, Executive Officer/Clerk

By: _____

F. Hinojosa, Deputy Clerk

DAVID ZELENSKI, ESQ.
6424 SANTA MONICA BOULEVARD
LOS ANGELES, CALIFORNIA 900386

MINUTES ENTERED
11/17/09
COUNTY CLERK

APPENDIX – E

JUD-100

ATTORNEY OR PARTY WITHOUT ATTORNEY (name, state bar number, and address): Alan Harris (SBN 146079) Los Angeles HARRIS & RUBLE 6424 Santa Monica Boulevard TELEPHONE NO. (323) 962-3777 FAX NO. (optional) (323) 962-3004 E-MAIL ADDRESS (optional): aharris@harrisandruble.com ATTORNEY FOR {Name}: Plaintiff	FOR COURT USE ONLY CONFORMED COPY OF ORIGINAL FILED Superior Court JAN John A. Clarke, Executive Officer/Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
STREET ADDRESS: 1725 Main Street
MAILING ADDRESS:

CITY AND ZIP CODE Santa Monica, California 90401
BRANCH NAME: Santa Monica Courthouse

PLAINTIFF: Seth Leon

DEFENDANT: Allsportsmarket, Inc.,

et al.

JUDGMENT	CASE NUMBER: SC 096638
(X) By Default (X) After Court Trial (X) Defendant Did Not Appear At Trial	

JUDGMENT

1. (X) By DEFAULT as to Chris P. Rabalais and AllSportsMarket, Inc.

e. (X) Court Judgment (Code Civ. Proc., § 585(b)). The court considered

(1) (X) plaintiff's testimony and other evidence

(2) (X) plaintiff's written declaration (Code Civ. Proc., § 585(d))

3. (X) AFTER COURT TRIAL The jury was waived. The court considered the evidence.

a. The case was tried on (date and time): Nov. 12, 2009, at 11:00 a.m.; Nov. 17, 2009, at 9:00 a.m. before (name of judicial officer): Hon. Craig D. Karlan

b. Appearances by:

(X) Plaintiff

(1) Seth Leon

(X) Plaintiff's attorney (name each):

(1) Alan Harris

(2) David Zelenski

c. Defendant did not appear at trial. Defendant was properly served with notice of trial: as to Soluciones Globales Optimas, S.A.

d. A statement of decision (Code Civ. Proc. § 632) (X) was not requested.

JUDGMENT IS ENTERED AS FOLLOWS BY:

(X) THE COURT

5. Parties. Judgment is

a. (X) for plaintiff (name each):

Seth Leon

and against defendant (names):

Chris P. Rabalais

(X) Continued on Attachment 5a

6. Amount.

a. (X) Defendant named in item 5a above must pay plaintiff on the complaint:

(1) (X) Damages $379,026.14

(4) (X) Costs 320.00

(6) TOTAL $379,346.14

7. (X) Other (specify): Judgment is entered jointly and severally against Chris P. Rabalais, AllSportsMarket, Inc. and Soluciones Globales Optimas, S.A.

Date: 1/4/10 Craig D. Karlan (stamped)

JUDICIAL OFFICER

ATTACHMENT 5a

Additional Defendants Against Whom Judgment Is Entered:

AllSportsMarket, Inc.

Chris P. Rabalais

PROOF OF SERVICE

I am an attorney for Plaintiff herein, over the age of 18 years, and not a party to the within action. My business address is Harris & Ruble, 6424 Santa Monica Boulevard, Los Angeles, California 90038. On December 16, 2009, I served the within document(s): **JUDGMENT.**

I caused such to be delivered by hand in person:

N/A

I caused such to be delivered by fax or e-mail to:

N/A

I am readily familiar with the Firm's practice of collecting and processing correspondence for mailing. Under that practice, the document(s) would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business, addressed as follows:

Erik S. Syverson
Pick & Boydston, LLP
1000 Wilshire Boulevard, Suite 600
Los Angeles, California 90017

Soluciones Globales Optimas, S.A.
6942 FM 1960 East #384
Humble, Texas 77346-2706

