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December 12, 2007

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551

Department of Treasury
Office of Critical Infrastructure Protection
And Compliance Policy
Main Treasury Building, Room 1327
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Re: Treas-DO; Docket Number Treas-DO-2007-0015 &
Regulation GG; Docket No. R-1298

Dear Sir or Madam:

Duplicate (2007) Inc. (“Duplicate”) submits these comments in response to the Notice of Joint Proposed Rulemaking regarding the Prohibition on Funding of Unlawful Internet Gambling issued by the Departmental Offices of the Department of Treasury and the Board of Governors of the Federal Reserve System (the “Agencies”). *See Federal Reserve System, Regulation GG; Docket No. R-1298; Department of the Treasury, RIN 1505-AB78, 72 Fed. Reg. 56680 (Oct. 4, 2007) (“Joint Notice”).*

As the Agencies move forward in implementing regulations under the Unlawful Internet Gambling Enforcement Act of 2006 (“Act”), Duplicate urges the Agencies to ensure that their regulations do not jeopardize the viability of law-abiding businesses such as Duplicate. This rulemaking proceeding presents the Agencies with the important opportunity to strike a proper balance by implementing the Act’s mandate without unnecessarily placing in harm’s way legitimate businesses such as Duplicate. In these comments, Duplicate offers proposals that would assist the Agencies in achieving this regulatory balance.

As set forth below, the Agencies should recognize that duplicate poker is exempt from the prohibitions of the Act and should expressly exempt duplicate poker from the regulations promulgated under the Act. The Agencies also should consider establishing a procedural mechanism by which entities offering online games may apply for and obtain a certification from the Agencies that they are engaged in a lawful Internet gaming business.

I. Duplicate (2007) Inc. and the Game of Duplicate Poker

Duplicate offers various forms of its patented¹ duplicate poker games online at www.duplicatepoker.com. Pinhas Romik, Duplicate's Founder and President, is a champion bridge player who has held the U.S. bridge title, the European title, and has placed second in the world bridge championship. Attached as Exhibit 1 is a recent article from *Poker Pro* magazine describing Duplicate and the game of duplicate poker. The games offered by Duplicate involve the play of Texas Hold'em and have the following characteristics:

1. At each table, an identically ordered deck of cards is used for each deal. Thus, players in the same seat position at each table receive the same cards. The community cards on each table also match for each deal.
2. Like regular poker games, a player in a given seat at a table plays each "deal" against the other players at his or her table. However, unlike regular poker games, the results for the player in that seat are compared against others in the same seat at each of the other tables to determine who played the hand most skillfully. There is no competition among players at the same table. Thus, a player could actually lose some number of chips on a given deal, but would be the winner if his loss was less than that of others in the same seat position at the other tables.
3. Players begin each deal with the same number of playing chips, regardless of their previous winnings or losses.
4. The ultimate winner is determined by ranking all the players in the corresponding seats at each of the tables in play over the course of all of the deals in a given session. There must always be a minimum of two tables in play in order to play a hand of duplicate poker.

Thus, unlike in regular poker, in the games offered by Duplicate, a player's outcome is determined solely based upon a comparison of his play of each hand with the play of the identical hand by other players in the same seat position at other tables who have the same cards and begin each hand with the same number of playing chips. The duplicate format therefore removes the "luck of the draw" element introduced in traditional poker by the

¹ Patent number 7,104,542 dated Sept. 12, 2006.

shuffling and dealing of cards. The removal of the random luck of the draw aspect of traditional poker creates a new game in which the outcome is determined solely by a comparison of the relative results obtained by players with the identical cards competing against other similarly situated players, each of whom, in turn, is confronted with opponents that hold the same cards as those seated in the same position at each other table.

Duplicate poker is similar to the game of duplicate contract bridge, which is widely recognized as a game of skill. Duplicate respectfully refers the Agencies to the letter submitted by Michael Cappelletti in response to the Joint Notice. As set forth in his letter, Mr. Cappelletti is a highly-accomplished contract bridge player. In addition, he has published books regarding poker and has written over 400 columns regarding various aspects of poker for CARD PLAYER Magazine. Mr. Cappelletti concludes that both duplicate contract bridge and duplicate poker are games of skill.

II. The Games Offered by Duplicate Are Skill Games Not Subject to the Unlawful Internet Gambling Enforcement Act Of 2006

The Act prohibits any “person engaged in the business of wagering” from knowingly accepting payments “in connection with the participation of another person in unlawful Internet gambling.” *See* 31 U.S.C. §5363. The Act defines “unlawful Internet gambling” as placing, receiving, or otherwise knowingly transmitting a “*bet or wager* by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received or otherwise made.” *See* 31 U.S.C. §5362(10)(A) (emphasis added). “Bet or wager,” in turn, is defined as:

[T]he 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.

See 31 U.S.C. §5362(1)(A) (emphasis added). Duplicate poker does not involve one person risking something of value on the outcome of a contest of others, and it is not a sporting event, so the only issue is whether it is a game subject to chance. As shown below, it is not, and therefore does not fall within the regulatory scheme created by the Act.

Numerous court decisions have established the “accepted meaning” of the term “game of chance:”

Although different language is used in some of the cases in defining the term, the definitions are substantially the same. It is the character of the game rather than a particular player’s skill or lack of it that determines whether the game is

one of chance or skill. The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game.

See In re Allen, 377 P.2d 280, 281 (Cal. Sup. Ct. 1962). In *Allen*, the California Supreme Court determined that game of bridge is “predominantly one of skill” because “there is a continually recurring necessity in the bidding and play of the hand to make decisions which, considered together, will ordinarily be determinative of the outcome of the game.” *Id.*

The Alaska Supreme Court has listed factors for determining whether skill predominates over chance, including the following:

1. Participants must have a distinct possibility of exercising skill and must have sufficient data upon which to calculate an informed judgment.
2. Participants must have the opportunity to exercise the skill, and the general class of participants must possess the skill. Where the contest is aimed at the capacity of the general public, the average person must have the skill, but not every person need have the skill.
3. Skill or the competitors’ efforts must sufficiently govern the result.
4. The standard of skill must be known to the participants, and govern the result.

