

IN THE COURT OF POKER ARBITRATION

ALLEN KESSLER	:	
Chainsaw & Claimant,	:	
	:	Case No. 19-cv-001-TW-MV
v.	:	
JASON BRAL	:	
Agitator & Claimant.	:	

FINDINGS OF FACT AND CONCLUSIONS OF POKER LAW

This matter comes before the Court of Poker Arbitration, the Honorable Todd Witteles and the Honorable Mac VerStandig presiding, on the crossclaims of Allen Kessler (“Mr. Kessler”) and Jason Bral (“Mr. Bral”) concerning the proper use of the term “overlay” in the context of American tournament poker. Having reviewed the parties’ respective Twitter rants, the tirades of amicus curiae taking sides on social media, and myriad other things seemingly relevant to this flamingly absurd spat, this Court does hereby make the following findings of fact and conclusions of poker law:

I. Findings of Fact

This matter emanates from the 2019 LA Poker Open (the “LAPO”), a series of poker contests hosted in the historic Commerce neighborhood of Los Angeles County within the State of California. Specifically, the LAPO advertised a series of “No Same Flight Re-Entry” poker tournaments with guaranteed prize pools, but permitted persons incapable of finding a bag to play in multiple such flights unless and until they either survived a full day of play, ran out of opportunities, or went broke. With at least three LAPO tournaments having four or more entry flights, this prompted criticism the “no re-entry” claims – even though clearly qualified as applying only to the “same flight” – were deceptive and/or disingenuous in nature.

For reasons difficult to set forth in a cogent narrative, but tied largely to criticisms of a

specific tournament director and the validity, *vel non*, of such criticisms, this debate somehow then morphed into a heated discussion regarding the specific definition of the word “overlay”, as it pertains to tournament poker. This is, in a sense, deeply regrettable, as a lengthy, learned opinion on the propriety of exacerbated starting flight structures and the prejudices attendant thereto (specifically touching upon the disparate opportunities afforded poker professionals and recreational poker players needing to take time off of work) would likely be a lot more interesting.¹

Critically, the debate *sub judice* turns on the industry norm of monies tendered by poker players, for entry into a tournament, being divided into a “buy-in” and an “entry fee” (with other entry fee-esque monies sometimes being placed into a third or fourth category, but essentially serving the same purpose). In most tournaments, the buy-in is placed into a communal pool and divided between and amongst various qualifying tournament participants based on their ultimate performance in the contest,² while the entry fee is taken by the poker room as consideration for operating the event and used to pay operating expenses and overhead (including allowing for profit). Thus, the buy-in portion is wholly returned to the player pool as prize money, whereas the entry fee portion is not.

In certain circumstances, a tournament operator will make a “guarantee” in connection with one or more events, promising that a certain minimum sum of money will be distributed to participants, regardless of the amount of buy-in money collected. This is a common means of (i)

¹ We have resisted the temptation to address this issue in lengthy dicta and simply respond to the matter before us in a bland footnote, but such is solely because we believe this Honorable Court to be above the serpentine temptations of biblical times.

² In the spirit of resistance (see, *supra*, n. 1) we will also avoid a discussion of the war crimes perpetrated by the Venetian Poker Room in the early autumn of 2019 and the resultant partial bastardization of this concept.

inducing players to attend by showing there is a bona fide expectation of a significant turnout for a given event; and (ii) ensuring top prizes in a specific tournament are sufficiently lucrative as to inspire delusions of wealth amongst inferior players hoping to get lucky.

When a guarantee is made, and the buy-ins collected from tournament players do not equal or exceed the guaranteed sum of money, the poker room is generally compelled to place into the prize pool a sum of money equal to the deficiency. This practice has, in and of itself, been the product of periodic controversy as certain operators take unusual measures to avoid having to insert monies into a prize pool. *See, e.g., In re Gardens Casino Poker Classic Event #2 (Hawaiian Gardens, CA 2017); In re HPT Westgate Main Event (Las Vegas, NV 2018).*

