

SUPERIOR COURT

(Class Action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000578-118

DATE: January 21, 2013

THE HONOURABLE PIERRE-C. GAGNON, J.S.C.

MITCHELL SCHNURBACH

Petitioner

v.

FULL TILT POKER LTD.

TILTWARE LLC

KOLYMA CORPORATION A.V.V.

POCKET KINGS LTD.

POCKET KINGS CONSULTING LTD.

FILCO LTD.

MAIL MEDIA LTD.

Corporate Respondents

-and-

HOWARD LEDERER

CHRIS FERGUSON

MIKE MATUSOW

RAYMOND BITAR

NELSON BURTNICK

Individual Respondents

JUDGMENT AUTHORIZING THE BRINGING OF A CLASS ACTION

JG1462

A. INTRODUCTION

[1] The Petitioner Mr. Mitchell Schnurbach, a resident of Côte Saint-Luc, Québec, seeks authorization to bring a class action in damages against the Corporate Respondents and the Individual Respondents.

[2] All Respondents are represented by the same counsel (Mtres Lazarus Charbonneau) except for Mr. Mike Matusow, who did not file an appearance.

[3] At one time, three of the Respondents, Howard Lederer, Chris Ferguson and Raymond Bitar, filed a *Motion to Dismiss*, but they discontinued it during the hearing, while submitting arguments why the *Motion for Authorization* should be dismissed entirely or at least in part, especially insofar as the Individual Respondents are concerned.

[4] Initially, the Motion for Authorization identified other Individual Respondents but the Petitioner discontinued the case against them, with the approval of the Court¹.

[5] The minutes of the hearing held on March 28, 2012, reflect that the Court approved the discontinuance of the motion as against Mr. Philip Ivey Jr., the justification being that "*un jugement des tribunaux civils de l'État de New-York (l')a exonéré de toute responsabilité dans le volet américain de ce litige*".

[6] As well, the minutes of the hearing on June 22, 2012 show that the Court ratified the discontinuance of the motion as against six individual respondents, namely Jennifer Harman-Traniello, Erick Lindgren, Erick Seidel, Andrew Bloch, Allen Cunningham and Johnson Juanda.

B. THE DISPUTE IN A NUTSHELL

[7] The following summary is meant only to outline the context in which this judgment is being rendered. The facts stated are still allegations that will need to be proven at a later stage (although most do not appear highly controversial at this point in time).

[8] The dispute concerns individuals residing in Canada who deposited funds with the operators of the website www.fulltiltpoker.com, for the purpose of playing poker online for "real money".

[9] The Federal Department of Justice of the United States of America ("DOJ") considered that, under the *Unlawful Internet Gambling Enforcement Act of 2006*², it was unlawful for a person to accept most forms of payment for the participation of another person (residing in the U.S.A.) in unlawful internet gambling.

¹ As required by Article 1016 of the *Code of Civil Procedure* ("the C.C.P.").

² 31 U.S.C., ss. 5361-5367.

[10] On March 10, 2011, a grand jury indicted various individuals (among them Raymond Bitar and Nelson Burtnick) on various counts of fraud and money laundering³. In particular, count no. 6 referred to the activities of Full Tilt Poker. The present Corporate Defendants were identified among the entities involved in the criminal activities.

[11] On April 15, 2011 (the so-called "Black Friday" in gambling circles), the DOJ came down hard against various operators of online gambling sites, including those of the Full Tilt Poker group.

[12] On that same day, the DOJ filed a Civil Complaint before the United States District Court in New York City⁴.

[13] Petitioner Schnurbach relies on the allegations contained in those American civil and criminal proceedings to articulate his own allegations in the present matter.

[14] It appears that the laws of the United States of America do not prohibit online gambling activities when non-U.S. residents are the gamblers.

[15] This explains why, despite the Black Friday crackdown, the Full Tilt Poker group was party to an agreement on April 19, 2011 with the U.S. Attorney for the Southern District of New York, that allowed for the resumption of the operations on the website www.fulltiltpoker.com for players outside of the United States⁵.

[16] Despite this agreement, it became apparent to Mr. Schnurbach and other Canada-based players that the funds they had deposited with the Full Tilt Poker group were not accessible.

