COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CASE NO. 08-CI-1409

COMMONWEALTH OF KENTUCKY, ex rel. J. MICHAEL BROWN, Secretary, Justice and Public Safety Cabinet **PLAINTIFF**

vs. **OPINION AND ORDER**

141 INTERNET DOMAIN NAMES **DEFENDANTS**

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Statement of Matters Pending

This matter is before the Court to determine if the Seizure Order entered September 18, 2008 is valid and whether the Court should proceed toward forfeiture of the 141 Internet domain names. Additionally, there are several motions filed by various Groups described in greater detail below. For purposes of brevity, the Court identifies the following common pending matters for its consideration and action, to wit: (1) the motion to dismiss the present civil action for forfeiture,[1] (2) the motion to vacate or set aside this Court's Seizure Order of September 18,[2] (3) the motion of Internet Gaming Association to Intervene pursuant to Kentucky Civil Rules of Procedure (CR) 24.

[1] The persons and entities who filed separate Motions to Dismiss were Atty. William E. Johnson on behalf of the Group of 7 (hereinbelow defined), Atty. Alison L. Grimes on behalf of the Group of 2 (hereinbelow defined), Interactive Gaming Council, and the Interactive Media and Entertainment Gaming Association.
[2] The persons and entities who filed separate motions to alter or vacate the Seizure Order of September 18, 2008 were Atty. Alison L. Grimes on behalf of the Group of 2 and Atty. William E. Johnson on behalf of the Group of 7.

After reviewing the records of this case and the arguments raised in written briefs and during oral arguments, and after having been sufficiently advised, this Court hereby renders this Opinion and Order:

Parties, Other Groups, and Lawyers

The plaintiff before this Court is the Commonwealth of Kentucky, as represented by the Secretary of the Justice and Safety Cabinet, Mr. J. Michael Brown.

The named defendants to this action are 141 Internet domain names. Some, but not all, of the 141 domain names have been identified to have counsel. Annex "1," consisting of the list of the 141 Internet Domain Names, hereinafter collectively referred to as the "Defendants 141 Domain Names", is attached and incorporated in this Opinion and Order.

The first group of domain names, namely, playersonly.com, pokerhost.com,[3] sbglobal.com,[4] sportsbook.com, sportsinteraction.com, mysportsbook.com, and linesmaker.com, are represented by Attorneys William E. Johnson,[5] Kevin D. Finger,[6] Paul D. McGrady[7] and Patrick O'Brien.[8] For purposes of clarity, we hereinafter refer to this group of 7 defendant domain names as the "**Group of 7**."

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[3] The Court notes that in the Motions filed by Atty. William E. Johnson before the hearing of September 26, counsel included the Internet domain name pokerhost.com as one of the res he represented. However, in subsequent motions filed, this name was no longer included. For purposes of the present order, the Court will treat that pokerhost.com is still represented by William E. Johnson.

[4] The Court notes that in the Motions filed by William E. Johnson before the hearing of September 26, counsel included the Internet domain name sbglobal.com as one of the *res* he represented. However, in subsequent motions filed, this name was no longer included. For purposes of the present order, the Court will treat that sbglobal.com is still represented by counsel.

[5] Attorney William E. Johnson is local counsel in Frankfort, Kentucky, and practices with Johnson True & Guarnieri LLP in the Commonwealth.

[6] Attorney Kevin F. Finger practices law with Greenberg Traurig LLP in Chicago LLP and was authorized by this Court to practice in Kentucky *pro hac vice* in relation to this case.

[7] Attorney Paul D. McGrady practices law with Greenberg Traurig LLP in Chicago and was authorized by this Court to practice in Kentucky *pro hac vice* in relation to this case.

[8] Attorney Patrick T. O'Brien also practices law with Greenberg Traurig LLP in Fort Lauderdale, Florida.

The second group of domain names, namely, goldenpalace.com and goldencasino.com, are represented by Attorneys P. Douglas Barr, Palmer G. Vance II and Alison Lundergan Grimes[9] The domain name goldenpalace.com is further represented by Atty. Lawrence G. Walters.[10] For purposes of clarity, we hereinafter refer to this group of 2 defendant domain names as the "**Group of 2**."

There are other groups that requested leave from this Court to intervene and/or to appear as a friend or amici curiae of the Court. These groups are as follows:

The **Interactive Gaming Council** (IGC) is an incorporated trade association organized and existing under the laws of British Columbia, Canada. IGC comes to this Court for the purpose of representing the rights of the internet gaming community and its general members, especially the owners and operators of some (but not all) of the domain names identified in the Commonwealth's Second Amended Complaint. The Court notes that the IGC did not expressly identify which of the 141 domain names are owned by or related to the operations of its members.