Allsportsmarket, Inc.
6942 FM 1960 East #384
Humble, Texas 77346-2706

Chris Rabalais
6942 FM 1960 East #384
Humble, Texas 77346-2706

Chris Rabalais
Crystal World Holdings, Inc.
1701 Pennsylvania Avenue N. W., Suite 300
Washington, D.C. 20006

I declare under penalty of perjury that the above is true and correct. Executed on December 18, 2009, at Los Angeles, California.

s/David Zelenski

APPENDIX – F

Los Angeles Superior Court Tentative Ruling

Case Number: SC096638 **Hearing Date:** November 6, 2008

Dept: P

TENTATIVE RULING:

The motion of Defendants Chris Rabalais and AllSportsMarket, Inc. to set aside default is GRANTED. CCP § 473(b) Defendant's answer shall b e deemed filed as of this date.

ANALYSIS:

Whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit of fault attesting to his/her mistake, inadvertence, surprise or neglect, the court shall vacate the resulting default, default judgment or dismissal. CCP § 473(b). The only limitation is that the court may deny relief if it finds that the default, default judgment or dismissal was not in fact caused by the attorneys mistake, inadvertence, surprise or neglect, but that the attorney is attempting to cover up for his/her client. Rogalski v. Nabers Cadillac (1992) 11 Cal.App.4th 816. If the attorney is willing to take the blame and pay the costs, the court must set aside the entry of default, default judgment or dismissal.

If the application for relief is not accompanied by an attorney affidavit of fault, relief is discretionary and

must be based on a showing of mistake, inadvertence, surprise or excusable neglect (CCP 473(b).). In this case, Rabalais and ASM move to set aside on grounds of excusable neglect. The burden is on the moving party to show that the neglect was excusable; that it could not have been avoided through the exercise of ordinary care. If it fails to make this showing, "the court may not grant relief. It has no discretion." Parage v. Couedel (1997) 60 Cal.App.4th 1037, 1042. Further the court of appeals has held that, "the law strongly favors trial and disposition on the merits. Therefore any doubts in applying section 473 must be resolved in favor of the party seeking relief. When the moving party promptly seeks relief and there is no prejudice to the opposing party, very slight evidence is required to justify relief. We will more carefully scrutinize an order denying relief than one which permits a trial on the merits." Mink v. Superior Court (1992) 2 Cal.App.4th 1338, 1343.

In this case, Rabalais and ASM move to set aside default entered against them for failing to respond to Leon's second amended complaint. Rabalais and ASM contend that they never received a copy of the second amended complaint and were therefore unaware that a responsive document needed to be filed (Rabalais Decl. ¶ 4). Rabalais declares that although he and ASM were served with process initially at addresses in the United States, his current address as reflected in all prior pleading documents is located in Costa Rica. Id. Rabalais therefore expected to receive all future filings at this address and did not expect to obtain the second amended complaint from the United States address. Id. Although Rabalais was planning to respond, he

believed that because he was not served at the Costa Rica address, that Leon had dropped the case. Id. at 6. This, Rabalais, contends constitutes excusable neglect. Id. at 8. Rabalais has since retained counsel to represent himself and ASM and asks the court to set aside his default on the grounds of his excusable neglect in failing to ascertain that an amended pleading had been filed and that he needed to file a responsive pleading thereto.

All parties concede that the second amended complaint was served at the same address where the first amended complaint had been served. Yet, Rabalais declares that he never received a copy of the second amended complaint. In light of the facts that Rabalais is presumably out of the country and was representing himself in pro per taken together with the rule that disputes regarding whether there was actual excusable neglect are decided in favor of allowing a full disposition of a case through litigation and not on default, the court finds Rabalais and ASM have shown that default should be set aside as requested. Rabalais and ASM's motion is therefore GRANTED. CCP § 473(b).