See Morrow v. State, 511 P.2d 127, 129 (Sup. Ct. Alaska 1973).

The mechanics of duplicate poker are consistent with the Alaska Supreme Court’s factors for classifying skill games. The duplicate poker player competes against players in the same seat at other tables who have been dealt the same cards, and each player starts a hand with the same number of chips. The ultimate result depends upon which player in the same seat among the different tables plays his hand most skillfully. A player’s skill, rather than the cards he receives by chance, governs the result of the game.

Professor I. Nelson Rose of Whittier Law School, who is recognized in the United States as a leading authority on gaming law, has concluded that, under these established legal principles, duplicate poker is a skill game:

It is impossible to completely eliminate all chance factors. But because the contest of duplicate poker consists of a contest among players having identical cards, the most important chance factor of card games, the randomness of the distribution of the cards themselves, has been eliminated. Even the most lucky

unskilled player will find it difficult to beat the most unlucky skilled player, who is playing with the exact same cards. The players have to not only do well against the players at their table, but also against players in their contests at other tables.

See Professor I. Nelson Rose, *Legal Opinion: Duplicate Poker Skill Games*, Nov. 6, 2005, at 10 (attached as Exhibit 2). Professor Rose's opinion supports the view that the unique rules of duplicate poker greatly reduce the random factor associated with games of chance.

Finally, federal law prohibits the broadcasting of advertisements for, or information regarding, lotteries and games "dependent in whole or in part upon lot or chance...." See 18 U.S.C. §1304. In an action to enforce the anti-lottery broadcast statute, the Federal Communications Commission's former Mass Media Bureau determined that the statute does not apply to a "poker tournament" involving a "closed-ended arrangement in which all players start with an equal amount of money and play in a 'winner-take-all' elimination contest" and that such poker tournament is a game of skill. See *Hualapai Broadcasters, Inc.*, 7 FCC Rcd. 6261 (MMB 1992). All of Duplicate's games are a form of tournament and, due to the duplicate nature of the games, involve the exercise of greater skill than in a regular poker tournament.

In summary, because duplicate poker is a game of skill and thus not a "game subject to chance" in the statutory sense, participation in duplicate poker does not involve a "bet or wager" and therefore does not constitute "unlawful Internet gambling" under the Act. Accordingly, duplicate poker transactions are not "restricted transactions" subject to the prohibitions of the Act. Duplicate respectfully requests that the Agencies: (1) recognize that duplicate poker is exempt from the Act's prohibitions; and (2) expressly exclude duplicate poker from the regulations promulgated under the Act.

III. The Agencies Should Consider Establishing a Process to Certify Lawful Internet Gaming Businesses

The Agencies frankly acknowledge that the Act will result in the blocking of otherwise lawful transactions:

Some payment system operators have indicated that, for business reasons, they have decided to avoid processing any gambling transactions, even if lawful, because, among other things, they believe that these transactions are not sufficiently profitable to warrant the higher risk they believe these transactions pose.

Joint Notice at 19. However, despite this marketplace reality, the Agencies state that they "do not have the authority to require designated payment systems or participants in these systems to

process any gambling transactions, *including those transactions excluded from the Act's definition of unlawful Internet gambling*, if such system or participant decides for business reasons not to process such a transaction." Joint Notice, 72 Fed. Reg. 56688 (emphasis added).

While the Agencies may not have the authority to require designated payment systems or participants to process lawful gaming transactions, the Agencies do have the authority to establish a procedure to ensure that designated payment systems and participants may process lawful gaming transactions without subjecting themselves to risk under regulations promulgated under the Act. To this end, Duplicate urges the Agencies to consider establishing a mechanism by which an entity can apply for a determination from the Agencies that it is engaged in a lawful Internet gaming business. This certification procedure could be available to websites that offer exclusively games of skill (as determined under the generally accepted principles discussed in Section II above), charge players to compete in such games, and award prizes to winners. A certification by the Agencies that a website offers exclusively games of skill would not constitute a determination of the games' legal status under any particular state's law, although skill games are lawful in the great majority of states. Gaming websites would still need to comply with all applicable state gaming laws.

Under this approach, designated payment systems and participants could rely upon the Agencies' certification of a website as a basis for processing transactions with that website in compliance with the regulations issued under the Act.

Duplicate will rely on the Agencies' expertise to develop procedures for this type of certification process. However, Duplicate respectfully submits that the certification process should include the following elements:

1. The gaming entity will prepare and submit an application form developed by the Agencies containing complete information regarding the gaming entity, its business model and the games it offers.
2. The gaming entity must support its application with a legal analysis demonstrating that its gaming activities are lawful under applicable federal and/or state law.
3. The application will require a significant filing fee to cover the Agencies' administrative expenses in processing the application.
4. The certification procedures adopted by the Agencies should include an appeals process in the event of an adverse determination.

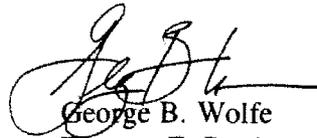
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Duplicate believes that the establishment of this type of certification process for a company involved in lawful Internet gaming activities may reduce the significant harm that Duplicate and other entities involved in legitimate online gaming activities may otherwise suffer from overblocking.

CONCLUSION

For the foregoing reasons, the Agencies should recognize that duplicate poker does not fall within the Act's prohibitions and should explicitly exempt duplicate poker from the regulations issued under the Act. The Agencies also should consider developing a mechanism for entities offering online games to apply for and obtain a certification from the Agencies that they are engaged in a lawful Internet gaming business.

Respectfully Submitted,



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Counsel for Duplicate (2007) Inc.

