COMMONWEALTH OF KENTUCKY
SUPREME COURT
2009-SC-000043

COMMONWEALTH OF KENTUCKY
J. MICHAEL BROWN, SECRETARY, JUSTICE
AND PUBLIC SAFETY CABINET **APPELLANT**

V.

INTERACTIVE MEDIA ENTERTAINMENT & GAMING
ASSOCIATION, INC., *et al.* **APPELLEES**

ON APPEAL FROM
COURT OF APPEALS
ORIGINAL ACTION NOS. 2008-CA-002019; 2008-CA-002000; 2008-CA-002036

ORIGINAL ACTIONS ARISING FROM
FRANKLIN CIRCUIT COURT, DIVISION II
CIVIL ACTION NO. 08-CI-1049
HON. THOMAS D. WINGATE, JUDGE

BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief for Appellants was served by First Class U.S. Mail, postage prepaid, upon Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. John L. Tate, Hon. Ian T. Ramsey, Hon. Joel T. Beres, Stites & Harbison, PLLC, 400 West Market Street, Suite 1800, Louisville, KY 40202-3352, Hon. Bruce F. Clark, Stites & Harbison, PLLC, 421 West Main Street, Frankfort, KY 40601, and Hon. A. Jeff Ifrah, Hon. Jerry Stouck, Greenberg Traurig, LLP, Suite 1000, 2101 L. Street, N.W., Washington, D.C. 20037, *Counsel for Interactive Gaming Council and vicsbingo.com;* Hon. Thomas Wingate, Judge, Franklin Circuit Court, P.O. Box 40601-0678, Frankfort, KY 40601-0678, *Appellee;* Hon. William E. Johnson, Johnson, True & Guarnieri, LLP, 326 West Main Street, Frankfort, KY 40601, Hon. Patrick T. O'Brien, Greenberg Traurig, 401 East Las Olas Boulevard, Suite 2000, Fort Lauderdale, FL 33301, and Hon. Kevin D. Finger, Hon. Paul D. McGrady, Greenberg Traurig, LLP, 77 West Wacker Drive, Suite 2500, Chicago, IL 60601, *Counsel for Domain Defendants playersonly.com, sportsbook.com,sportsinteraction.com, mysportsbook.com ,and linesmaker.com;* Hon. Jon L. Fleischaker, Hon. R. Kenyon Meyer, Hon. James L. Adams, Dinsmore & Shohl, LLP, 1400 PNC Plaza, 500 West Jefferson Street, Louisville, KY 40202, Hon. Edward James Leyden, Hollrah Leyden, LLC, 1850 K Street, N.W., International Square, Suite 390, Washington, D.C. 20006, *Counsel For Interactive Media Entertainment & Gaming Association, Inc.*, and Phillip D. Scott, Greenebaum Doll & McDonald PLLC, 300 West Vine Street, Suite 1100, Lexington, Kentucky 40507, and Phillip D. Scott, Greenebaum Doll & McDonald, Suite 1100, 300 W. Vine Street, Lexington, Kentucky 40507 and Margaret E. Keane, Greenebaum Doll & McDonald PLLC, 3500 National City Tower, 101 South Fifth Street, Louisville, Kentucky 40202, *Counsel for vicsbingo.com and Interactive Gaming Council,* this 18th day of June, 2009.

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STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

Appellees refuse to acknowledge that this action is not about gambling – it is about illegal, unlicensed, unregulated anonymous internet gambling. Appellees deride as a "screed" the recitation of the numerous enforcement actions taken by various authorities, and to alleged "moralistic pronouncements about gambling." This action is not about gambling; rather it is about the right of Kentucky to enforce its laws in an area of exclusively state regulation. Appellees make only token arguments denying the brazen illegality of their purported members' offshore illegal gambling operations. Civil forfeiture is the most effective tool available in the aggressive efforts of the U.S. government and other states to combat the offshore operations which purposely and illegally operate in the Commonwealth. Its use by the Commonwealth is a proper response to the use of the internet to combat illegal gambling from safe havens abroad. Kentucky courts should not employ a discretionary and extraordinary writ to stop this effort at such a preliminary stage.

I. SECRETARY BROWN HAS STANDING TO BRING A CIVIL FORFEITURE ACTION.

The issue of Secretary Brown's standing is not a jurisdictional question, and cannot be reviewed by a petition for writ. The concept of standing is a judicial construct regarding only the presence of an actual case or controversy. Nonetheless, it is clear from the express language of the statutes that Secretary Brown has proper standing to bring this action to have the illegal gambling devices forfeited to the Commonwealth.

KRS 12.210 and 12.220 empower the executive branch to hire attorneys and bring claims. *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820 (Ky. 1942). KRS 12.210 allows that "the Governor, *or any department with the approval of the Governor,*

may employ... attorneys for legal services...." KRS 12.220 allows the Governor or department with his approval to appear through his employed attorneys "in the trial and argument of any *cases and proceedings in any and all courts*...." Secretary Brown is the Secretary of the Justice and Public Safety Cabinet, and oversees the Kentucky State Police and other law enforcement agencies. The Secretary is a member of the Governor's Executive Cabinet, and as such "shall assist the Governor in the proper operation of his office and perform other duties the Governor may require of him." KRS 11.065. The Governor assigned these specific duties and gave his approval for the retention of counsel to carry them out, as memorialized in Executive Order 2008-712 on July 15, 2008. It could not be more clear that Secretary Brown has the proper standing to bring this action.