APPENDIX – G

Civil • Tentative Rulings

DEPARTMENT P LAW AND MOTION RULINGS

Case Number: SC096638 **Hearing Date:** April 28, 2008

Dept: P

TENTATIVE RULING:

Defendant Allsportsmarket, Inc. ("ASM") has improperly filed a demurrer before the court. As a corporate entity, ASM must be represented by counsel in order to properly appear before the court. ASM has failed to do so, and its demurrer must be OVERRULED in its entirety on such procedural grounds. ASM is admonished to make all future appearances through representative counsel.

Defendant Chris Rabalais' demurrer brought in propia persona on grounds that this court lacks jurisdiction is OVERRULED. Rabalais' demurrer is SUSTAINED with leave to amend as to the 2nd cause of action for breach of contract and 7th cause of action for violation of the Consumers Legal Remedies Act, and is OVERRULED as to the 1st, 3rd, 4th, 5th and 6th causes of action.

ANALYSIS:

Defendant Allsportmarket Demurrer

The heading of Defendants' demurrer to Plaintiff's complaint indicates it is being brought by both Defendants, "in pro persona." Defendant Christoper Rabalais is permitted to appear in pro per, however, Defendant Allsportsmarket, Inc, a corporation, may not. Although a corporation can sue or be sued in its name, it cannot appear in court "in propria persona." Except in limited circumstances, which are not applicable here, the corporation must be represented by a lawyer m all cases. See Merco Const. Engineers, Inc. v. Mun.Ct. (1978) 21 Cal.3d 724,730, 147, and Rowland v. California Men' Council (1993) 506 U.S. 194, 201-202. Because Defendant AllSportsMarket is not represented by counsel, it has no standing to assert this demurrer and it's attempt to do so is defective. The demurrer by Defendant ASM is therefore OVERRULED in its entirety.

Defendant Chris Rabalais Demurrer

Rabalais demurs to every cause of action alleged in the Complaint, demurs on grounds that Defendant was apparently not named in summons, that summons was not properly served, that the court does not have jurisdiction over the subject matter, and that Leon is required to arbitrate his dispute. A demurrer lies to object to a party's initial pleadings on any of the following grounds:

"(a) The court has no jurisdiction of the subject the pleading.

(b) The person who filed the pleading does not have the legal capacity to sue.

(c) There is another action pending between the same parties on the same cause of action.

(d) There is a defect or misjoinder of parties.

(e) The pleading does not state facts sufficient to constitute a cause of action

(f) The pleading is uncertain. As used in this subdivision, 'uncertain" includes ambiguous and unintelligible.

(g) In an action founded upon a contract it cannot be ascertained from the pleading whether the contract is written, is oral or is implied by conduct.

(h) No certificate was filed as required by Section 411.35.

(i) No certificate was filed as required by Section 411.36." (CCP § 430.10).

Thus, under section 430.10, Rabalais demurrer is proper for the purpose of objecting to Leon's complaint on grounds that the causes of action are improperly pleaded, and to challenge the court's jurisdiction over the subject matter. Such challenges are properly raised under subsections (a) and (e) above. However, Rabalais' challenges to the propriety of summons and service thereof are not proper grounds for demurrer, nor is his challenge to Leon's choice to litigate rather than arbitrate the dispute, and will therefore be disregarded by the court. Such challenges must be raised through other motions, such as motions to dismiss and motions to compel arbitration.

Jurisdiction

Rabalais argues that this court has no jurisdiction over the subject matter in Leon's pleading. Specifically, Rabalais points to provisions contained within the "Terms of Service" posted on the website, www.allsportsmarket.com, which he claims contain a choice of law provision which requires all actions or proceedings arising out of, or related to, the Terms of Service be brought in an appropriate state or federal court located in the Kingdom of the Netherlands or the Republic of Costa Rica

A party may demur to a complaint on such grounds "where the lack of subject matter jurisdiction appears on the face of the pleading or from any matter of which the court may or must take judicial notice." 2 Witkin, Cal. Proc. 4th (1997) Jurisd, § 387; CCP § 430.10(a). Jurisdiction of the subject matter is sometimes referred to as jurisdiction "in the fundamental or strict sense." or the "power to hear or determine the case." 2 Witkin, Cal. Proc. 4th (1997) Jurisd, § 10. On the face of Leon's complaint, Leon alleges that he engaged in activities and agreed to contract with defendants on the website, www.allsportsmarket.com. (Complaint ¶ 12, 65). Further, Leon alleges that he was a registered customer on the website, and had "agreed to ASM's published rules." (Complaint ¶ 65). However, Leon makes no specific reference to the "Terms of Service" or its apparent choice of law provision referenced by Rabalais. There thus appears to be no issue on whether the court may exercise jurisdiction over Rabalais which appears on the face of the complaint and which is therefore subject to demurrer.