EXHIBIT 1

DANIEL NEGREANU TALKS ABOUT LIFE ON THE TOUR

POKER ♠ PRO

NOVEMBER 2007

APPROACH
SIT-N-GOS
THE RIGHT WAY

SURPRISES AT
WORLD SERIES
OF POKER EUROPE

FINDING THE
3-WAY PATH
IN HIGH-LOW
VARIATIONS

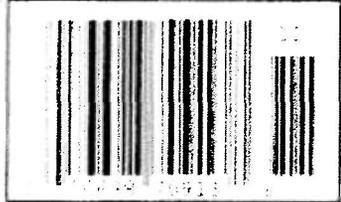
TAKE OUR
POKER QUIZ

New
Concept

DUPLICATE POKER

It's
Online
— And
It's Legal

\$5.95 US \$7.95 CAN



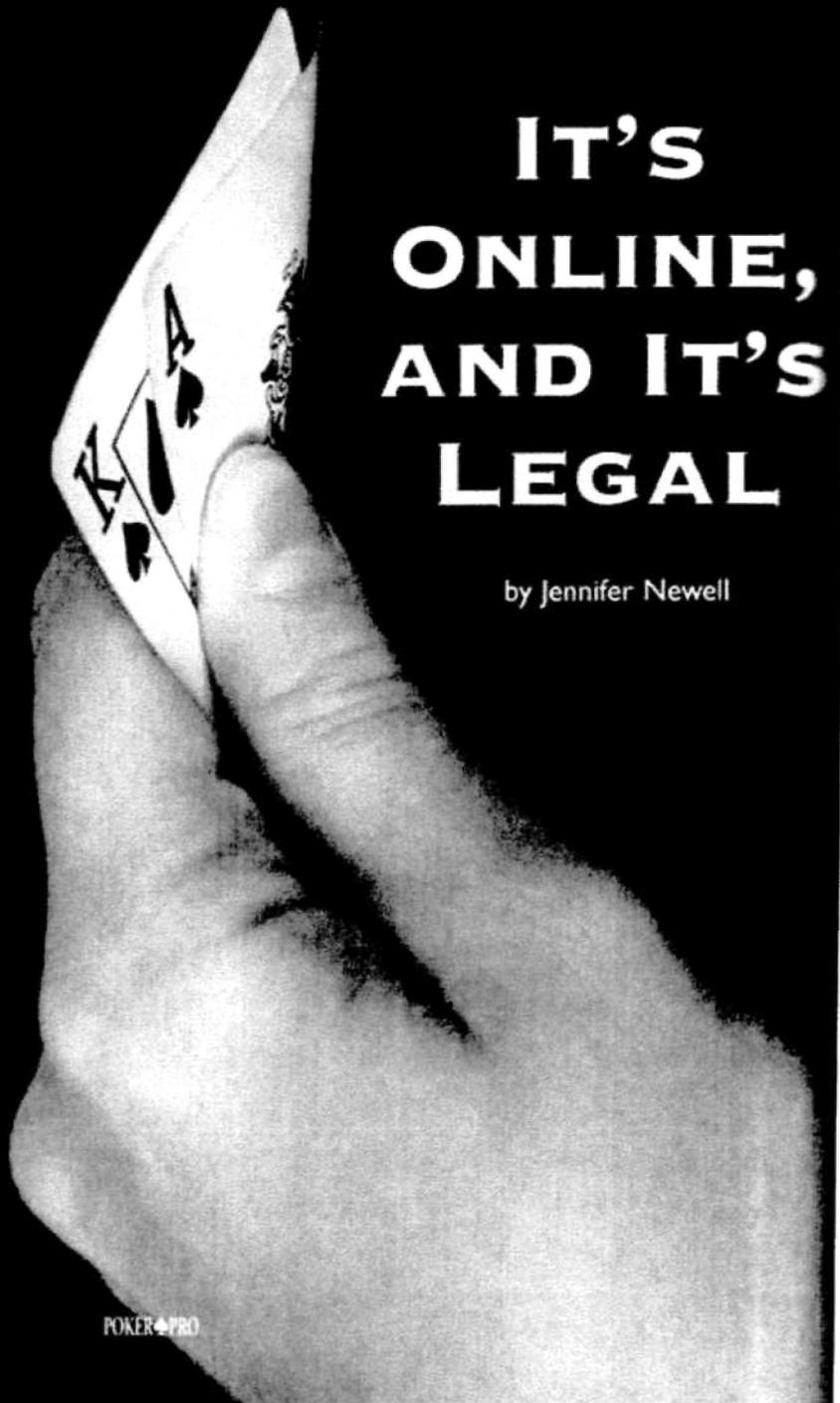
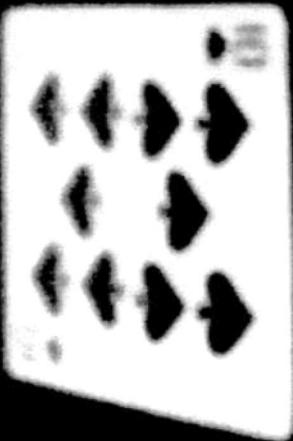
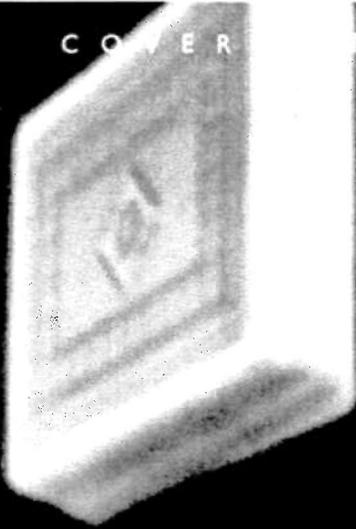
www.PokerProMagazine.com

Duplicate Poker
CEO Pinhas Romik

DUPLICATE POKER:

**IT'S
ONLINE,
AND IT'S
LEGAL**

by Jennifer Newell





Unique Skill-Based Variation Negates the Impact of Bad Beats and Bad Cards

DUPLICATE POKER IS DIFFERENT.

From the moment the download is complete and you find that there is already real money in your account, to playing one of the games for the first time, there is no doubt that it is a new experience. From the ability to play with real money by using your Visa, Mastercard or American Express account to transfer funds, to the fact that winning is based on skill, not luck, Duplicate Poker is a concept that has been a long time coming.