II. KRS 528.100 IS A CIVIL FORFEITURE STATUTE.

Appellees continue, on behalf of the anonymous and absconding operators of the illegal offshore internet gambling sites, to suggest that KRS 528.100 requires a criminal conviction prior to forfeiture of an illegal gambling device. The text of that statute contains no such language. It does not reference a conviction, criminal action, or even person against whom a criminal action might be brought. It states that "Any gambling device possessed or in violation of this chapter is forfeited to the state...."

The Franklin Circuit Court correctly held that "KRS 528.100 contemplates a separate and independent civil proceeding, having for its purpose the condemnation of the property that is used in violation of KRS Chapter 528, independent of the innocence or guilt of its owner." *Opinion & Order*, p. 12. Judge Wingate and the other two judges on the Curt of Appeals panel declined to join Judge Taylor in his concurring opinion – because a conviction is clearly not required by the text of KRS 528.100.

This case was brought as a civil proceeding, not out of a desire to be creative or to deny rights of any unidentified persons (whomever and wherever in the world they may be). It was brought as a civil action for the simple fact that Kentucky law has long provided that a forfeiture of a gambling device is a civil action, and nothing in KRS 528.100 can be read to have altered that precedent. *See, 14 Console Type Slot Machines v. Com.*, 273 S.W.2d 582 (Ky. 1954); *Hickerson v. Com.*, 140 S.W.2d 841 (Ky. 1940), *Sterling Novelty Co. v. Com.*, 271 S.W.2d 366, 368 (Ky. 1954)(the forfeiture proceeding "should have been tried as a civil action because essentially it is an action in rem against the machines.")

Civil forfeiture, under whichever authorizing statute, does not require a conviction, merely proof of a violation. It is sufficient to show a nexus between the property sought to be forfeited and its use to facilitate a violation. *Smith v. Com.*, 205 S.W.3d 217 (Ky.App. 2006)(interpreting KRS 218A.410). KRS 528.100, like the statute considered in *Smith,* references only a violation, not a conviction. The Appellees suggest that because KRS 528.100 is located in Chapter 528 of the Kentucky Revised Code, it is therefore a criminal forfeiture statute. In *U.S. v. Ursery*, 518 U.S. 267, 295 (1996), the government brought a civil forfeiture action under 18 U.S.C. § 981, located in Title 18, Crimes and Criminal Procedure, against property used to manufacture marijuana. The *Ursery* Court held that notwithstanding its location in the U.S. Code, the fact that 18 U.S.C. § 981 is triggered by *violations* of the criminal code is irrelevant – it authorizes a civil action *in rem* against offending property.

The statutes considered in *Smith* and *Ursery,* like KRS 528.100, reference a violation of the criminal statutes, but do not reference a person or a conviction. Those

courts both held, appropriately, that the reference to a "violation" did not alter the civil character of an *in rem* action.

In *Smith v. Com*, 205 S.W.3d 217 (Ky.App. 2006), the Kentucky Court of Appeals considered *Ursery* in determining whether a civil forfeiture under KRS 218A.410 violated Double Jeopardy. It noted that "[f]orfeitures pursuant to the statute are specifically structured to be impersonal by targeting the property itself." *Id.*, 221. Just as in *Smith*, the statute under scrutiny in the instant case targets the property itself, not any person. It is the character of the action as one against property that determines its nature as a civil action. It goes without saying that a conviction is not a prerequisite for a civil action.

III. THE COMMONWEALTH PROPERLY APPLIED FOR AN ORDER OF SEIZURE.

The Commonwealth brought the action as a civil action because that is demanded by the nature of *in rem* forfeiture, and Kentucky case law has uniformly provided that forfeiture of gambling devices is a civil action. *See, e.g., Commonwealth v. Fint,* 940 S.W.2d 896 (Ky. 1997). The Commonwealth's Motion for Seizure was the only proper and logical way to proceed with a civil forfeiture of easily transferrable property utilized in the commission of crime. It does not violate the rights of any person to conduct a seizure hearing, because no person is a party to the action and no person has any rights to appear on behalf of that property. Under Kentucky law, individuals only have a right to appear on behalf of the seized property to demonstrate that they are a lawful owner.

Appellees fail to distinguish between the notions of seizure and forfeiture. Even had there been such a person, the person's rights would have no more been violated in this proceeding, at which evidence was presented to an impartial Judge, who then made a

finding of probable cause, than there would have been in a proceeding for an application for a warrant, an application for a temporary restraining order, or in Grand Jury proceedings. The seizure hearing is a hearing on a preliminary issue – whether probable cause exists to seize the property *in rem*.