[17] On September 18, 2011, Mr. Schnurbach began the present proceedings, seeking mainly a court order to pay to each member of the proposed group or class, the amount of money deposited in his or her individual player account.

[18] On September 20, 2011, the DOJ amended its Civil Complaint, notably to allege that Howard Lederer, Chris Ferguson and other defendants had misappropriated the funds in the player accounts and were utilizing them for their own benefit⁶.

[19] The amended Civil Complaint alleged that, rather than protect player funds as promised, the Full Tilt Poker group had arranged the transfer of :

(a) approximately \$41 million to Raymond Bitar;

³ *United States of America v. Scheinberg*, United States District Court, Southern District of New York, 10 CR. 336 (exhibit R-21). The indictment was unsealed on April 15, 2011 (see exhibit R-3).

⁴ *United States of America v. Pokerstars and al.*, Southern District of New York, 11 Civ. 2564 (exhibit R-1); amended on September 21, 2011 (exhibit R-1A).

⁵ Exhibit R-3.

⁶ Exhibit R-1A.

(b) approximately \$42 million to Howard Lederer; and

(c) approximately \$85 million to Chris Ferguson;

thereby rendering the Full Tilt Poker group insolvent.

[20] On July 31, 2012, the Honorable Leonard B. Sand of the United States District Court delivered an order of settlement of the Civil Complaint⁷.

[21] Among its elements, the settlement includes :

(a) the acquisition by the PokerStars Companies of certain assets of the Full Tilt Poker group;

(b) the undertaking by the PokerStars Companies to make available for immediate cash withdrawal, the online poker account balances of all non-U.S. players of the Full Tilt Poker group.

(c) the prohibition to reimburse in this fashion certain individuals, among which Raymond Bitar, Howard Lederer and Chris Ferguson.

[22] By letter dated November 28, 2012, the attorneys acting for the PokerStars Companies (Rational Group) confirmed that their clients had complied with the undertaking with respect to the former Canadian players of the Full Tilt Poker group⁸.

[23] On December 4, 2012, Petitioner Schnurbach was able to access his Full Tilt player account in which the balance was \$225.69 US. On that day, he transferred the full balance to a similar account with PokerStars.

C. THE FINAL CONCLUSIONS SOUGHT

[24] On December 5, 2012, there being no objection by Respondents, the Court authorized the re-amendment of the Motion for Authorization.

[25] The Re-Amended Motion states the following conclusions:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages;

ASCRIBE the Petitioner the status of representative of the persons included in the class herein described as:

⁷ Exhibit D-3.

⁸ Exhibit D-1.

- all residents in Canada who had money being held in their Full Tilt Poker Player Accounts since June 29th 2011 until November 6th 2012, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who had money being held in their Full Tilt Poker Player Accounts since June 29th 2011 until November 6th 2012, or any other group to be determined by the Court;

IDENTIFY the principal questions of fact and law to be treated collectively as being the following:

- a) Did the Respondents block access to Class Members' Full Tilt Player Accounts?
- b) Did the Respondents refuse to return Class Member's own money that they were entrusted with to hold?
- c) Whether all of the Respondents participated in the conduct or the affairs of Full Tilt, and, if so what was the nature of such participation?
- d) (...)
- e) Are the Respondents liable to pay compensatory, moral, punitive and/or exemplary damages to Class Members, and, if so, in what amount?
- f) Are the Respondents liable to pay interest at the legal rate or otherwise on the amounts of money owed to Class Members' that were held in their Full Tilt Player Accounts between the period of June 29th 2011 until November 6th 2012?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the class;

DECLARE the Defendants solidarily liable for the damages of the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class interest at the legal rate or otherwise on the amounts of money owed to Class Members' that were held in their Full Tilt Player Accounts between the period of June 29th 2011 until November 6th 2012, and **ORDER** collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class compensatory, moral, punitive and/or exemplary damages, and **ORDER** collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

DECLARE that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the class in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein on the website of the Petitioner's attorneys at www.clg.orq, as well as by email to all those members of the class that entered their email addresses in order to join the class action at www.clq.orq;

ORDER that said notice be available on the website www.fulltiltpoker.com with a link stating "Notice to Full Tilt Real Money Players in Canada";

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

THE WHOLE with costs including publications fees.