Under the circumstances where the guaranteed prize pool is ultimately not reached through the normal buy-in process, a tournament will be colloquially denoted as having an “overlay”. While the possibility of an overlay occurring inserts a new form of financial risk for the poker room hosting the tournament, today’s highly linked world of social media has allowed rooms to often avoid this fate at the eleventh hour. As the close of registration nears, an understanding of the presence, *vel non*, of an overlay often inspires persons not otherwise interested in participating in the event to register nonetheless, as the insertion of house monies positively impacts the expected value (“EV”) of the given event. Word of an overlay opportunity frequently spreads on various social media platforms, often initially reported by the hosting poker room itself, which can only gain from additional entrants. This frequently causes a mass hysteria among poker players in the area, who will often abruptly abandon any other activity in progress (e.g. dinners, spending quality time with children, weddings, sexual intercourse), for fear of missing out upon a positive EV opportunity. In a sadistic twist of irony, the more well publicized an overlay, the higher the chance will be that the massive number of

players running down to register during the final hour will eliminate the overlay which attracted them in the first place. Thus, it is to the poker room's financial advantage to report on social media a likely overlay situation. Since an actual overlay can only be declared once registration closes, there is no set formula for determining when an overlay looks "likely" during the registration period, nor is there an industry standard as to how early such a prediction can be stated. However, the broadest definition of the term "overlay" would be beneficial for the poker room, for terms of making such predictions look credible. Additionally, if a tournament can report an overlay definitely occurred at a previous or ongoing event, this might encourage more people to show up to future events within that same tournament series, which again provides financial benefit to the poker room.

Mr. Kessler, who has long considered himself a player advocate and self-appointed watchdog regarding poker tournaments, has expressed on social media the concern about the exact definition of "overlay", and when poker rooms can claim one has occurred.

The question presented here is regarding the exact definition of "overlay" as it relates to poker tournaments. Mr. Kessler contends that an overlay can only be claimed when the total of all monies collected (buy-ins and entry fees combined) end up less than the stated guarantee. Mr. Bral contends that an overlay can be claimed as long as the amount of cumulative buy-ins in the prize pool end up being less than the stated guarantee. Thus, Mr. Bral contends that the entry fee portion of the monies collected should not be considered when determining if an overlay has occurred, whereas Mr. Kessler contends the opposite.

At its simplest, the question comes down as follows: If the amount added to the prize pool by the poker room does not exceed the total amount of entry fees collected, is it an overlay? If yes, then Mr. Bral is correct; if no, then Mr. Kessler is correct.

II. Conclusions of Poker Law

Only one scholarly publication is known to have endeavored to furnish a functional definition of overlay in the context of poker tournaments, with the Hastings Business Law Journal – an official publication of the University of California at Hastings School of Law – addressing the matter in 2017. Specifically, in the context of an analysis of daily fantasy sport regulations, Paul Suh, then a third-year juris doctoral candidate who now works as a labor and employment attorney in Los Angeles, observed, *inter alia*:

Some people believe that the top players have large entry figures because they are taking advantage of the “overlay” the daily fantasy sports sites provide. Overlay is the “money that ... sites have to add to the prize pool that is not covered by player entries.” As a result, each entry is worth greater than what they are priced to be, which entices players with bigger bankrolls to submit as many entries as possible. The concept is public knowledge, so recreational players who wish to take their game to the next level could also take advantage of this. As a critic puts it, “[i]t’s like Lyft...offering \$5 or \$10 rides anywhere in Manhattan, even though they lose money on each ride[.]” Unsurprisingly, overlay exists in poker sites as well.

Paul Suh, “Daily Fantasy Sports: A Call for Clear Guidelines,” HASTINGS BUSINESS LAW JOURNAL, 13 Hastings Bus. L.J. 351 (Spring 2017) (quoting Eric Chemi, Online Poker vs. Daily Fantasy: Which Creates More Winners?, CNBC (Oct. 2, 2015); Pokertips.com Poker Glossary).

Mr. Suh’s reliance on the Pokertips.com Poker Glossary (the “Glossary”) is, however, suspect. While that publication does define an overlay as, *inter alia*, “when a poker room has to add money to the prize pool in a poker tournament,” the Glossary appears to be an amateur and largely obscure amalgamation of musings on a website seemingly designed by an individual hellbent on paying eternal tribute to the mysterious travels of Carmen Sandiego. Both members of this Honorable Court work in the poker industry, and yet neither are even vaguely awed by this strange spawn of the World Wide Web; to rely on its definitional construct – or a law review article rooted in its definitional construct – would be plain error.