The online poker site launched on September 1, 2006, but only began its expansive marketing blitz this year. Now, its logo can be seen on numerous poker-related websites as the word spreads about this new phenomenon called duplicate poker. The concept and its premise are catching on quickly.

While still in the beginning stages of building a customer base and introducing the idea to card players, the minds behind the concept have already conducted a trial live tournament and are looking to create a tour of live duplicate poker events culminating in a championship event. But it

all starts with the success of their already growing website.

Dan Goldman, Vice President of Marketing for Duplicate Poker, discussed the effect that the company feels it has on the game of poker. "If you look back over the years since the World Series of Poker started, there have been only three major things that have happened in poker. One is online poker, another is televised poker, and duplicate poker is the third. It's not a different game, like the difference between stud and hold'em; this is an entirely new way to play the same game that has

been around for a long time. And it accomplishes something that players have wanted for a long time - proving who is really the best based on skill."

THE CONCEPT

Plain and simple, the game of bridge was the inspiration behind duplicate poker. And the people who were involved in developing Duplicate Poker as a website pooled their knowledge of bridge, poker and business to launch the idea.

Goldman explained, "The concept originated with bridge. It was learned very early on in bridge tournaments that bridge is clearly a game of skill and has a lot less variance from hand to hand than poker, and that there was a very short-term impact based on the draw or luck of the cards. If a player was dealt a spectacular hand in bridge, even a bad player would be able to do extremely well. The concept of duplicate bridge originated when decks were set up identically, and two teams of two players each would play at one table, same with another table, and their hands would be compared.

"Finhas Romik, the founder and president of Duplicate Poker, is a champion bridge player who has held the U.S. title, European title and come in second place in the world championship. He started a website quite a few years ago based on duplicate bridge and has always had some interest in poker. He wanted to see if he could apply the same duplicate bridge concepts to poker in order to minimize luck."

Romik enlisted the assistance of people who knew a thing or two about the online poker world, business, marketing and poker. Bob Ciaffone, a veteran poker player and teacher with decades of experience in poker, not to mention bridge, came to the table with the idea of duplicate poker having crossed his mind over the years as more than a passing thought. In addition, Ciaffone has a great deal of insight into the poker world and knew that players would appreciate the idea of the skill aspect of poker being brought to the forefront of the game. Romik also asked Nolan Dalla to represent the company as the director of communica-



DUPLICATE POKER IS BASED IN NEW YORK CITY AND HAS GAINED THE TRUST OF U.S. BANKS

tions, and Dalla not only brought his poker expertise to the company but his extensive media background as well.

With a team of contributors and employees who cared about the project and saw its potential, e-PokerUSA, Inc. launched the site in 2006. And 2007 found the concept to be drawing support and interest from card players of all skill levels, especially those in poker who have long sought a way to prove that poker is a skill-based game.

The concept also goes beyond the Internet, as the game's creators hosted the first ever live duplicate poker tournament in Tulsa, Oklahoma, at the Cherokee Casino, an event that attracted about 200 people and resulted in skilled players like Jan Fisher and Linda Johnson finishing in second and

sixth place respectively. Other live tournaments are in the planning stages to correspond with major poker tournaments. Duplicate Poker is currently in talks with Los Angeles card rooms to finalize the arrangements, and formal announcements will be made in the near future.

THE RULES

Familiarizing oneself with the rules of Duplicate Poker is a must. Ciaffone reiterates that point: "As in any competition, you have to understand the rules. You should understand them well - how the scoring happens, what makes a winner and a loser, and other basics of the game. Before you risk money at it, understand the basic concept of each type of tournament and game on the site."

And the rules are easy to find. Before downloading Duplicate Poker, there is a tutorial available to watch on the main website, and after the quick download, the help sections are easy to locate. In addition, a forum exists with comments and suggestions from fellow players.

The basics are:

- There are always two or more tables of players, with the same number of players seated at each table.
- An identically shuffled deck of cards is used at each table for each hand played so that players in the same seat position at each table receive the same hole cards, and the common cards are the same at each table.
- Every player begins each hand with the same number of playing chips, regardless of how the previous hand played out.
- The winner of each hand is determined by the number of chips at the end of the hand as compared with those held by all players in the same seat at other tables.
- Session and tournament winners are determined by comparing the results achieved by the players who played identical hands so that skill determines who wins, not whether they were dealt good or bad cards. Any hand is winnable if it is played properly.

Goldman sums up the basic concept: "In Duplicate Poker, if you were dealt aces every single hand, it would have absolutely no impact on the outcome because while nominally you're competing against the people at your table, you're really trying to win more or lose less than people at other tables in your same position with the exact same cards."

THE APPEAL

Duplicate Poker is an attractive game to card players, even chess and backgammon players, who are strategists. Nolan Dalla feels that the game is appealing to a wide variety of people. "A lot of poker players, especially experienced players, sign on to a regular online site or play in a brick and mortar casino and hope that the cards

break even for us. We don't need a flurry of great cards but don't want the cards to be against us. Duplicate Poker appeals to people who want to win based on skill rather than luck. Most intelligent players say that eliminating so-called bad beats is very appealing. Others who are attracted to Duplicate Poker are those who are not gamblers by nature. There is still a significant segment of society that does not gamble or participate in casino games."

Another important aspect of the site is the players' forum where people can discuss strategy, hands, situations and even make suggestions. As the site continues to grow, the players' comments are an integral part of its future.

One particular example of the players' impact on Duplicate Poker is the ability to see your rank and score during a tournament or session.

Originally, the site programmers removed that feature, and players voiced their opinions, saying it wasn't fun and didn't feel it was good for the game. After discussing with the players and staff, they decided to show rankings in all sessions and tournaments, while showing the score in some of them. Goldman said, "Our players dictated the best solution. We constantly try to make decisions that are based on a balance between what's best for the player and what's best for the game in order to ensure fairness and the skill factor."