D. OPPOSITION BY THE RESPONDENTS

[26] The eight main arguments of the Respondents against authorization of the class action (all based on the second requirement of article 1003 C.C.P.), are the following:

- (a) the allegations of the Re-Amended Motion are insufficient to give rise to the liability of the Individual Respondents;
- (b) Mr. Schnurbach purports to base his contentions on the contents of the Civil Complaint by the DOJ (exhibits R-1 and R-1A). However, no final judgment has been rendered by the United States District Court, so Mr. Schnurbach invokes mere allegations by the DOJ that have yet to be proven in court;
- (c) the Civil Complaint describes illegitimate methods allegedly used by corporate entities of the Full Tilt Poker group. It also alleges that Howard Lederer, Chris Ferguson and Raymond Bitar received money as a result

of such methods, but not that they personally authorized the implementation of the methods. In other words, there are no potential fraudsters but the Corporate Respondents.

- (d) in the original *Motion for Authorization* (before amendments), Philip Ivey Jr. was blamed in much the same way as Howard Lederer, Chris Ferguson and Raymond Bitar. Therefore, the court order authorizing the discontinuance as against Mr. Ivey should, in fairness, also apply to Messrs. Lederer, Ferguson and Bitar.
- (e) the Re-Amended Motion fails to state *prima facie* the extra-contractual liability of these three individuals;
- (f) Mr. Schnurbach alleges no prejudice other than being deprived of the balance in his player account (\$225.69 US) during approximately 17 months. Therefore, he does not establish entitlement to any type of damages other than the payment of interest;
- (g) in particular, there is no possibility of punitive damages since no legal provision is invoked that provides for any, as required for article 1621 of the *Civil Code of Quebec* ("the C.C.Q.") to apply;
- (h) this is a case where a class action is inappropriate under the principles of *Harmégnies v. Toyota Canada inc.*⁹, since a "multitude of small trials" would be required to verify the individual prejudice to each class member, arising from frustration of his or her intended use of the funds held by the Full Tilt Poker group in the individual player accounts.

E. DISCUSSION

i. *The four requirements of article 1003 C.C.P.*

[27] Article 1003 *C.C.P.* reads as follows:

1003. Le tribunal autorise l'exercice du recours collectif et attribue le statut de représentant au membre qu'il désigne s'il est d'avis que:

a) les recours des membres soulèvent des questions de droit ou de fait identiques, similaires ou connexes;

b) les faits allégués paraissent justifier les conclusions recherchées;

1003. The court authorizes the bringing of the class action and ascribes the status of representative to the member it designates if of opinion that:

(a) the recourses of the members raise identical, similar or related questions of law or fact;

(b) the facts alleged seem to justify the conclusions sought;

⁹ 2008 QCCA 380.

c) la composition du groupe rend difficile ou peu pratique l'application des articles 59 ou 67; et que

(c) the composition of the group makes the application of article 59 or 67 difficult or impracticable; and

d) le membre auquel il entend attribuer le statut de représentant est en mesure d'assurer une représentation adéquate des membres.

(d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately.

[28] It is a well-established principle that, in Quebec, the authorization of a class action is a summary and preparatory step, meant to check whether the requirements of article 1003 are met, and not to assess the merits of the dispute¹⁰.

[29] In other words, compared to standard civil applications, class actions are submitted to a summary filtering process (authorization) designed to set aside actions that are frivolous or clearly unfounded¹¹.

[30] Even though all four requirements of article 1003 must be met, the most important one, to be examined first, is that of paragraph (b), the appearance of right¹².

[31] For the purpose of paragraph (b), the facts alleged by the petitioner are deemed to be true¹³. These facts may be stated in the motion itself or in the exhibits attached.

ii. The appearance of right (paragraph b)

[32] During the hearing, very little was said about the Corporate Respondents specifically.

[33] The Re-Amended Motion distinguishes the various Corporate Respondents in the following fashion:

(a) Full Tilt Poker Ltd. is the corporate entity with which the various professional poker players contracted in order to join the Full Tilt Poker Team;

(b) Tiltware LLC is:

* the parent company of Pocket Kings Ltd., Pocket Kings Consulting Ltd. and Filco Ltd.;

¹⁰ *Adams v. Banque Amex du Canada*, J.E. 2007-78 (C.A.).