IV. A WRIT IS INAPPROPRIATE TO DETERMINE THE MULTIPLE QUESTIONS OF FACT.

A Petition for Writ of Prohibition is not the proper vehicle for addressing the numerous questions of fact on which the exercise of *in rem* jurisdiction must be evaluated. The Circuit Court was more than able to review the evidence, assess the credibility and qualifications of the witnesses, and make findings based upon that evidence. The trial court was the proper forum to address the several questions of fact argued by Appellees, chief among them whether a domain name is a gambling device.

A. THE FACTUAL QUESTION OF WHETHER A DOMAIN NAME IS A GAMBLING DEVICE IS PROPERLY DECIDED BY THE CIRCUIT COURT.

Appellees themselves strenuously asserted during oral arguments, by two separate counsel, that the question whether a domain name is a device is one of fact for a jury. (VR No. 1: 12/12/09; 11:23:37 and 11:41:15). This question of fact is best determined by the trial court, which can assess the evidence and the credibility of experts on the subject. A Petition for Writ, in the absence of such evidence, does not allow the appellate courts the benefit of that evidence. Nonetheless, the Court of Appeals determined that the Domain Defendants are not gambling devices, without consideration of the only testimony in the record (that of Dr. Paulson) that domains are indeed devices. It considered no evidence and gave no deference to the trial court's findings, improperly making a determination as a matter of law. Because it considered no evidence and made

no factual findings, it is impossible for this Court to apply the "clear error" standard for reviewing factual findings. *Newell* at 755. The standard of review for issues of law in the grant of a writ is *de novo*. *Newell Enterprises, Inc. v. Bowling*, 158 S.W.3d 750, 754 (Ky. 2005). This Court should give no deference to the lower court's conclusion of law, but should dissolve the Writ of Prohibition and allow the Circuit Court to proceed with the evidentiary hearing..

B. GAMBLING DEVICE IS BROADLY DEFINED TO EFFECTUATE THE LEGISLATIVE INTENT.

The General Assembly, in crafting KRS 528.010, anticipated the evolution of new types of gambling devices, using the words "or other device", and included the unambiguous language "included but not limited to". Appellees invoke the doctrine of *ejusdem generis* for the proposition that the definition can be applied only to devices of a similar type as those specifically listed in the statute. *Ejusdem generis* is inapplicable by the clear text of KRS 528.010, which specifically includes devices of a type not listed.

In addition to the expressly broad language of this statute, the legislature has mandated that: "[A]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." KRS 446.080(1). The true intention or will of the legislature is the law, not the literal language of the statute. *Hardwick v. Boyd County Fiscal Court*, 219 S.W.3d 198 (Ky. 2007). Courts must consider the intended purpose of the statute, the reason and spirit of the statute, and the mischief intended to be remedied. *Com. v. Kash*, 967 S.W.2d 37 (Ky. 1997); *Mitchell v. Kentucky Farm Bureau Mut. Ins. Co.,* 927 S.W.2d 343 (Ky. 1996). Numerous decisions have recognized that when it enacted the gambling laws, the intent of the legislature was

to prevent illegal gambling in whatever form. *Gilley v. Com.*, 229 S.W.2d 60 (Ky.1950); *Meader v. Com.* 363 S.W.2d 219 (Ky.1963).

Appellees make much of the fact that in enacting Chapter 528, the General Assembly chanted the definition of forfeited property from "contrivance" to "device". The Court's previous decisions, however, make clear that the Court will broadly interpret either "contrivance" or "device", as have courts of sister states, to effectuate the legislature's intent to stop all unregulated gambling. In *Gilley*, the Commonwealth moved for an order of forfeiture under the predecessor statute to KRS §528.100. Though the prior statute used the word "contrivance", *Gilley* recognized that other courts were proper in broadly construing the word "device", just as it broadly effectuated the General Assembly's intent by construing the word "contrivance". *Id.* In concluding that paper "number slips" were in fact "contrivance used for gambling", the Court stated:

> Recognizing that the intent of the Legislature was to stop all forms of gambling, this court will give a broad interpretation to the word 'contrivance'.... We find other courts likewise construe a *gambling device or contrivance* to mean any instrument whereby money or things of value are won or lost. [citations omitted].

The Domain Names are clearly instruments "whereby money or things of value are won or lost" which regardless of the nomenclature of the statutes is the test to be applied to effectuate the legislature's intent. *Gilley, supra.* The Trial Court correctly relied upon *Gilley* and concluded the defendant Domain Names, the "virtual keys for entering and creating virtual casinos from the desktop of a resident in Kentucky", are gambling devices.