Perhaps the greatest appeal of Duplicate Poker is its legality in the United States. Not only is its headquarters in New York City, an area that has been targeted by the Department of Justice in the past, but it has gained the trust of U.S. banks. In order to deposit or withdraw funds from the site, a player can use Visa, Mastercard or American Express, which is something that hasn't been possible on gaming websites since 2002.

Goldman noted, "Banks tend to be very conservative on these issues, but for them to be willing to process deposits to our site goes a long way toward their confidence that Duplicate Poker doesn't come under the category of gambling; it is firmly in the skill games category."

BOB "THE COACH" CIAFFONE'S TIPS

FOR PLAYERS NEW TO DUPLICATE POKER, the most important first step is to become familiar with the rules and scoring system. In addition, the game's resident expert has some tips:

1. Appreciate what it means when someone else has the same cards. If you pick up two kings and somebody else has two aces and you lose a bunch of money, the same thing probably happened at the other tables. This won't put you in a hole.

2. If you are not doing well, you're going to have to do something unusual in order to make the cut at the end of the session to advance. The term for that is "shooting," a bridge term for playing in an abnormal fashion when you know that playing normally isn't going to be successful. It's taking the worst of it to create a swing.

3. There is room for different styles of play, but it's important to decide how to play at various stages. Most importantly, you have to be capable of varying your play according to how you stand in the session. That is the key to the game!

Besides the site being very user-friendly and welcoming to new players, Duplicate Poker has provided some incentive to try it out. By simply downloading the site and logging on, every player will find \$5 of real money automatically available for live play for a limited time. With games that begin at \$1+\$0.10, several games can be played to get the feel of it before depositing funds. And the ease of transferring money directly from a credit or debit card allows for immediate play. There is also a 100 percent deposit bonus for added incentive.

Duplicate Poker is an innovative concept that has been sought after by card players for some time, and its day has dawned. The site is located at www.duplicatepoker.com. ♦

EXHIBIT 2

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FAX: (818) 788-3104
WEB SITE: www.GAMBLINGANDTHELAW.com
EMAIL: rose@sprintmail.com

November 6, 2005

Pinhas Romik
President and CEO
e-pokerusa Inc.
via email: pinhas@e-pokerusa.com

LEGAL OPINION

NOTE - This Legal Opinion is not complete without the attached Statement of Limitation and Biography.

Question Presented

Is a skill contest, in which players are grouped into contest groups for judging purposes only and play poker with identical hands of cards at tables made up of other players who are also organized into similar contest groups (“duplicate poker contest” herein) legal in general under United States federal law and in general under the applicable laws of the various states of the United States?

Short Answer

It is universally accepted that gambling must have three elements: chance, prize and consideration. A skill contest which awards valuable awards and charges players entry fees, clearly has the elements of prize and consideration. **The duplicate poker contest does not have the element of chance, under federal law and most state anti-gambling laws, because it is a game of skill. The operator of an Internet site that offers only contests of skill, such as duplicate poker, is, by definition, not involved in gambling.**

The governments of the various states do have the power to regulate or even prohibit skill contests, specific games such as poker, or games played with cards. Examples of laws that restrict skill games include statutes that limit contests of skill to small prizes or require that the prizes awarded not be created out of contestants’ entry fees. It is possible statutes such as these, which would make the offering of these skill

contests illegal, violate the United States Constitution; however, care must be taken to not violate these state restrictions unless they have been declared invalid by a court.

Analysis

I. Factual Assumptions

The skill contests (“the contests”) will be conducted as games on the Internet. Players participating in the contests are grouped for judging purposes only and play poker with identical hands of cards at tables made up of other players who are also organized into similar contest groups. The poker played is conducted as it would be in a live game. However, the several contest groups will be running simultaneously, with representatives of each contest group interspersed so that no more than one player from a contest group is playing at any one table. When the cards are dealt all players at each table will have different hands as in a live game; however, the players at all other tables will have the identical hands as well. All players in seat #1 will have the same hand; seat #2 will have the same hand and so on. In other words the deal and card play is mirrored at each table. Therefore, if there are four contests running there will be four players at each of four tables with all of the players receiving the identical cards to their contest counterparts at the other tables. Each table would thus have exactly the same cards appear.

The contest prizes are composed of the contest entry fees, where that is allowed, or by predetermined set amounts, where the law requires that prize structure. The operator of the skill contests will receive a fee from each player, which may, for convenience, be a portion of the entry fees. Players receive identical amounts of chips for play at their tables. The chips are non-redeemable and cannot be used for any purpose other than playing at the table games; chips are not money or tokens of value. Winners’ prizes are based on their ranking in their contest, not on the amount of chips won or lost at a table. The player with the largest amount of chips at a table may not have won his respective contest, if a player in his seat number, starting with the same amount of chips and receiving identical cards, obtained more chips at his table game. Chips are only a way of keeping score and providing a basis for evaluating the skill of the players, similar to points in a rummy game or duplicate bridge game.

The poker games played at each table proceed as normal with all players playing and betting to the very best of their ability, betting chips, not money. The cards are “shuffled,” i.e., they are distributed to players randomly (with, of course, each player in a contest receiving the same cards). The rules of poker apply to the table games. Players win or lose chips depending on the cards and how they play them. The chance of the cards may favor one player over another at a table and some players will win or lose accordingly, as in normal play. However, the chance of the cards has no affect on whether players win or lose their respective contests, since they are only competing against players holding identical cards. The process is repeating itself at each table, so

that players receiving identical cards at different tables are competing against each other to acquire the most chips, or lose the least amount, to win their respective contests. The judging criteria will be the amount of chips in players' possession at the end of the contest and this will be compared to those others in their group that played the identical cards. Because a player lost in the process of play does not mean that he will lose in his contest group. He may have managed his play better in the face of poor cards and stiff competition than others in his contest group and he would win his contest. Likewise, a player may have won at his table but still may lose in his contest group as his win may be less others starting with identical cards and chips.