Pokernews.com, a trade publication with greater authority on this matter, also features a glossary which, in turn, does furnish a definition for overlay:

When a poker room hosts a tournament for which they have set a guarantee on the prize pool and not enough players participate to meet that prescribed amount, the room will add the needed money to meet the guarantee, with that addition referred to an an³ “overlay.”

<https://www.pokernews.com/pokerterms/overlay.htm>. Unfortunately, as is fairly manifest, this definition is of absolutely no use to resolving the instant dispute, as it does not specifically contemplate a scenario where the poker room adds less money to the prize pool than they collected via entry fees. Online poker site 888 Poker defines an overlay as “a gap between the guaranteed prize pool and the total number of buy-ins.” <https://www.888poker.com/magazine/poker-terms/overlay>. This definition intimates at an overlay being any situation where any monies over and above the buy-ins are contributed to a prize pool, but is sufficiently fleeting as to suggest the particular scenario raised herein is not fully contemplated by 888 Poker. Indeed, it appears that this definition was hastily thrown together among other terms to form a glossary intended for beginners. And while Wikipedia offers its own topical definition (“...the gap between a poker tournament's guaranteed prize pool and the actual prize pool generated by entrants”), we are loathe to accept the anonymous *vox populi* output of Wikipedia as authoritative, even though the article appears to have not been edited since several years before this controversy arose.

Media usage is oddly blurry. Mo Nuwwarah, a seasoned industry reporter traversing the gaming halls of America for Pokernews.com, has covered an overlay controversy which occurred at the Westgate in 2018. Mr. Nuwarrah explained, in detail, a scenario where the added money to the prize pool would have had to come from “collected rake and staff fees” (the entry

³ [sic]

fees). See Mo Nuwwarah, “HPT and Westgate Under Fire After Overlay Fiasco,” *Pokernews.com* (April 9, 2018). In reporting upon that scenario, Mr. Nuwwarah avoids utilization of the verbiage “overlay” and, instead, astutely notes, “Any number [of entries] between 303 and 347 would essentially mean reduced rake for the players who fired in the event.” *Id.* This concept of “reduced rake” – linguistically accurate and appreciably more precise than the more amorphous wording of “overlay” – seems to strike at the heart of the dilemma herein: there is an appreciable difference between a situation where house-contributed monies exceed entry fees, and where house-contributed monies do not exceed entry fees; if both scenarios are subsumed within identical nomenclature (“overlay”), the vocabulary of poker is thusly rendered less precise than it ought to be.

Conversely, we are equally persuaded two countervailing realities also meaningfully contribute the construction of an overlay: (i) generally accepted accounting principles; and (ii) binary player expectations. Is it absurd to bring GAAP standards into this fight? Probably. However, as this entire controversy is absurd, we find it appropriate to proceed nonetheless.

With the exception of situations where an entry fee is partially earmarked for the communal pooling of dealer tips, or is otherwise determinative of the level of dealer compensation, entry fees are income to a poker room at the moment of their receipt. If a poker room were to file a quarterly report with the United States Securities and Exchange Commission between starting flights of a poker tournament, and the report (inexplicably and unrealistically) did not contain financials on a trailing or deferred basis, the room would be obligated to report the entry fees thus far collected as income, even though the tournament has not yet met a

guarantee – much less paid out so much as a single player.⁴

In this sense, whether a guarantee deficiency exceeds cumulative buy-ins or not is of no moment; the poker room is compelled to reach into its figurative pockets to place monies into the prize pool. And, more pointedly, it may often be the case that the monies placed in the prize pool by the poker room from entry fees are not simply a reduction of profit. It is likely the case that a portion of entry fees are earmarked for dealer compensation or other per diem expenses, and such obligations may not be whimsically avoided or clawed back to satisfy a guarantee deficiency. Thusly it is often (albeit not always) true that some portion, if not all, of a guarantee deficiency is made whole through the application of dollars booked as marketing or promotional expenditures.