¹¹ *Voisins du train de banlieue de Blainville inc. v. Agence métropolitaine de transport*, J.E. 2007-513 (C.A.).

¹² *Rouleau v. Canada (Procureur général)*, J.E. 98-25 (C.A.).

¹³ *Trudel v. Banque Toronto Dominion*, J.E. 2007-701 (C.A.).

- * the exclusive poker software developer and licensor;
- * the marketing wing of the group;
- * the mechanism through which funds belonging to the players were redirected to the owners of the Full Tilt Poker group;

(c) Vantage Ltd. is:

- * the contractual counterpart of the North American players who entered into the end user license agreement;
- * the entity accepting deposits from new and existing customers, permitting gambling transactions and game play as well as permitting withdrawal of funds by customers;

(d) Filco Ltd. is:

- * the entity to which the Alderney Gambling Control Commission issued an "e-Gambling license";
- * another entity licensed for activities similar to those of Vantage Ltd., described above;

(e) Kolyma Corporation A.V.V. was the legal owner of the Full Tilt website;

(f) Pocket Kings Ltd. operated the Full Tilt website and provided related services and otherwise directed the conduct of the group;

(g) Pocket Kings Consulting Ltd. was a consultant to the group and directed its conduct;

(h) Ranston Ltd. is an entity under whose name Full Tilt Poker funds were held in Switzerland. Ranston directed the conduct of the group and aided in the commission of its illegal acts;

(i) Mail Media Ltd. is another entity under whose name Full Tilt funds were held in Switzerland. It directed the conduct of the group and aided in the commission of its illegal acts.

[34] The amended Civil Complaint (R-1A) further alleges that:

(a)t various times relevant to this Amended Complaint, Full Tilt Poker did business and other entities including but not limited to Tiltware LLC, Kolyma Corporation A.V.V., Pocket Kings Ltd., Pocket Kings Consulting Ltd., Filco Ltd.,

Vantage Ltd., Ranston Ltd., Mail Media Ltd. and Full Tilt Poker Ltd. (collectively, "Full Tilt Poker")¹⁴.

[35] The Civil Complaint alleges in particular that Tiltware LCC distributed approximately \$443,860,350 to its owners and directors, part of which derived from funds owed to players around the world¹⁵.

[36] In view of the allegations summarized above, it appears *prima facie* that Mr. Schnurbach and the other members of the putative group have a right of action against:

1. Vantage Ltd., the North American licensee; and
2. Tiltware LLC, Pocket Kings Ltd., Pocket Kings Consulting Ltd., Ranston Ltd. and Mail Media Ltd., which allegedly took part in the conspiracy to deprive the poker players of their funds and to redirect them illegally as distributions to person associated with the Full Tilt Poker group.

[37] However, the allegations, even as substantiated further by the exhibits, are insufficient to establish an appearance of right against Full Tilt Poker Ltd., Filco Ltd. and Kolyma Corporation A.V.V., as there is no indication that any of them participated in an illegal scheme :

- (a) Full Tilt Poker Ltd., as operating a team of professional poker players does not indicate participation in any illegal scheme;
- (b) Filco Ltd., as it would logically be the licensee for poker players residing outside of North America (and not for Canadian players, for which the licensee was Vantage Ltd.); and
- (c) Kolyma Corporation A.V.V., as being merely the owner of the website is insufficient to indicate participation in any illegal scheme.

[38] Turning now to the Individual Respondents, the legal situation is quite clear regarding Howard Lederer, Chris Ferguson and Raymond Bitar.

[39] Among other attributes, Mr. Lederer is alleged to be the president of Tiltware LLC, as well as the recipient of approximately \$42 million in distributions and profit sharing payments from the Full Tilt Poker group.

[40] Mr. Bitar is alleged to be CEO of Tiltware LLC and the recipient of approximately \$41 million in distributions and profit sharing payments from the Full Tilt Poker group.

¹⁴ Exhibit R-1A, paragr. 22.