Contest prizes may be awarded in the following ways:

1. In Winner Takes All games, the player with highest chip count among all players sitting in the same position across different tables wins the entire contest prize.
2. In Get Fair Share (GFS) games, the distribution of the contest prize is as follows:
 - a. The chip count of the player with the least chips is deducted from all stacks of players sitting in the same position across different tables. That player therefore has a score of zero, and will not get any share of the contest prize. Example: If there are three tables and the players sitting in position #1 finished with stacks of 1020, 1000 and 980 chips, 980 chips would be deducted from each players' stack, resulting in stack sizes of 40, 20 and 0.
 - b. The relative share of each player's new stack size compared to the accumulated new stacks of players sitting in the same position across different tables is calculated for the rest of the players. For the same example above, the relative share of the player remaining with 40 chips would be $40/(40+20+0)$, which is 66.7%. The relative share of the player remaining with 20 chips would be $20/(40+20+0)$, which is 33.3%. The last player gets $0/(40+20+0)$, which is 0%.
 - c. Each player then gets their proportionate share of the contest prize.
3. In Normalized Tournaments there are two types of chips: game chips which are renewed each hand, like in ring games, and victory chips where in ring games you have money. Players play until they either run out of victory chips or win the tournament. Contest prizes are then distributed per a predetermined distribution key. Win or loss of victory chips from game to game is calculated as follows:
 - a. GFS percentage is calculated for the game chips stack at the end of each game (see GFS, above).

b. The percentage scores are then normalized, in order for the sum of the percentages to equal zero and not a hundred. This is done by deducting $100/C$, where C is the number of comparisons (the number of tables that get dealt the same card set). This is done to ensure that the number of victory chips created in every hand is zero sum, i.e., the number of plus chips is equal to the number of minus chips. For the example given for GFS above, after obtaining the percentage distributions of 66.7%, 33.3% and 0%, 33.3% $(100/3)\%$ will be deducted from each player. The resulting count will then be 33.4%, 0% and -33.3%.

c. The resulting percentages are then multiplied by a factor (e.g. 10) to give the victory chips change for this game round. The factor can be dependant on the stage of the contest. For the example above the winner got 334 victory chips, and the player in table 3 lost 333 victory chips.

d. If the player with the smallest stack has only lost chips equal to the small blind or the big blind, an allowance is made so as to allow a loose game. The factor will then be divided by 4.

It is also assumed that all companies, individuals and operations are in complete compliance with all applicable laws concerning licensing, taxation, record-keeping, use of other's names and likenesses, truthfulness of statements, use of intellectual property and the manner in which the games are played.

II. Legal Analysis

A. Introduction

The gambling laws of the United States are a confusing, conflicting, and often over-lapping hodgepodge of usually outdated statutes, regulations, Attorney General Opinions and cases. A major reason for this is the tendency of legislatures to react to a particular crisis facing them at the time, such as the Louisiana Lottery scandal of the 1890s, and then to leave the laws on the books. Politicians do not usually win votes by acting to remove restrictions on gambling.

In addition, governments have the right to regulate non-gambling activities, if there is a danger to the health, safety, welfare or morals of their citizens. This is known as a state's "police power." Gambling, whether legal or illegal, falls within the police power. Governments have begun using their police power to regulate contests of skill, to ensure that the contests are fair and that prizes are actually awarded to winners.

In general we are dealing with criminal statutes, which, although they carry penal penalties, have the advantage of requiring strict construction. The criminal law of the federal government and virtually every state require that there be a specific statute

outlawing an activity before the activity can be deemed criminal. There are no common law crimes, only the legislature can declare an activity illegal; a judge cannot decide for himself whether an activity is criminal. This means that an activity is legal unless it fits into an existing criminal prohibition. The prohibitions on gambling often date back to the 19th century and simply did not anticipate the changes wrought by modern technology. There are very few laws on the books that specifically mention the Internet.

B. Definition Of Gambling

Gambling has been universally defined as having three elements: a prize, consideration and an outcome determined by chance.

The elements of gambling are consideration, a result determined by chance rather than skill, and a reward or prize; or, in other words, payment of a price for a chance to gain a prize. In addition, under a statute that prohibits gambling for profit, "for profit" is a necessary element of the offense.

38 Am.Jur. Gambling §2.

If any one of these three elements is missing the activity is not gambling, though it still might be subject to government regulations.

C. Chance v. Skill

Even if a game costs a player money to enter and therefore has "consideration," and the winner will receive a thing of value, a "prize," the contest is technically not gambling if skill predominates over luck in determining the winner. The test is stated in different ways by different courts. At a minimum, the outcome must be determined by chance for a game to be gambling.

A game has been defined as a "contest for success or superiority in a trial of chance, skill, or endurance." When used in connection with gambling, a game is anything that is used as a means of playing for money or other stakes, with the result depending more on chance than on skill.

19 AM.JUR.POF 647.

[W]e construed the phrase "the award of which is determined by chance, even though accompanied by some skill," an element in the definition of lottery, see §945.01(5)(a), Stats., to mean that "[c]hance ... rather than skill must ... be the dominant factor controlling the award...."

State v. Hahn, 221 Wis.2d 670, 679, 586 N.W.2d 5, 10 (1998).

See also *Hotel Employees and Restaurant Employees International Union v. Davis*, 21 Cal.4th 585, 981 P.2d 990, 88 Cal.Rptr.2d 56 (1999), where the California Supreme Court cited GAMBLING AND THE LAW (1986), written by the author of this Legal Opinion.

It is important to note that there is no “house” and that no individual can place a wager on a contest between two other players. As the official commentator to the New York anti-gambling laws put it:

"Gambling" is not defined purely in terms of betting or risking something of value upon a contest of chance. The point may be illustrated by considering a chess game between A and B, with A and B betting against each other and X and Y making a side bet. Despite the character of the game itself as one of pure skill, X and Y are "gambling" because, from their standpoints, the outcome depends upon "chance" in the sense that neither has any control or influence over it. The same is not true of A and B, who are pitting their skills against each other; they, therefore, are not "gambling." It is this feature that requires a definition of "gambling" to embrace not only a person who wagers or stakes something upon a game of chance but also one who wagers on "a future contingent event [whether involving chance or skill] not under his control or influence."