Rather, from a review of the Complaint it appears the court does have jurisdiction over Rabalais. In order to establish general jurisdiction, the defendant must have extensive, wide-ranging, substantial, continuous and systematic contacts with California. See Cornelison v. Chaney (1976) 16 Cal.3d 143, 147. Leon alleges that although ASM is incorporated under the laws of Delaware, and that Rabalais is the President/CEO of the company, ASM has an established office in San Diego, California. (Complaint ¶¶ 3, 9). Moreover, Leon alleges that ASM contracted with him in Los Angeles, California and that Rabalais defrauded Leon through acts of wire and internet fraud in Los Angeles, California (Complaint ¶ 11). Leon further alleges that he engaged in numerous different contacts specifically, who was acting on behalf of ASM while Leon resided in California. It is therefore clear from the face of the complaint that the court maintains proper jurisdiction over the subject matter of the dispute claimed in the complaint.

At issue then is whether the court lacks jurisdiction according to matters of which the court may take judicial notice. In certain instances, the court is permitted to take judicial notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Evid. Code § 452(g). Rabalais has attached what he contends are the Terms of Service to which Leon agreed, and argues that the choice of law provision contained in those Terms of Service prevents Leon from trying this case in California. The Terms of Service attached to the demurrer indicate that all claims are to be brought

either in the Kingdom of the Netherlands, or the Republic of Costa Rica. However, the apparent facts and matters contained within the Terms of Service which was apparently posted on the Defendants' website are not facts "that are not reasonably subject to dispute." In fact, a review of Defendants' website on April 22, 2008 led the court to find that Terms of Service now require all disputes to be brought in a court located in the United Kingdom, not the Netherlands or Costa Rica. It is clear that the facts contained on this website, which are subject to the control of Defendants, are subject to dispute and are not capable of immediate and accurate determination There is nothing to prevent the Defendants, and Rabalais, from changing the contents of the website at a moment's notice in order to best serve his interests at any given moment. The court therefore refuses to take judicial notice of the Terms of Service cited by Rabalais for purposes of analyzing the demurrer. Rabalais' demurrer for lack of jurisdiction is therefore OVERRULED.

Demurrer to Specific Causes of Action

Rabalais demurs to the each of the seven causes of action alleged in the complaint on grounds that Leon fails to state facts sufficient to constitute a cause of action, fails to state facts to show how the defendants operate or reside in California, and fails to state whether the contract is written, oral or implied. CCP §§ 430.10(a), (e) and (g). As discussed above, Rabalais' argument in support of his demurrer on grounds of lack of jurisdiction fails. As to the two remaining grounds raised in opposition to each of Leon's seven causes of action, the demurrer is completely devoid of any legal argument showing

why Leon has failed to state facts sufficient to constitute each cause of action or why it cannot be ascertained from the pleading whether the contract was written, oral or implied in conduct.

First Cause of Action for Conversion

Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion are: (1) the plaintiff's ownership or right to possession of the property at the time of the conversion; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use. Farmers Ins. Exchange v. Zerin (1997) 53 Cal.App.4th V- 1, 451-452.

