How a Cozen M&A Partner Helped Close a Different Kind of Deal

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At the end of July, a Cozen O'Connor team led by M&A partner Anne Madonia and Washington, D.C., office managing partner Barry Boss, a white collar criminal litigator, wrapped up complex deal negotiations for client Full Tilt Poker that involved an asset sale to a former rival and a settlement with the U.S. Department of Justice.

In Madonia's experience, it was a unique transaction.

"I don't think anybody has worked on something similar to this, where a company is forfeiting its assets to the government and then there is a subsequent sale to a buyer," Madonia says. "I don't know that in DOJ history that has ever occurred before." (A Justice Department spokesman did not return a call seeking comment on whether the Full Tilt deal was indeed the first of its kind for the agency.)

As The Am Law Daily has previously reported, Dublin-based Full Tilt was one of several poker website operators whose assets and domain names were seized by U.S. authorities on April 15, 2011—a date known in the gaming industry as Black Friday—amid a broad crackdown on Internet gaming companies. The case featured criminal indictments against Full Tilt CEO Raymond Bitar and 10 other people, as well as a civil complaint accusing the website operators of committing illegal gambling and bank fraud offenses.

On July 31, the Justice Department dropped the civil case against Full Tilt and former rival PokerStars, which was also targeted in the Black Friday sweep, as part of a $731 million settlement. The settlement calls for PokerStars to acquire Full Tilt's assets while forfeiting some of its own assets to repay online poker players in the U.S. and abroad who could not cash out their Full Tilt accounts when the site's operations were frozen. PokerStars will pay the U.S. government $547 million over the next three years, some of which will be used to repay Full Tilt players in the U.S.

PokerStars will also pay $184 million to repay Full Tilt players abroad. (Though the civil suits have been dropped, the criminal cases against Bitar and multiple other individuals are proceeding.)

For the Cozen team, completing the roughly year-long assignment involved clearing several potentially problematic hurdles, including the FBI taking Bitar into custody, the Justice Department terminating a potential settlement and sale to a group led by French businessman Bernard Tapie at the last minute, and the agency's filing of an amended civil complaint that claimed Full Tilt was essentially a Ponzi scheme.

In the early stages of trying to find a buyer for Full Tilt's assets, Madonia says, "many potential acquirers came and went. We looked at all sorts of options, getting an infusion of equity, getting debt, looking at differerent financing sources." Late last summer, the Cozen team engaged an investment banker to help lead the process, with most of the attention focused on the gaming industry. "There was a lot of outreach done to private equity firms and other poker gaming companies. Soon we started to get non-disclosure agreements, confidentiality agreements, to review."

Momentum stalled in September. "Unfortunately," Madonia says, "the investment banker terminated the relationship when the DOJ amended its complaint and issued a press release claiming that the Full Tilt operation was a Ponzi scheme." After that, she adds, "we were almost acting like the investment banker and handling and responding to the interested parties."

Full Tilt's primary concern, Madonia says, was that its players be fairly compensated: "Our client's concern was making sure that there was a buyer at the table who was ready, willing, and able to compensate the players."

By December, the tentative $80 million deal with the Tapie group was in place, only to be upended several months later for undisclosed reasons by the Justice Department.

"When you work with the government, you're not really privy to everything that they know and they're doing and they're investigating," Madonia says. "We don't really know how the Tapie deal fell apart. Our client's concern was making sure that there was a buyer at the table who was ready, willing, and able to compensate the players. When that became unclear that that was the case, from our client's perspective, that was important. It's hard to know if that was the only issue on the DOJ side. But they came to the table with PokerStars as the potential buyer pretty quickly, so you wonder what other conversations were happening."

Despite the quick emergence of PokerStars as a potential buyer in April, the Justice Department's involvement in the talks helped stretch them out for another three months. "When you're working on a typical M&A transaction, there is the buyer and the seller and you can negotiate and you can resolve an issue within 24 hours or a couple of days," Madonia says. "When you're dealing with a buyer overseas and the U.S. government, it just takes longer than it would normally take."

Along the way, Madonia and Boss pulled in corporate lawyers and litigators from Cozen offices in Washington, D.C., New York, and California; worked with Ifrah Law (which is representing Bitar, who has pleaded not guilty to the charges against him) and Full Tilt counsel in the U.K. and Ireland;

and negotiated with PokerStars' attorneys at Skadden, Arps, Slate, Meagher & Flom and Tel Aviv firm Herzog Fox & Neeman.

Further complicating matters: the need to satsify regulators around the world that had launched their own inquiries in connection with the potential transaction. Another challenge to closing the deal, Madonia says, was working quickly to get through due diligence with PokerStars given the amount of sensitive information at play in the criminal invesgtigation and civil suits.

"We wanted to make sure we were protecting the attorney-client privilege," she says. "We didn't want our client to waive attorney-client privilege with respect to anything in their record. When you're selling all of your assets, you risk waiving the attorney-client privilege unless you put things in place to protect that. So we needed to make sure we had done that. Obviously, there was a lot of public awareness and scrutiny of everything we were doing. Plaintiffs lawyers in different parts of the world, in the U.S. and Canada, were looking at this transaction. You had to have, as they say, eyes behind your head."

There was, Madonia says, one area in which Full Tilt's precarious position actually gave Cozen some leverage in navigating what can be a time-consuming sticking point in M&A transactions: negotiating representations, warranties, and indemnities.

"We didn't have that here," she says. "Our client was forfeiting all of its business assets. PokerStars' lawyers tried to get reps and warranties and indemnities from our client, but it was easy to go back and say, 'No. We're not going to have many assets! If there's a breach, if there's an indemnity claim, you will now have all of our assets,'" she says. (Of course, she adds, Full Tilt still needed to obtain representations, warranties, and indemnities from PokerStars because her client needed to avoid any legal action that might arise later should PokerStars have committed any sort of breach.)

Full Tilt had little say over the final settlement price, though Madonia says there was a "minimum purchasing price" that had to be met in order to ensure that Full Tilt players in the U.S. and abroad can get the amount they are owed.

"To us, if a buyer came to the table that couldn't meet that obligation, it was sort of a non-starter, although Full Tilt always kept its options open," she says, adding: "To be honest with you, we weren't even privy to the final settlement amount that PokerStars was going to pay until it was publicized to the rest of the world. But we knew that it was substantial and that the first payment would be more than sufficient to cover the entire U.S. player liability. We also knew that the deal would involve complete reinstatement of all non-U.S. player balances within 90 days."

Even with the transaction's terms in place and all three parties in agreement, Madonia says the criminal indictment hanging over Bitar presented the Cozen team with another unusual wrinkle to smooth out before closing the deal: "having to work out the logistics with DOJ and the FBI to get your client to sign documents."

"You don't have that every day," she says.