Similarly, a player's economic expectations, vis a vis the EV (positive or negative) of an event, are partially fixed at the time a buy-in and entry fee are tendered. Ignoring other subjective factors (such as an individual player's assumed strength as compared to the rest of the field), the economic transaction is fixed at the time cash is tendered. The ratio of a buy-in to an entry fee does not change based on field size, rebuys, and/or re-entries,⁵ and thus the only variable capable of bettering this ratio in favor of a player is the placement of additional funds in a prize pool to satisfy a deficient guarantee.

Whether those funds come from entry fees, marketing budgets, unjustifiably marked up

⁴ Would the same report show a reserve liability for a guarantee? Probably. Does this matter? No. Do we anticipate one or more poker players with CPA licenses will use this as fodder to argue with us on Twitter? Of course.

⁵ We deliberately avoid a discussion of add-ons since (i) such exist primarily online; (ii) when used in live tournaments, such tend to be in minor reoccurring tournaments held at awkward hours of the day and in which a starting stack is good for roughly two big blinds after the first four levels; (iii) unscrupulous poker room staff will often pocket add-on money and blame the existence of extra tournament chips on "color ups"; and (iv) add-ons do not change the principles expressed herein, even if they do undermine some of our sweepingly assumptive language.

staking deals, or the random-and-slightly-creepy generosity of Bill Pulte is of no moment from an economic perspective. A player benefits by the so-called “juicing” of a prize pool regardless of where a poker room finds the extra money.

On the other hand, it is appropriate to note that in an expansive Monte Carlo simulation, the average player’s EV in the average tournament on the average day at the average poker room will only turn positive if a guarantee deficiency exceeds cumulative entry fees. And, thus, there is immense merit in noting this specific situation is materially different than one where a guarantee deficiency does not exceed cumulative entry fees. If even one penny is collected which is not returned to the player pool via prize money, the tournament becomes less than a zero sum game for the players as a whole. All players combined only walk away with a cumulative profit if the guarantee deficiency exceeds the total entry fees collected.

Ultimately, the absurd cyber quarrel (had by two otherwise rather respected gentlemen) we confront is one of dialect. This is per se dangerous, as words have a veritably subjective and amorphous quality about themselves; not long ago, “literally” was universally defined as being a description of something sounding in objective truthfulness; yet courtesy of popular media allowing the hyperbole of a Valley Girl dialect of English to permeate the mainstream, this word has now adopted an inexplicably stupid alternative meaning inclusive of its own antonym. A look further back in time reveals that the word “gay” initially described someone’s mood of happiness, and had nothing to do with their sexual preference.

Ultimately, however, we are persuaded that “overlay” without modifying verbiage – such as “reduced rake overlay,” or “partial entry fee overlay” – is still most commonly understood as denoting a situation where a house’s contribution to a prize pool exceeds the cumulative monies collected as and for entry fees. Based upon this determination, one might surmise that this

opinion ultimately lands in favor of Mr. Kessler. However, we have neither the arrogance nor ego to surmise this is a universally-accepted definitional distinction, but instead proffer it as being that we each individually construe it as an optimal use of poker's vocabulary.

We do urge, however, that just as all H.O.R.S.E. games are "poker," but Omaha has a different lingual designation than stud, the differing varieties of overlays ought to be accorded distinct nomenclature as the *lingua franca* of poker continues to evolve. And we thus propose an overlay exceeding all entry fees hereinafter be known as a "Chainsaw Overlay," while an overlay equaling less than the sum of all entry fees hereinafter be known as a "Bral Overlay."

Thanksgiving is this Thursday; anyone who read this far thinking we were going to anoint a clear victor, at the expense of one of these two fine gentlemen, is genuinely a fish. And in poker circles, we are satisfied the word "fish" is without any definitional ambiguity.

III. Conclusion

DONE AND ORDERED, this 27th day of November, 2019, by the Court of Poker Arbitration.

/s/ Todd Witteles
Hon. Todd Witteles
Arbitrator

/s/ Mac VerStandig
Hon. Mac VerStandig
Arbitrator