Neither party provides a specific argument as to why the claim for conversion is improperly or properly pleaded. However, an examination of the pleadings indicates that Leon has properly pleaded facts in support of this cause of action. He alleges that made a credit card deposit on the website, and that the Defendants promised that his "balance is always available for withdrawal." (Complaint ¶¶ 17, 25). Leon further alleges that he has "repeatedly demanded in writing that ASM pay him the $143,040 that belongs to him, which he has withdrawn in accordance with ASM's rules and regulations but ASM has not paid." (Complaint ¶ 60). Leon further alleges that he has suffered damages as a result of ASM's conversion of his money. (Complaint ¶ 62). Leon has therefore properly pleaded sufficient facts

to state a claim for conversion. Rabalais' demurrer to this cause of action is thus OVERRULED.

Second Cause of Action for Breach of Contract

The elements for a breach of contract cause of action are: (1) the contract; (2) plaintiffs performance or excuse for nonperformance; (3) defendants breach; and (4) resulting damages. Reichert v. General Ins. Co. (1968) 68 Cal.2d 822, 830. In alleging a breach of contract cause of action, it is necessary to specify whether the contract is written, oral or implied by conduct. CCP 430.10(g). In order to plead a written contract (the first element listed above), a plaintiff must, in addition to alleging the making of the contract, do one of the following: (1) set forth the contract in haec verba; or (2) plead the contracts legal effect by alleging the substance of its relevant terms. 4 Witkin, California Procedure 4th Edition, 479-481. In order to plead an oral contract, a plaintiff must plead its legal effect, i.e. allege the substance of the contractual terms .(Id., at 483.)

Rabalais demurs to all seven causes of action on grounds that each "fails to state if any action founded upon a contract, it cannot be ascertained from the pleading whether the contract is written, is oral, or is implied by conduct" the court turns to the facts alleged in the complaint. Although Leon alleges that he and "ASM entered into a contract when Leon registered as a customer on ASM's website and agreed to ASM's published rules, as detailed above," Leon's complaint does not specifically outline whether the contract was written, oral, or implied in conduct and further does not describe the terms of that contract. Leon has alleged that he "registered on this ASM website, opened a new account, and made a

credit card deposit" and "used that deposit to purchase shares of several sports teams and began trading on the website." (Complaint ¶ 25). Leon also alleges that ASM has "promises potential customers that you can withdraw your funds at any time'" and also alleges that "ASM provides any number of withdrawal methods, including check payments... [and] wire transfers out." (Complaint ¶ 13, 16). Leon further alleges that ASM represented to its customers that "your funds are held in an individual trust account and remain there until you request a withdrawal, or make a trade." (Complaint ¶16). These allegations show that various promises were made, but they do not show whether the actual contract alleged to have been breached by the Defendants was written, oral or implied in conduct and does not outline the terms of that agreement. Rabalais' demurrer to the second cause of action is therefore SUSTAINED with leave to amend.

Third Cause of Action for Breach of Fiduciary Duty

Again, although Rabalais demurs to the third cause of action, he does not provide any legal argument in support of that demurrer. Moreover, Leon does not provide any legal argument to show that the third cause of action has been properly pleaded. The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) damages proximately caused by the breach. Stanley v. Richmond (1995) 35 Cal.App.4th 1070, 1086. Leon alleges that "in entering into the contract ASM agreed to safely hold Leon s moneys in an individual trust account until he requested a withdrawal or used those funds to execute a trade," and that "in agreeing to safeguard

Leon's money, and to return his free cash upon demand, ASM assumed a fiduciary duty to Leon." (Complaint ¶¶ 72, 73). A trust relationship, such as that alleged in the third cause of action, is a fiduciary relationship, and the actions alleged by Leon constitute a breach thereof. See O'Flaherty v. Belgum (2004) 115 Cal.App.4th 1044. Thus, Leon has properly alleged facts to state a claim for breach of fiduciary duty and Rabalais' demurrer to the cause of action must therefore be OVERRULED.

Fourth Cause of Action for Fraud and Deceit

Yet again, Rabalais provides no specific legal argument in support of his demurrer to the fourth cause of action for fraud, and Leon provides no specific argument showing why he has properly pleaded facts to state such a claim. The elements of fraud are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud or induce reliance; (4) justifiable reliance; and (5) damages. (See Civil Code 1709.) Fraud actions are subject to strict requirements of particularity in pleading. Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 216.