¹⁵ Exhibit R-1A, paragr. 105 and 106.

[41] Mr. Ferguson is alleged to be the chairman of the board of Tiltware LLC and the recipient of approximately \$25 million in distributions.

[42] Viewed in the context of the dispute, Messrs. Bitar, Lederer and Ferguson cannot at this stage be considered mere bystanders who happened to collect large sums of money, without any knowledge of wrongdoing by others.

[43] Quite the contrary, the allegations tend to indicate that they were among the masterminds of a conspiracy to defraud the online poker players.

[44] The situation is slightly different in the case of Nelson Burtnick. He is depicted as the head of the payment processing department for the Full Tilt Poker group. It is not alleged that he received distributions. He may or may not be an underling, but he appears liable for his participation in the fraud against the online poker players.

[45] The last Individual Respondent, Mike Matusow, is described as a professional poker player and a member of the Full Tilt Poker Team. He is also alleged to be "*a shareholder and director of, and/or a participant in Full Tilt and/or one or more Full Tilt related entities*".

[46] It is unclear whether Mr. Matusow was, at any relevant time, a director of one or other of the six corporate entities that appear, *prima facie*, to have been involved in the conspiracy (Vantage Ltd., Tiltware LLC, Pocket Kings Ltd., Pocket Kings Consulting Ltd., Ranston Ltd. and Mail Media Ltd.).

[47] Petitioner's attorney candidly conceded that he would have readily discontinued against Mr. Matusow if only counsel had appeared on the latter's behalf and made representations in this respect.

[48] In view of the legal principles identified above, the authorization process must set aside elements of the motion that are frivolous or clearly unfounded. Here, the proceedings establish no appearance of right to include Mr. Matusow as a defendant.

[49] The Individual Respondents identify no legal rule (certainly not *stare decisis*) whereby discontinuance against Philip Ivey Jr. should likewise extend to Messrs. Bitar, Lederer, Ferguson and Burtnick.

[50] As a matter of fact, it was agreed during the hearing of March 28, 2012 that Mr. Ivey had been cleared of any civil wrongdoing by the courts of New York. The other Respondents cannot make a similar claim.

[51] Discontinuance is a unilateral act of the party who filed a suit or proceeding (article 262 C.C.P.). The court can only intervene if it is shown that the discontinuance

causes injury to the other party¹⁶ (Mr. Ivey, in this instance) or if the party who filed the discontinuance later establishes that it was not given freely and voluntarily¹⁷.

[52] The supervisory role conferred upon the court by article 1016 *C.C.P.* in class action matters does not alter these basic rules. Clearly, it does not allow for additional rights to parties other than the ones directly addressed by the discontinuance.

[53] The Respondents also argued that the Re-Amended Motion failed to establish entitlement to any type of damages.

[54] Petitioner Schnurbach seeks interest from June 29, 2011 to November 6, 2012 on the balance held in each group member's player account. He also seeks unspecified "*compensatory, moral, punitive and/or exemplary damages*".

[55] The Re-Amended Motion alleges no prejudice other than the undue delay to the group members suffered before the balance in their player account became accessible again.

[56] Article 1617 *C.C.Q.* reads as follows:

Art. 1617. Les dommages-intérêts résultant du retard dans l'exécution d'une obligation de payer une somme d'argent consistent dans l'intérêt au taux convenu ou, à défaut de toute convention, au taux légal.

Le créancier y a droit à compter de la demeure sans être tenu de prouver qu'il a subi un préjudice.

Le créancier peut, cependant, stipuler qu'il aura droit à des dommages-intérêts additionnels, à condition de les justifier.

Art. 1617. Damages which result from delay in the performance of an obligation to pay a sum of money consist of interest at the agreed rate or, in the absence of any agreement, at the legal rate.

The creditor is entitled to the damages from the date of default without having to prove that he has sustained any injury.

A creditor may stipulate, however, that he will be entitled to additional damages, provided he justifies them.

[57] The right to claim damages in addition to interest must be agreed upon by the parties; also, such damages must be justified¹⁸. Nothing of the sort is alleged in the Re-Amended Motion.