C. DOMAINS ARE SUBJECT TO THE JURISDICTION OF KENTUCKY COURTS WHEN USED FOR ILLEGAL GAMBLING IN KENTUCKY.

Despite Appellees' arguments on behalf of the illegal gambling operation owners, extra-territorial *in rem* civil forfeiture actions are routinely employed against internet gambling assets.[1] The evolution of extra-territorial seizues in civil forfeiture case law culminated in *U.S. v. Approximately $1.67 Million (US) in Cash,* 513 F.3d 997 (9th Cir. 2008), and was eventually codified with the enactment of the Civil Asset Forfeiture Reform Act (CAFRA).[2] Extra-national seizures of property had been made under the law as it existed prior to the amendment of § 1355, in a number of cases, and upheld by numerous appellate courts. Congress expressly codified in 28 U.S.C. § 1355(b) the rule that courts have jurisdiction to seize property used in criminal activity within their districts, even if the property is outside the district or the United States. *U.S. v. All Funds in Account in Banco Espanol de Credito, Spain,* 295 F.3d 23, 27 (D.C.Cir. 2002). Due Process clearly permits civil forfeiture of property located in foreign jurisdiction if the property has sufficient nexus to criminal activity in the forum state. *See, United States v. Certain Funds Located at the Hong Kong & Shanghai Banking Corp.,* 96 F.3d 20, 22 (2d

[1] In the brief time since the filing of the Briefs for Appellees, the United States Attorney for the Southern District New York seized thirty million dollars ($30,000,000) in funds belonging to the payment processors of offshore poker sites. *See* Associated Press Article, June 9, 2009, attached as Exhibit A.

[2] Senator Alphonse D'Amato of New York, when introducing the bill, acknowledge that civil forfeiture case law already provided for extra-territorial forfeiture:

> Subsection (b)(2) addresses a problem that arises whenever property subject to forfeiture under the laws of the United States is located in a foreign country. As mentioned, under current law, it is probably no longer necessary to base in rem jurisdiction on the location of the property if there have been sufficient contacts with the district in which the suit is filed....

137 Cong. Rec. S12183-02, S12239 (Aug. 2, 1991).

Cir. 1996); *Contents of Account Number 03001288 v. U.S.*, 344 F.3d 399 (3rd Cir. 2003); *Approximately $1.67 Million (US) in Cash, supra.*

As these cases demonstrate, due process does not require that the property be located within the forum state in order for it to be forfeited. *In rem* jurisdiction is justified over the property whenever there is a basis sufficient to justify exercising jurisdiction over the interests of persons in the property. *Citizens Bank and Trust Co. of Paducah v. Collins*, 762 S.W.2d 411 (Ky. 1988). In the forfeiture context, there is a sufficient basis when the property has been used in connection with criminal activity in the forum. There is no question that Kentucky has jurisdiction over the owners and operators who used the Domain Defendants to operate their illegal gambling enterprises within the Commonwealth. By choosing to use their Domain Defendants to violate KRS Chapter 528, the owners and operators chose to subject their Domain Defendants to the *in rem* jurisdiction of Kentucky's courts.

In an attempt to mock the Commonwealth's jurisdiction, Appellees accuse the Commonwealth as having "switched" from an *in rem* jurisdictional analysis to an "*in personam*" jurisdictional analysis. To the extent that the analysis has "switched," the switch occurred when the United States Supreme Court applied the due process minimum contacts analysis of *International Shoe* to *in rem* jurisdiction. In *Shaffer v. Heitner*, 433 U.S. 1865, 212 (1977), the U.S. Supreme Court expressly held that "all assertions of state-court jurisdiction must be evaluated according to the [minimum contacts] standards set forth in *International Shoe* and its progeny." (emphasis added). Appellees continue to contend that *Pennoyer's* "presence" requirement survived *Shaffer;* however, *Shaffer* expressly overruled all prior decisions inconsistent with the *International Shoe* minimum-

contacts standard, including *Pennoyer*. *Id.* at note 39. The legal fiction of *in rem* jurisdiction does not depend on the appropriate exercise of *in personam* jurisdiction over the interest holder and the property. As Judge Wingate noted, "the requirement of "presence" is seen through the lens of "minimum contacts," for both *in rem* and *in personam* actions." Opinion and Order, p. 18.

The "purposeful availment" requirement of the minimum contacts test is satisfied when the defendant's contacts with the forum state "proximately result from the actions of the defendant *himself* that create a 'substantial connection' with the forum State," and when the defendant's conduct and connection with the forum are such that he "should reasonably anticipate being haled into court there." *Cummings v. Pitman*, 239 S.W.3d 77, 85 (Ky. 2007), *citing Southern Machine Co. v. Mohasco,* 401 F.2d. 374, 381 (6th Cir. 1968). Operation of an Internet website constitutes the purposeful availment of the privilege of acting in a forum state "if the website is interactive to a degree that reveals specifically intended interaction with residents of the state." *Bridgeport Music, Inc. v. Still N The Water Pub*, 327 F.3d 472, 483 (6th Cir. 2003). If a defendant enters into contracts with residents of a foreign jurisdiction over the Internet, personal jurisdiction is proper. *Euromarket Designs, Inc. v. Crate & Barrel Ltd*, 96 F.Supp.2d 825, 837 (N.D.Ill. 2000)(*citing Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D.Pa. 1997). The fact that this relationship has continued over an extended period of time and has involved substantial amounts of money will, in itself, satisfy the minimum contacts test. *First National Bank of Louisville v. Shore Tire Co. Inc.*, 651 S.W.2d 472, 474 (Ky.App. 1982). The owners and operators of a website can sever their connection with a particular state if it determines that the jurisdictional risks are too great, but by

choosing to do business in the forum state, a defendant purposefully avails itself of the privilege. *Lexmark Intern., Inc. v. Laserland, Inc.*, 304 F.Supp.2d 913, 918 (E.D.Ky. 2004).