Since allegations of fraud involve a serious attack on character, fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defense. Accordingly the rule is everywhere followed that fraud must be specifically pleaded such that: (a) General pleading of the legal conclusion of fraud is insufficient; the facts constituting the fraud must be alleged and (b) Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and

specifically), and the policy of liberal construction of the pleadings will not ordinarily be invoked to sustain a pleading defective in any material respect. Id.

Leon has alleged that "before and at the time of the contract at issue, ASM and Rabalais intentionally made the material misrepresentations described above (among others), including that customers can withdraw their funds at any time, upon demand, through an immediate check or wire payment from ASM," and "after contracting with Leon. ASM and Rabalais made repeated false promises that Leon's withdrawal requests would be honored through immediate check or wire payments with no intention of performing " (Complaint ¶ 77). Leon alleges that "when ASM and Rabalais made those representations, they knew their representations were false, had no intention of performing, and made those representations with the intent to deceive and defraud Leon to act in reliance on those representations." (Complaint ¶78). Leon further alleges that he justifiably relied upon those misrepresentations, and that he invested his money on the website but has suffered damages and injury as a result. (Complaint ¶¶ 79-80). These allegations appear to be sufficient to state a claim for fraud with the requisite level of specificity as is required in California. Rabalais' demurrer is therefore OVERRULED.

Fifth Cause of Action for Unfair Business; Practices

Rabalais again provides no specific legal argument in support of his demurrer to the fifth cause of action for unfair business practices, and Leon provides no specific argument showing why he has properly

pleaded facts to state such a claim. The purpose of the Unfair Business Practices Act (Bus. & Prof. Code 17000,et seq.) is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented. (Bus. & Prof. Code 17001.) The Unfair Business Practices Act shall include any unlawful, unfair or fraudulent business act or practice. (Bus & Prof. Code 17200.) The Unfair Business Practices Act is a tool with which to enjoin deceptive or sharp practices. Samura v. Kaiser Foundation Health Plan, Inc. (1993) 17 Cal.App.4th 1284, 1299. fn. 6. A plaintiff alleging unfair business practices under these statutes must state with reasonable particularity the facts supporting the statutory elements of the violation. Khoury v. Maly's of California, Inc. (1993) 14 Cal.App.4th 612, 619.

Section 17200 broadly defines unfair competition as including unfair, unlawful or fraudulent acts or practices. (Along with deceptive advertising in violation of 17500.) These grounds for the action operate in the alternative and only one of three need be shown. Cel-Tech Communications v. Los Angeles Cellular Tel. Co. (1999) 20 Cal.4th 163.

Leon alleges that the actions of ASM and Rabalais were "unlawful, unfair or fraudulent." (Complaint ¶ 82). Leon does not specifically state what actions he contends were unlawful, unfair or fraudulent, but merely incorporates the allegations contained in the preceding paragraphs of the complaint. (Complaint ¶ 81). The court has already determined that the facts pleaded in support of the claim for fraud were

sufficiently pleaded to state such a claim. As such, there is at least one sufficient ground upon which Leon has based this claim. Thus, Rabalais' demurrer to the fifth cause of action is OVERRULED.

Sixth Cause of Action for False Advertising

Rabalais yet again provides no specific legal argument in support of his demurrer to the sixth cause of action for false advertising, and Leon provides no specific argument showing why he has properly pleaded facts to state such a claim. Bus. & Prof. Code 17500 prohibits a business entity from disseminating, in any manner or means whatever, any statement regarding its product which is untrue or misleading, and which is known, or by the exercise of reasonable care should be known, to be untrue or misleading. In order to establish a violation of 17500, it must be shown that the defendant publicly disseminated advertising which contained the false statements. Both public dissemination and advertising have been broadly construed the Courts to include even one-on-one oral statements to a single individual and even product labels. In fact there is no requirement that public media or widespread publicity be used to disseminate the false statement. The standard for determining whether advertising is deceptive is the same as fraud under 17200: it is untrue or misleading if members of the public are likely to be deceived. (That any member of the public was in fact deceived is not required.) Finally, an omission or nondisclosure is just as actionable as an actual misstatement.