[58] Concerning punitive damages, Petitioner Schnurbach refers in his submissions to section 272 of the *Consumer Protection Act*¹⁹ allowing a consumer to claim punitive

¹⁶ *Association internationale des pompiers de Montréal inc., local 785 v. Montréal (Ville de)*, (1980) AZ-50859860 (C.A.).

¹⁷ *Chartier v. Lavigne*, B.E. 2006BE-375 (C.Q.).

¹⁸ *Protege Properties Inc. v. 3424626 Canada inc.*, 2008 QCCS 2703, confirmed by 2010 QCCA 1507.

¹⁹ R.S.Q., c. P-40.1.

damages against a merchant who fails to fulfil an obligation imposed by the Act or its regulations.

[59] However, the Re-Amended Motion fails to allege any obligation imposed by the *Consumer Protection Act* or its regulations that would have been breached by any of the Respondents, as merchants.

[60] Therefore, the class action can only be authorized to seek compliance with article 1617 *C.C.Q.*, that is, the payment of interest covering a period of approximately 17 months.

iii. The existence of identical, similar or related question of law and fact (paragraph a)

[61] The only objection raised by the Respondents consists of the risk of a “multitude of small trials”, as summarized in subparagraph [26] (h) above.

[62] As the Court has ruled that payment of interest is the only remedy available under the Re-Amended Motion, there is no likelihood of individual assessment of injury that might create too many questions and make it impossible to deal efficiently with collective questions.

[63] The requirement of paragraph [a] is fulfilled.

iv. The difficulty or impracticality of mandate or joinder (paragraph c)

[64] There is no issue here.

[65] Petitioner Schnurbach indicated that 523 individuals have registered as putative group members on the website of his counsel²⁰.

[66] The Court understands that some online poker players from the same locale may be acquainted with one another (Mr. Schnurbach told of those he met in a Kahnawake poker room). However, by definition, the members of the putative class usually play in the anonymity of their homes, anywhere in Quebec or in Canada.

[67] In these circumstances, one cannot expect the putative group members to regroup as contemplated in article 67 *C.C.P.* or to sign a power of attorney designating one of them their mandatary to bring suit, as allowed in article 59 *C.C.P.*

v. The acceptability of Mr. Schnurbach as the representative (paragraph d)

[68] At the request of the Court, Mr. Schnurbach testified at length.

²⁰ Exhibit R-6, under seal.

[69] Mitchell Schnurbach resides in Côte Saint-Luc, on the island of Montreal. He currently works in Montreal for PC Mall, Inc., a direct marketing company selling electronic products to individuals, enterprises and institutions. Until July 2011, he worked as the manager of one of the four poker rooms operated on the territory of Kahnawake, a reserve governed by the Mohawk nation. He co-hosts a regular radio show about poker on TSN Radio 990, a sports media broadcaster in the Greater Montreal area.

[70] Mr. Schnurbach belongs to the putative class, since he had a balance of \$225.69 US in his Full Tilt Poker player account, that he could not access until November 6, 2012.

[71] Mr. Schnurbach has been proactive with other members of the putative class and with his counsel. He attended all the hearings in this case on March 28, 2012, May 25, 2012, June 22, 2012, October 2, 2012 and December 5, 2012.

[72] He meets the three requirements for the designation of a group representative:

- (a) a personal interest in the dispute;
- (b) the capacity to look after the interests of the group; and
- (c) the absence of any conflict with other members of the group²¹.

[73] The Court shall therefore ascribe to Mr. Schnurbach the status of representative of the persons included in the group.

[74] The Court urges him to be attentive to the progress of the case (or lack thereof), to seek periodical reports from counsel and generally, to represent the group members as best he reasonably can.

vi. A Quebec group or a Canadian group?

[75] Petitioner Schnurbach seeks to represent a Canadian group, that is, all residents of Canada who had money in their Full Tilt Poker player account withheld from June 29, 2011 until November 6, 2012.

[76] Alternatively, the group would be composed of those players residing in Quebec only.

[77] The Respondents have no position one way or the other.

[78] The request for a Canadian group ("national class") raises an issue of international private law, governed by articles 3148 and 3149 C.C.Q, reading as follows:

²¹ *Bouchard v. Agropur Coopérative*, [2006] R.J.Q. 2349 (C.A.).