Appellee IGC cites *Carefirst of Md., Inc. v. Carefirst Pregnancy Center, Inc.,* 334 F.3d. 390 (4th Cir. 2003), *Chloe v. Queen Bee of Beverly Hills, LLC,* 571 F.Supp.2d. 518 (SDNY 2008), and other cases for the proposition that a plaintiff cannot manufacture jurisdiction by entering into a transaction from a forum where the defendant was not already subject to jurisdiction. These cases so not stand for the proposition that a $20 billion a year illegal enterprise already engaging in business in that forum is somehow immunized by the fact that investigators gamble from that forum in the process of gathering evidence. The Commonwealth did not "manufacture" jurisdiction. The Domain Defendants "manufactured" jurisdiction by engaging in a long and profitable commerce with Kentucky residents. The Commonwealth's investigators "manufactured" names, but used Kentucky addresses, Kentucky banks, and Kentucky computers to show – as a matter of probable cause – that Domain Defendants are offering illegal gambling in Kentucky to Kentucky residents.

Appellees argue that only courts where the Domain Defendants are registered or where their owners and operators are located have jurisdiction. It is absurd to suggest that Kentucky must resort to foreign courts to enforce its laws. It is perhaps even more absurd to suggest that criminal enterprises should be permitted to choose the jurisdiction and the courts that judge their conduct. If this were the law, child pornographers would locate in a jurisdiction that tolerates child pornography and drug cartels would locate in a jurisdiction that tolerates drug trafficking, yet each could freely peddle their wares into

Kentucky. These outfits would be free to export their criminal conduct around the world and the targeted jurisdictions would be impotent save the option but to appeal to the courts of the jurisdiction that tolerates the criminal conduct. Such a system would be Nirvana for criminal enterprises. Fortunately, it is clearly not the law.

Appellees attempt to distinguish *State v. Western Union Financial Services, Inc.*, 199 P.3d 592 (Ariz. App. 2008), wherein Arizona courts exercised *in rem* jurisdiction over intangible property related to illegal activities that occurred in the state. Arizona brought a civil forfeiture action against wire-transfer funds that were traceable to these human-smuggling and narcotics trafficking activities. Although "wire-transfers sent from outside Arizona did not 'flow through, touch or have any connection with' Arizona and were 'carried out in and constitute[d] interstate and foreign commerce,'" the Arizona Court of Appeals, citing *Shaffer,* noted that "[t]he touchstone of jurisdictional analysis must be whether the relationship among the owners or beneficial interest holders in the *res*, the forum, and the litigation would make the exercise of jurisdiction fair and just," and concluded that sufficient minimum contacts existed. *Id.* at 10. The Court held that the *res* constitutes proceeds of criminal activity, and that by purposefully committing the illegal acts in Arizona, the owners of the res should expect to adjudicate their rights in Arizona.

New York's courts rejected this absurd argument in another case involving illegal internet gambling:

> Wide range implications would arise if this Court adopted respondents' argument that activities or transactions which may be targeted at New York residents are beyond the state's jurisdiction. Not only would such an approach severely undermine this state's deep-rooted policy against unauthorized gambling, it also would immunize from liability anyone who engages in any activity over the Internet which is otherwise

> illegal in this state. A computer server cannot be permitted to function as a shield against liability, particularly in this case where respondents actively targeted New York as the location where they conducted many of their allegedly illegal activities.

People ex rel. Vacco v. World Interactive Gaming Corp., 714 N.Y.S. 2d 844, 850 (N.Y.Sup., Jul 22, 1999).

Courts have held that the illegal internet gambling transaction occurs in the state where the bet is made:

> It is irrelevant that Internet gambling is legal in Antigua. The act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling activity within New York State.").

U.S. v. Gotti, 459 F.3d 296, 340 (2nd Cir. 2006)(*quoting People v. World Interactive Gaming Corp., supra. See also, Thompson v. Handa-Lopez, Inc.*, 998 F.Supp. 738 (W.D.Tex. 1998) (internet betting constituted gambling in Texas).

In Thompson, a case against an internet casino, the Court upheld Texas jurisdiction, finding that:

> Defendant Handa-Lopez did more than advertise and maintain a toll free telephone number--it continuously interacted with the casino players, entering into contracts with them as they played the various games. ....Defendant Handa-Lopez entered into contracts with the residents of various states knowing that it would receive commercial gain at the present time. Furthermore, in the instant case, the Texas Plaintiff played the casino games while in Texas, as if they were physically located in Texas, and if the Plaintiff won cash or prizes, the Defendant would send the winnings to the Plaintiff in Texas.

Id. at 744.