William C. Donnino, Practice Commentary McKinney's Penal Law Ch. 40, Pt. 3, T. M, Art. 225, Refs & Annos. (1999).

The amount of luck or skill involved in any game has always been important in determining whether or not the game is a form of gambling. Some courts have gone further and looked at the amount of skill and luck to determine whether the game was a lottery. The contests in question (duplicate poker) appear to be contests of skill.

For the purposes of this Legal Opinion it is not necessary to analyze the difference the law sometimes makes between gambling games that are predominant games of chance as opposed to gambling games that are entirely chance, except to note that in some jurisdictions, including federal law, laws prohibiting lotteries only apply to games in which no skill at all is present. "Gambling schemes where winning depends on skill or judgment are not like a lottery in which success is determined by pure chance and is thus specially attractive to the inexperienced and the ignorant." *Boasberg v. United States*, 60 F.2d 185, 186 (5th Cir. 1932); Annotation, Offenses Against the Mails: What is a Lottery or Similar Scheme, 96 L.Ed. 312, 314 (1952). In those “pure chance = lottery” jurisdictions, the skill contests would not be barred by any prohibition on “lotteries.” This is important because federal statutes are often limited to “lotteries” rather than all forms of gambling. See, e.g. 18 U.S.C. §1304; Applicability of Lottery Statutes to Contests and Sales Promotions, 18 F.C.C.2d 52 (1969). Under federal law as it now

exists, any significant amount of skill takes the game out of the category of "lottery." Many statutes do not prohibit all forms of gambling; by their own wording they are limited to lotteries and thus would not apply even to the underlying poker games, let alone to the skill contests.

No federal statute or regulation explicitly prohibits Americans from playing games of any type. Because the Internet is so new, there are very few federal laws of any kind dealing with on-line activities. No federal law or regulation explicitly mentions Internet gambling, gaming, lotteries, games of chance or contests of skill. Congress has very little interest in gambling, whether legal or illegal, so there are relatively few federal statutes dealing with gambling of any type. Congress has passed laws to attack organized crime, which make it a federal crime for a business to be involved in gambling, under some circumstances. The federal anti-gambling statutes and regulations would not apply to contests of skill that are not gambling. The Wire Act, 18 U.S.C. §1084, for example, applies only to persons who are in the "business of betting or wagering." Because the contests of duplicate poker are games of skill, the operator is not in the "business of betting or wagering."

There are few specific state statutes dealing with gambling on the Internet, and even fewer that might include contests of skill. Still, many state attorneys general have taken the position that any gambling offered on the Internet and available to residents of their particular states is a violation of that state's laws. Entry fees for contests of skill are rarely considered gambling under state laws. A case involving a contest which was not even predominantly skill contains typical language:

With respect to [one Defendant], its "Presidential Skill Contest" requires listing presidents in order of date of service, answering an essay question, and a "wordfind." In order to qualify as a contest under the statute, the game must require some combination of skill and chance, but skill need not dominate the game. See Cal.Bus. & Prof.Code §17539.3(e). In considering whether a game requires skill, the court looks to whether the players "exercise some control over the outcome." [This] game requires skill. The rules explain how entries are judged and players can improve their responses and, thus, their chances of winning. These contests include both skill and consideration and are not, therefore, illegal lotteries. Plaintiff's claim that [this] skill contest is an illegal lottery is dismissed.

Haskell v. Time, Inc., 857 F.Supp. 1392, 1404 (E.D. Calif. 1994).

Even if there is a prohibition on betting on games of skill, these laws often exempt the actual participants. In practice, law enforcement is not concerned with legitimate contests of skill, where the participants have to pay an entry fee, and no one is allowed to place a bet on another person.

It would take a detailed examination of each state's statutes, regulations, case law and attorney general opinions to ensure that any particular manner of operating a game of skill was not in technical violation of a state's laws. Nevada, for example, was the first state to explicitly outlaw Internet gambling. NRS §§465.091-465.094. Naturally, Nevada's own licensed casinos and race and sports books are exempt. The statute makes it illegal to accept a wager from a person physically in Nevada. "Wager" is defined separately as "a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain." NRS 463.0192. This does not mean that contests of skill cannot be conducted on the Internet with participants from Nevada. The Nevada Supreme Court held in *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961), that a "wager" does not include an entry fee paid by a participant in a contest, where the prize must be given by the operator of the contest if a participant meets the contest's requirements. In that particular case, the owner of a golf course offered to pay \$5,000 to any person who, having paid 50 cents for the opportunity to do so, shot a hole in one. The Court held that was a contest of skill that was legal, because the prize was not created out of entry fees. So in states like Nevada, the contest winner would have to receive an award of a fixed amount, announced in advance. See also 2003 WL 22050876 (S. Carolina A.G. Aug. 29, 2003).

Any state law which would completely prohibit all games of skill, and therefore the contests of duplicate poker, may be unconstitutional. The Commerce Clause of the United States Constitution has been construed by the United States Supreme Court as barring states from interfering with interstate and international commerce under certain circumstances. This constitutional barrier to a state attempting to infringe on commerce from other states and foreign nations is known as the Dormant Commerce Clause. Dormant Commerce Clause jurisprudence forbids individual states from regulating within their borders commerce that is essentially national or international in character in such a way as to "burden" interstate or international commerce. Michael P. Kailus, Note, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, 1999 U.Ill.L.R. 1045, 1076 (1999). Applying state law to Internet games risks the Internet activities being subjected to conflicting laws, imposed by different states with different priorities. A related concern is the risk that a tiny, conservative state or country, or even county or city, could effectively impose its standards of morality on the rest of the planet. This threat materialized in 1995, when CompuServe temporarily blocked access worldwide to over 200 Internet sites, after a single prosecutor in Munich, Germany, alleged that the sites contained sexual and other material that violated German law.