Here, Leon has alleged that "ASM and Rabalais have made false statements, detailed above, including without limitation their published advertisements and promises that all customers' funds would be held for safekeeping in individual trust accounts and could be withdrawn upon demand, which constitutes false advertising over the internet." (Complaint ¶ 86). Leon further alleges that such statements "have actually misled and deceived consumers such as Leon," causing damages as a result. (Complaint ¶¶ 87-88) . Leon has pleaded sufficient facts to state a claim for false advertising. Rabalais' demurrer to the cause of action is therefore OVERRULED.

Seventh Cause of Action for Violation of Consumers' Legal Remedies Act

The Consumers Legal Remedies Act (Civ. Code § 1750 et seq.) enables a consumer to bring a class action on behalf of himself or herself and other consumers similarly situated if the consumer has suffered "any damage" from the use or employment of a "method, act or practice" made unlawful by the Act. 4 Witkin, Summary 10th (2005) Sales, § 296. Civil Code 1781(c) requires that a noticed motion be brought to determine that a class action is proper. Civil Code 1782(a) provides, in pertinent part:

Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the following:

(1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Secion 1770

(2) Demand that the person correct repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770.

Leon has not alleged facts showing that he has complied with the preliminary motion requirements established by the Consumers' Legal Remedies Act. A review of the case file reveals that he has not filed a motion pursuant to section 1781(c) prior to bringing such a claim, and has otherwise failed to comply with other preliminary class action certification requirements. Moreover, Leon has not alleged facts showing that he made a demand on defendants pursuant to section 1770. Thus, Leon has failed to state facts sufficient to state a proper claim for violation of the consumers legal remedies act, and Rabalais' demurrer thereto must be SUSTAINED with leave to amend.

APPENDIX - H

PASPA (28 U.S.C. §3701-3704)

§3701

For purposes of this chapter—

(1) the term "amateur sports organization" means—

> (A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or
>
> (B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means—

> (A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

§3702

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

§3703

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the

United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.

§3704

a) Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph

(1), conducted exclusively in casinos located in a municipality, but only to the extent that—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a),section 3702 shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

APPENDIX - I

Wire Act (18 U.S.C. § 1084)

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of

transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(e) As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.

APPENDIX – J

UIGEA (31 U.S.C. § 5362) – relevant provisions

In this subchapter:

(1) Bet or wager. — The term "bet or wager"—

> (A) means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;
>
> (B) includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);
>
> (C) includes any scheme of a type described in section 3702 of title 28;
>
> (D) includes any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering; and
>
> (E) does not include—
>
> > (i) any activity governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 for the purchase

or sale of securities (as that term is defined in section 3(a)(10) of that Act);

(ii) any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act;

(iii) any over-the-counter derivative instrument;

(iv) any other transaction that—

(I) is excluded or exempt from regulation under the Commodity Exchange Act; or

(II) is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act or section 28(a) of the Securities Exchange Act of 1934;

APPENDIX – K

CEA (7 U.S.C. §7a-2(c)(5)(C)) – relevant provisions

Special rule for review and approval of event contracts and swaps contracts

(i) Event contracts. In connection with the listing of agreements, contracts, transactions, or swaps in excluded commodities that are based upon the occurrence, extent of an occurrence, or contingency (other than a change in the price, rate, value, or levels of a commodity described in section 1a(2)(i) of this title), by a designated contract market or swap execution facility, the Commission may determine that such agreements, contracts, or transactions are contrary to the public interest if the agreements, contracts, or transactions involve—

> (I) activity that is unlawful under any Federal or State law;
> (II) terrorism;
> (III) assassination;
> (IV) war;
> (V) gaming; or
> (VI) other similar activity determined by the Commission, by rule or regulation, to be contrary to the public interest.

(ii) Prohibition. No agreement, contract, or transaction determined by the Commission to be contrary to the public interest under clause (i) may be listed or made available for clearing or trading on or through a registered entity.