The Commonwealth presented overwhelming evidence, and Judge Wingate found, that the owners and operators used the Domain Defendants to establish clear commercial links with residents of the Commonwealth, to enter into contracts with residents of the Commonwealth, to actively solicit Kentucky customers and conduct commerce within the Commonwealth, to receive payment from within the Commonwealth and to deliver software, services, opportunities, wagering information, and sums from winning wagers to residents of the Commonwealth. Judge Wingate considered the evidence and found that the Commonwealth had established a *prima facie* case supporting the Court's jurisdiction. *See,* Opinion and Order, October 16, 2008, p. 22-3.

The jurisdictional analysis is based on the purposeful availment by the Domain Names in doing business in Kentucky, not the options used by the Commonwealth's investigators in finding those domains. Though immaterial for the minimum contacts analysis, Appellees wrongly assert that Commissioner Howard went out into the internet and sought passive websites that offered gambling in legal jurisdictions. As the copious evidentiary files submitted to the Circuit Court demonstrate, Commissioner Howard and his investigative team accessed these websites by a number of ways, in order to demonstrate to the Court the ease and availability of accessing the illegal gambling domains. Some were accessed using search engines to point the investigative team to the domain name, some were accessed by links to the domain name from sites such as Casino City that exist to advertise the illegal gambling domains, and some were accessed by directly typing the domain name into the browser window. The evidence in the Circuit

Court included numerous instances of the illegal gambling sites reaching into Kentucky through brochures, emails, TV ads, web ads and other means, etc.[3]

Judge Wingate was in the best position to evaluate the evidence and the credibility of the witnesses, something the Court of Appeals did not and could not do. A remand for a full evidentiary hearing on the appropriateness of the forfeiture is necessary to satisfy the factual questions of minimum contacts.

V. DOMAIN DEFENDANTS ARE INTANGIBLE PROPERTY WITH SITUS IN KENTUCKY.

While the authorities cited above demonstrate that civil forfeiture is proper for property located outside the jurisdiction, it is also true that domain names are intangible property with a situs in Kentucky.[4] Appellees virtually ignore Justice Cardozo's explanation in *Severnoe* that the fictional location of the *situs* varies depending upon the legal purpose, and that the same intangible property may be deemed to have a *situs* for a particular purpose, yet have another *situs* for a different purpose. See, *Severnoe Securities Corporation v. London & Lancashire Ins. Co.*, 174 N.E. 299, 300 (N.Y. 1931); *Higgins v. Commonwealth*, 103 S.W. 306, 308 (Ky. 1907). *Higgins* and *Severnoe* hold that when a

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[3] Appellees also attempt to mock the qualifications of the Commonwealth's investigators. Greg most recently served as Commissioner of Vehicle Enforcement for the Commonwealth. Under his leadership, KVE became the first and only vehicle enforcement agency in the nation to be accredited by the Commission for Accreditation for Law Enforcement Agencies. He led a distinguished career with the LFUCG Police Department, supervising the Special Investigation Unit, achieving the rank of Captain, and commanding the entire Detective Bureau. Since 1982, he trained LFUCG detectives in investigations. He was also the inaugural President of the Kentucky Law Enforcement Officers Memorial Foundation, and served on the Kentucky Office of Homeland Security Executive Committee. He remains an Adjunct Instructor for the Kentucky Department of Criminal Justice Training.

Dr. Derek Paulson is an Associate Professor at Eastern Kentucky University, which has a premier criminology program, and hosts the Kentucky Department of Criminal Justice Training. Paulson is an expert and international lecturer on cyber crime and cyber security, and is employed by the US State Department to educate and train its personnel in cyber counter-terrorism operations.

[4] As explained above, in *Shaffer*, the U.S. Supreme Court replaced *Pennoyer's* "presence" requirement with *International Shoe's* minimum contacts standard. Accordingly, there is no need to establish a fictional *situs*. Instead, the proper inquiry is whether sufficient contacts exist between the *res*, the forum and the cause of action.

court needs to attribute a fictional situs to intangible property, the fiction must be based upon a "common sense appraisal of the requirements of justice and convenience in particular conditions." *Severnoe* at 300. Here, a sovereign government seeks to exercise its legitimate police powers to prevent illegal gambling activities within the Commonwealth. Accordingly, to the extent that it is necessary to assign a fictional *situs* to the Domain Defendants, the Court must assign one that is consistent with the Commonwealth's public policy and legitimate governmental interests. *Id.* Considering the state's strong public policy and legitimate governmental interests in preventing illegal gambling activities, it is vital that the Commonwealth's courts be available to enforce its anti-gambling laws. In the civil forfeiture context, the only logical situs for intangible property is the forum in which it is used in illegal activity.

The Appellees asked the Franklin Circuit Court, and now this Court, to employ only two legal fictions of their choosing: (i) the venue provision from the federal Anticybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. § 1125; and, (ii) the statute for taxation of personal property found in *Bingham's Adm'r v. Commonwealth*, 251 S.W. 936 (1923). The Appellees base their entire jurisdictional argument upon these two legal fictions. Neither fiction applies to civil forfeitures.