Art. 3148. Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants:

1° Le défendeur a son domicile ou sa résidence au Québec;

2° Le défendeur est une personne morale qui n'est pas domiciliée au Québec mais y a un établissement et la contestation est relative à son activité au Québec;

3° Une faute a été commise au Québec, un préjudice y a été subi, un fait dommageable s'y est produit ou l'une des obligations découlant d'un contrat devait y être exécutée;

4° Les parties, par convention, leur ont soumis les litiges nés ou à naître entre elles à l'occasion d'un rapport de droit déterminé;

5° Le défendeur a reconnu leur compétence.

Cependant, les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises.

Art. 3149. Les autorités québécoises sont, en outre, compétentes pour connaître d'une action fondée sur un contrat de consommation ou sur un contrat de travail si le consommateur ou le travailleur a son domicile ou sa résidence au Québec; la renonciation du consommateur ou du travailleur à cette compétence ne peut lui être opposée.

Art. 3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

(1) the defendant has his domicile or his residence in Québec;

(2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;

(3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;

(4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;

(5) the defendant submits to its jurisdiction.

However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

Art. 3149. A Québec authority also has jurisdiction to hear an action involving a consumer contract or a contract of employment if the consumer or worker has his domicile or residence in Québec; the waiver of such jurisdiction by the consumer or worker may not be set up against him.

[79] In the case of *Spar Aerospace*²², the Supreme Court of Canada insisted that the *Civil Code of Quebec* sets out the private international law rules for the Province of Quebec and that the “real and substantial connection” criterion conferring jurisdiction on a Quebec court cannot be met beyond the provisions of the Code.

[80] None of the Respondents has a domicile, residence or establishment in Quebec. But they have submitted to the jurisdiction of this Court.

[81] Also, it appears that most of the members of the proposed class (whether Canada-based or Quebec-based) are consumers who entered into an end user licensed agreement with Vantage Ltd., one of the entities of the Full Tilt Poker group. The notable exception would be **professional** poker players, presumably a small proportion of the group. A significant proportion of these consumers reside in Quebec.

[82] Articles 3148 and 3149 confer jurisdiction on this Court to be seized of a class action where the group is composed of Quebec residents.

[83] But nowhere in these provisions is jurisdiction conferred as regards poker players residing outside Quebec.

[84] The Court considers that it cannot authorize a class action for a Canadian group (“national class”) when the Petitioner fails to establish that the requirements of the *Civil Code of Quebec* (in articles 3148 to 3151) are met²³. Such is the case here.

[85] The Court will authorize the bringing of a class action for Quebec residents who had money held in their Full Tilt Poker Player Accounts from June 29, 2011 until November 6, 2012.

vii. Publication of the notice to members

[86] Article 1005 *C.C.P.* requires that the judgment authorizing the bringing of a class action, order “the publication of a notice to the members”.

[87] Usually, publication is mainly in print media circulating in all main areas where the members of the group are presumed to reside. More and more, publication also takes place on websites, and occasionally, via electronic media (radio and television, for instance).

[88] Petitioner Schnurbach requested that, in this instance, publication of the notice to class members be on the websites www.clg.org (being the website of his counsel) and www.fulltiltpoker.com.

²² *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78.

²³ To the same effect, *Goyette v. GlaxoSmithKline*, J.E. 2009-1589 (S.C.).

[89] Mr. Schnurbach argued that, as a result of the initiatives by the DOJ in the USA and in particular, since the order of settlement of the Civil Complaint (D-3), the Corporate Respondents are very likely insolvent. As for the Individual Respondents, they may be solvent, but all reside outside Canada and, in some cases, outside the USA.

[90] In other words, recovery of a possible award after judgment on the merits may prove problematic.

[91] Therefore, counsel for the group must be especially cost-conscious.

[92] The Court agrees in principle but also considers that there is very likely a cost-efficient way of reaching the poker player community of Quebec.

[93] Although the Court has no judicial notice of such matters, it assumes that there exist print magazines and online magazines servicing the community in question.

[94] Therefore, the Court will order class counsel to submit for approval a bilingual notice to the members (in plain language²⁴), will order publication on both www.clg.com and www.fulltiltpoker.com and will order class counsel to submit within 30 days documented estimates by the publishers of what it would cost to publish the same notice once in an appropriate magazine or e-magazine. The Court reserves its powers to order additional publication as a result.