A few states have begun regulating contest of skill, to ensure the games give fair notice, are not rigged and the winner is paid. California, for example, has detailed requirements for skill contests, focusing mainly on giving adequate notice to all participants. Calif. Bus. & Prof. §§17539-17539.3. The operators of the contests should

have no trouble meeting these requirements. It must be noted, however, that the requirements must be met or the operators would be violating this law, even though the contest is not gambling.

In response to an Arizona Supreme Court case, holding a word contest was a game of skill and entry fees were not gambling, the Arizona Legislature enacted a statute which limits the size of prizes that may be awarded in skill contests. A game is legal as “amusement gambling” if, among other requirements:

- (a) The player or players actively participate in the game...
- (b) The outcome is not in the control to any material degree of any person other than the player or players.
- (c) The prizes are not offered as a lure to separate the player or players from their money.
- (d) Any of the following:

....

- (iv) Skill and not chance is clearly the predominant factor in the game and the odds of winning the game based upon chance cannot be altered, provided the game complies with any licensing or regulatory requirements by the jurisdiction in which it is operated, no benefit for a single win is given to the player or players other than a merchandise prize which has a wholesale fair market value of less than four (4) dollars or coupons which are redeemable only at the place of play and only for a merchandise prize which has a fair market value of less than four (4) dollars and, regardless of the number of wins, no aggregate of coupons may be redeemed for a merchandise prize with a wholesale fair market value of greater than thirty-five (35) dollars.

ARS §13-3301 (2005, originally enacted March 15, 2000, in response to *State v. American Holiday Ass'n, Inc.*, 151 Ariz. 312, 727 P.2d 807 (1986)). It should be noted that the statute’s limit of a wholesale value of \$35 means prizes worth \$70 or more may be awarded, because the markup from wholesale to retail is usually at least 100%. The contest must award no more than \$70 to anyone playing from Arizona or bar players from that state.

C. Tests for Skill

In practice, a court's determination of what is a game of skill often depends on the individual judge hearing the case. If a court wants to find something is a game of skill it can look to how skillful players prevail over non-skillful ones, in the long run. If,

however, the court wants to declare the exact same game one of chance it will look only at the very short run, where even a novice might beat an expert due to chance results.

It is impossible to completely eliminate all chance factors. But because the contest of duplicate poker consists of a contest among players having identical cards, the most important chance factor of card games, the randomness of the distribution of the cards themselves, has been eliminated. Even the most lucky unskilled player will find it difficult to beat the most unlucky skilled player, who is playing with the exact same cards. The players have to not only do well against the players at their table, but also against players in their contests at other tables. Each table will have the same number of players, and that number will usually be large enough, eight or more, so that each contestant will be playing against players with a range of skill. It is unlikely that an unskilled player will be playing at a table, where, through chance, all of the other players have even less skill. Of course, it takes skill to maximize your winnings and minimize your losses playing poker against players of less skill, but to minimize even this element of chance, the contest of duplicate poker will distribute skilled and unskilled players evenly among the tables.

The courts have laid down many different tests for determining whether a game is predominantly a game of skill. In brief, they will look for the following:

1) A skillful player will win more than an unskillful one. The Oregon Supreme Court gave an example:

Take, for instance, the great American game of poker; we have no doubt, if a couple of gamblers sat down to play this game against a couple of ministers, who presumably do not indulge in it, that the ministers would soon be destitute of "chips" and the gamblers' pile augment accordingly. *State v. Randall*, 256 P. 393, 394 (Or. 1927).

This is the essence of this contest.

2) Skill can be learned from experience, from real or mock play. Play improves with experience. All the experience in the world cannot help a slot machine or lottery player. But a skilled poker player will improve their winnings at his table and his ranking in the contests and in the contest with experience.

3) Skill games require a knowledge of mathematics. This is particularly true of games played with cards and dice, but applies to almost all other games. The major chance element of poker, the random distribution of the cards, has been eliminated by the contest of duplicate poker, because contestants in any one contest receive the same cards. The multilevel nature of the contest ensures that a skillful player, with knowledge of the mathematics of poker, will win over time.

4) Skill games require psychological skill. This is obviously limited to games involving play against other human beings. A player must know how to read people and how to predict or influence the actions of others. Although contestants are playing against other contestants in their respective contests without any interaction, their table games are poker, which requires the most psychological skill of any game.

5) Player participation changes the result. Typical is the system of laws set up by the Ohio Legislature, in creating created separate statutory prohibitions on "games of chance" and "scheme of chance," explicitly including a lottery. The Ohio Supreme Court analyzed the difference in terms of the control, however nebulous, the participant has. Players in the contest must participate in poker games as well as their contests and their individual participation affects the outcome of both the table game and the contest.

6) Skill can be learned from reading. In determining that the card game of bridge was a game of skill and not a game of chance the Supreme Court of California pointed to the large body of books and periodicals discussing strategy for playing the game. "The existence of such a large amount of literature designed to increase the player's skill is a persuasive indication that bridge is not predominantly a game of chance." *In re Allen*, 27 Cal.Rptr. 168, 53 Cal.2d 5, 377 P.2d 280 (1962). There are probably more books on poker than on bridge.

7) The opinion of the community. Common sense tells us that some games require skill. Someone who knows virtually nothing about the game might be willing to buy lottery tickets every day for a year, and no one would criticize him for his poor plays. But we would all think that same person was crazy if he took an identical amount of money and without knowing the game played against a professional poker player. An amateur can buy a lottery ticket, and might even win. But the amateur will lose, even in the short run, against an experienced and knowledgeable poker player.

Conclusion

Because the Internet is so new, there are few federal or state laws that are directly on point. The prohibitions on gambling that are on the books do not apply because they do not prohibit participants from paying a fee to enter contests of skill. This contest of duplicate poker is, in general legal under United States federal law and in general under the applicable laws of the various states of the United States. The contest operators must take care to comply with the laws of those few states which put restrictions on contests of skill and not to offer the game in those few states where it would be prohibited.