The ACPA provides a cause of action against a party who registers, traffics or uses a domain name that infringes on a protected trademark. 15 U.S.C. § 1125(d)(1).[5] Under certain circumstances, the ACPA permits a trademark owner to bring the action *in rem*. 15 U.S.C. § 1125(d)(2). The ACPA contains a venue provision that permits the

[5] Judge Wingate correctly held that the ACPA has no application to this civil forfeiture action, because this is not a cyber squatting case. Opinion and Order, October 16, 2008, p. 19.

action to be brought in the district where the domain name's registrar or registry is located. *Id.*

It is highly instructive, however, that the ACPA expressly provides that its *in rem* jurisdiction is not exclusive: "[t]he in rem jurisdiction established under paragraph (2) shall be *in addition to any other jurisdiction that otherwise exists, whether in rem or in personam.*" 15 U.S.C. § 1125(d)(4) (emphasis added). In other words, an ACPA claim may be brought in the district provided in 15 U.S.C. § 1125(d)(2), or in any other jurisdiction. Because Kentucky is an appropriate *in rem* jurisdiction under the minimum contacts analysis, and because the situs of the domains is likewise in Kentucky, jurisdiction is not limited as Appellees argue.

Alternatively, the Appellees suggest that *Bingham's Adm'r v. Commonwealth* controls. Just as the ACPA does not apply because it deals only with cyber squatting, *Bingham's Adm'r v. Commonwealth* does not apply because the General Assembly only applied that fictional situs in the context of taxation of personal property. At the time of *Bingham*, Section 4020 of the Kentucky Statutes provided that "... all personal estate of persons residing in this state ... shall be subject to taxation ...." *Bingham's Adm'r v. Commonwealth*, 223 S.W. 999 (Ky. 1920); *see also Bingham's Adm'r v. Commonwealth*, 251 S.W. 936 (Ky. 1923). In both cases, the Court simply applied the tax statute to the facts of the case. Neither the tax statute nor the case have any application to a civil forfeiture proceeding and do not limit the exercise of jurisdiction over property used to violate the law in Kentucky.

VI. THE COMMERCE CLAUSE DOES NOT PROTECT THE DOMAINS' ILLEGAL COMMERCE.

IGC cites two cases related to the dissemination of pornography over the internet to minors, *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2nd Cir. 2003) and *American Libraries Association v. Pataki,* 969 F.Supp. 160 (S.D.N.Y. 1997) in putative support of its Commerce Clause argument. While it is fitting that IGC would analogize the activity of its members with the clearly illegal dissemination of child pornography, it is surprising it would rely on these cases when their misguided understanding of the internet and the Commerce Clause have been rejected by numerous courts.

These issues were recently discussed in an analogous case involving online poker when an online poker enthusiast brought a declaratory judgment action seeking to declare a statute that prohibited the transmission of gambling information over the internet unconstitutional. *Rousso v. State of Washington,* 149 Wash.App. 344, 204 P.3d 243 (Wash.App. 2009). Rousso claimed Washington's "Gambling Act" was a violation of the Commerce Clause and discriminated against interstate and international commerce by restricting Washington poker players to in-state brick and mortar card rooms, as opposed to allowing them to gamble on the internet with players from other states or countries. The *Rousso* court rejected his Commerce Clause claim and reliance upon *American Libraries* stating:

> The *American Libraries* approach has been persuasively and widely criticized as resting "on an impoverished understanding of the architecture of the Internet," "misread[ing] dormant Commerce Clause jurisprudence," and "misunderstand[ing] the economics of state regulation of transborder transactions." More importantly, numerous other cases (many addressing practically identical subjects) have either rejected outright *American*

> *Libraries'* fundamental premise, or distinguished *American Libraries* as overbroad.

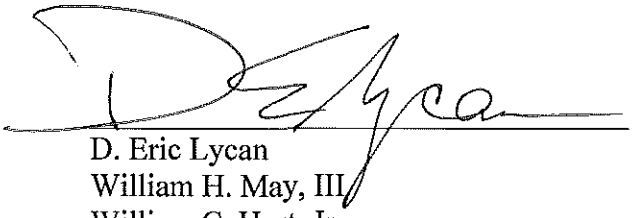
Rousso, 149 Wash.App. at 365 (citations omitted). The *Rousso* court ultimately concluded the State's interests in protecting its citizens from the ills associated with gambling outweighed the relatively small cost imposed on out-of-state businesses by complying with the Gambling Act. *Id.*

The courts that have examined *American Libraries* and *American Booksellers* have rejected their reasoning and conclusions. Furthermore, unlike in *American Libraries* and *American Booksellers,* the issues here do not involve passive postings of child pornography on the internet. Through the Domain Names, the gambling operators sign up Kentucky gamblers, accept money from Kentucky gamblers, download software to Kentucky gamblers, and otherwise conduct their gambling operations. It is their active and deliberate efforts that violate the Commonwealth's gambling laws. The Commonwealth, like Washington, has a legitimate interest in regulating, and such an interest outweighs the cost imposed on companies to comply. The Commonwealth has not violated the Commerce Clause.