WHEREFORE, THE COURT:

[95] **GRANTS** the present motion;

[96] **AUTHORIZES** the bringing of a class action in the form of a motion to institute proceedings in damages, against:

1. Vantage Ltd.;
2. Tiltware LLC;
3. Pocket Kings Ltd.;
4. Pocket Kings Consulting Ltd.;
5. Ranston Ltd.;
6. Mail Media Ltd.;

²⁴ See the report by Option Consommateurs to the Office of Consumer Affairs, Industry Canada, June 2011, at:
http://optionconsommateurs.org/documents/principal/fr/File/rapports/recours_collectifs/oc_avis_recours_collectifs_art2_2011.pdf.

7. Howard Lederer;
8. Chris Ferguson;
9. Raymond Bitar; and
10. Nelson Burtnick;

[97] **ASCRIBES** to the Petitioner the status of representative of the persons included in the group herein described as:

- all residents in Quebec who had money being held in their Full Tilt Poker Player Accounts from June 29, 2011 until November 6, 2012;

[98] **IDENTIFIES** the principal questions of fact and law to be treated collectively as the following:

- a) Did the Respondents block access to Class Members' Full Tilt Player Accounts?
- b) Did the Respondents refuse to return Class Members' money that they were entrusted with to hold?
- c) Whether the Respondents against whom authorization to sue is given, participated in the conduct or the affairs of Full Tilt, and, if so what was the nature of such participation?
- d) (...)
- e) (...)
- f) Are the Respondents liable to pay interest at the legal rate or otherwise on the amounts of money owed to Class Members' that were held in their Full Tilt Player Accounts between the period of June 29 2011 and November 6 2012?

[99] **IDENTIFIES** the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the group;

DECLARE the Defendants solidarily liable for the damages of the Petitioner and each of the members of the group;

CONDEMN the Defendants to pay to each member of the group interest at the legal rate or otherwise plus the legal indemnity on the amounts of money owed to Group Members that were held in their Full Tilt Player Accounts between

June 29, 2011 and November 6, 2012, and **ORDER** collective recovery of these sums;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual group members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the group;

[100] **DECLARES** that all members of the group that have not requested their exclusion, be bound by any judgment to be rendered on the class action to be instituted in the manner provided for by law;

[101] **FIXES** the delay for exclusion at 30 days from the date of the latest of all publications of the notice to the members, upon expiry of which the members of the group who have not exercised their right of exclusion will be bound by any judgment to be rendered herein;

[102] **ORDERS** the publication of the approved notice to the members of the group in accordance with article 1006 *C.C.P.* within 60 days from this judgment on the website of the Petitioner's attorneys at www.clq.org, as well as by email to all those members of the class who entered their email addresses in order to join the class action at www.clq.org;

[103] **ORDERS** that the approved notice be posted on the website www.fulltiltpoker.com with a link stating "Notice to Full Tilt Real Money Players in Quebec", within 60 days from the date of this judgment and at least until July 31, 2013;

[104] **ORDERS** the Petitioner to submit for approval by the Court, within 30 days from this judgment, the text in English and French of the notice to the members of the group, drafted in plain language;

[105] **ORDERS** the Petitioner to submit for approval by the Court within 30 days from this judgment, the name of the publisher of a magazine or e-magazine dedicated to poker players in North America and distributed in Quebec as well as documented estimates of what it would cost to publish the approved notice, one time only;

[106] **REFUSES** authorization to sue Full Tilt Poker Ltd., Filco Ltd., Kolyma Corporation A.V.V. and Mike Matusow; and **ORDERS** that their names be deleted from the style of the proceedings in the future;

[107] **THE WHOLE** with costs, including publication fees.



HONOURABLE PIERRE-C. GAGNON, J.S.C.

Me Jeffrey Orenstein
CONSUMER LAW GROUP INC.
Lawyers for the Petitioner

Me Cory Levi
Me Morden Lazarus
LAZARUS, CHARBONNEAU
Lawyers for the Respondents

Date of hearing: December 5, 2012