CONCLUSION

The attempt of the owners of the illegal gambling Domain Defendants to appear and assert their interests through associations or as "dot-com" pseudonyms is antithetical to the concept of *in rem* forfeiture, and cannot be countenanced by allowing these surrogates standing. It is clear that the Domain Defendants, by their use for illegal gambling in Kentucky, have the minimum contacts to satisfy any due process concerns over Kentucky's exercise of *in rem* jurisdiction. The rights of the anonymous owners,

much less the disinterested surrogates, will not be harmed by requiring them to assert their claims as required by KRS 500.090. The standards of *Hoskins v. Maricle,* 150 S.W.3d, 1 (Ky. 2004), are not met by these Petitions, and the Court should not exercise its discretion to condone the illegal scheme through issuance of a Writ of Prohibition.



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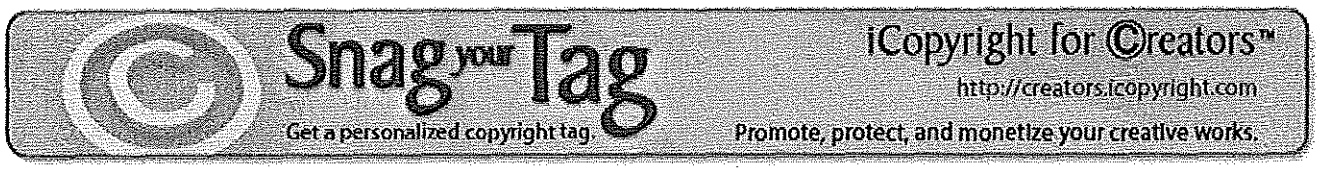
EXHIBITS

EXHIBIT A: Associated Press Article, June 9, 2009.



Associated Press

June 9, 2009

APNewsBreak: Group says poker winnings are frozen

By FREDERIC J. FROMMER
Associated Press Writer

An advocacy group for online poker said Tuesday that the federal government has frozen more than $30 million in the accounts of payment processors that handle the winnings of thousands of online poker players.

The Justice Department long has maintained that Internet gambling is illegal, a view that the poker group challenges.

The Poker Players Alliance told The Associated Press that the U.S. attorney for the Southern District of New York instructed three banks — Citibank, Goldwater Bank and Alliance Bank of Arizona — to freeze the accounts.

Documents obtained by the AP show that a magistrate judge in the district issued a seizure warrant last week for an account at a Wells Fargo bank in San Francisco, and that a federal prosecutor told Alliance Bank to freeze accounts.

In a letter dated Friday and faxed to Alliance Bank, the prosecutor said accounts held by payment processor Allied Systems Inc. are subject to seizure and forfeiture "because they constitute property involved in money laundering transactions and illegal gambling offenses." The letter was signed by Arlo Devlin-Brown, assistant U.S. attorney for the Southern District of New York.

In another letter faxed the same day, Devlin-Brown asks that the bank treat the funds "as legally seized" by the FBI, saying that the government has probable cause that the gambling payments of U.S. residents had been directed to offshore illegal Internet gambling businesses.

"The FBI has authority to seize proceeds of specified unlawful activity without a warrant under exigent circumstances," wrote Devlin-Brown — a process criticized by the Poker Players Alliance.

In addition, a grand jury subpoena issued last week to Allied Systems seeks communications, financial transactions and processing services between the company and Internet gambling operations. The subpoenas also seek corporate records and bank accounts.

A spokeswoman at the Southern District declined to comment.

John Pappas, executive director of the Poker Players Alliance, called the government's move an "unprecedented action" against online poker players.

In a letter Monday night to Devlin-Brown, Pappas requested that his group be notified and given the opportunity to be heard regarding attempts to seize the frozen funds.

He said that "seizure of Allied Systems' bank accounts would constitute a violation of due process because there are no exigent circumstances to justify deprivation of PPA members' property without prior notice and a hearing."

Exhibit A

"The PPA will pursue every legal course available to ensure that poker players' funds are not seized and their right to play poker online is protected," Pappas wrote.

In the interview, Pappas said 20,000 player accounts were affected, but that his group has received assurances from online poker sites that the players would be fully compensated.

A 2006 law prohibits financial institutions from accepting payments from credit cards, checks or electronic fund transfers to settle online wagers. The Justice Department viewed Internet gambling as illegal even before that.

In a statement, the alliance chairman, former New York Republican Sen. Alfonse D'Amato, said the frozen funds belonged to individual poker players, not poker Web sites.

"This money should be immediately released by the Southern District to ensure that player payouts are not further disrupted," he said.

The alliance, which is funded by its poker player members and the Interactive Gaming Council, a Vancouver, British Columbia-based trade association for online casinos, plans to spend $3 million lobbying this congressional session. The group supports legislation by Rep. Barney Frank, a Massachusetts Democrat who chairs the House Financial Services Committee, that would regulate rather than ban Internet gambling.

At least half the $16 billion Internet gambling industry, which is largely hosted on overseas sites, is estimated to be fueled by U.S. bettors.