The **Interactive Media Entertainment & Gaming Association, Inc.** (IMEGA), is an incorporated trade association organized and existing under the laws of the State of New Jersey. IMEGA is a voluntary association that collects and disseminates information regarding electronic and Internet-based gaming. IMEGA comes to this Court for the purpose of representing the rights of some of its members who are the owners of some (but not all) of the domain names included in the Commonwealth's Second Amended Complaint. The Court also notes that IMEGA and its counsel did not identify the specific

[9] Attorneys P. Douglas Barr, Palmer G. Vance, and Alison L. Grimes are local attorneys, practicing with Stoll Keenon Ogden PLLC in the Commonwealth.
[10] Attorney Lawrence G. Walters practices law with Weston, Garrou Walters & Mooney in Florida and was authorized by this Court to practice in Kentucky pro hac vice in relation to this case.

domain names, which are owned or used in the business operations of IMEGA's members.

The **Poker Players Alliance** (PPA) is an incorporated association of poker players and enthusiasts, organized and existing under the laws of the State of Nevada. The PPA represented to this Court that it has at least 13,000 members residing in Kentucky. The PPA sought leave to file a Memorandum *Amicus Curiae* for the purpose of bringing to the Court's attention that some of the domain names in the Commonwealth's Second Amended Complaint merely host games of poker, which, according to the PPA, is predominantly a game of skill and not chance and therefore should not be considered illegal under Kentucky's gambling laws.

The **Internet Commerce Association** (ICA) is also an incorporated trade association composed of domain name registrants and website owners organized and existing under the laws of the District of Columbia. The ICA sought leave to file a Memorandum *Amici Curiae* in opposition to the proceedings initiated by the Commonwealth before this Court. The mission of the ICA is to promote the interests of its members in the areas of Internet governance and domain name administration. The ICA monitors for its members any judicial actions that impact its members and their Internet business activities.

The **Network Solutions, Inc.** (NSI) and Mr. Michael R. Mazzoli, by way of seeking leave to admit its counsel, Mr. Timothy B. Hyland, sought permission to allow NSI to participate in all aspects of the action, including trial and appeal, but without submitting to the jurisdiction of this Court, whether *in rem* or *in personam*.

For purposes of clarity and brevity, the Group of 7, Group of 2, IGC, IMEGA, PPA, ICA and NSI, and their lawyers and representatives will hereinafter be collectively referred to as the "Opposing Groups and Lawyers."

STATEMENT OF FACTS

On August 26, 2008, the Commonwealth filed a complaint with this Court. Together with the complaint, the Commonwealth moved that the file be sealed until such time that the Court would consider the Commonwealth's Motion for a Seizure Order. This Court granted the Commonwealth's Order on this date, thereby sealing the records.

On September 18, 2008, the Commonwealth sought that the original complaint be stricken from the record of this case. Instead, the Commonwealth filed its Amended Complaint and Second Amended Complaint on the same day. Upon motion by the Commonwealth, the Court directed the Clerk of the Court to physically remove the first complaint from the record and return it to the counsel of the Commonwealth, consistent with the Kentucky Supreme Court's holding in *Roman Catholic Diocese of Lexington v. Noble*, 92 S.W.3d 724 (Ky., 2002).

That afternoon, this Court heard the Commonwealth's Motion for the Seizure of the Defendants 141 Domain Names. In the Commonwealth's Motion, it sought an order to direct the registrars of the Defendants 141Domain Names to transfer each of the Defendants 141 Domain Names to the Commonwealth's account.

At the September 18, 2008 hearing, the Commonwealth presented evidence that it created a team which engaged in at least 500 man-hours on-line, randomly accessing various internet gambling websites available in Kentucky. This team was created for the purpose of ascertaining whether internet gambling is available in Kentucky.

At the hearing, the Commonwealth called two witnesses to the stand. One witness, Officer Gregory G. Howard, testified that his team conducted an investigation for a period of at least 2 months. During that 2-month period, the team, at his office computer located in Kentucky, accessed gambling websites through the use of various

domain names. Officer Howard's team maintained a log book which recorded which domain names allowed them access to a website with live on-line gambling. According to Officer Howard, they used a Kentucky bank account or Kentucky bank issued credit card to place bets or play on-line slot machines and roulettes.

The second witness, Mr. Derick James Paulson, testified as an expert on cybercrime. Mr. Paulson opined that an Internet domain name is a device or a transport device allowing Kentuckians to engage in internet gambling.

The Commonwealth also offered in evidence several exhibits, described as follows:

1. Exhibit 1 consists of the logbook containing the day-to-day records and notes of all on-line gambling transactions completed or attempted;

2. Exhibit 2 consists of the hard drive from the computer used in investigation, on which all on-line plays and transactions, including computer gaming software, were stored;

3. Exhibit 3 consists of the 141 files covering each of the 141 domain names confirmed to allow access to or registration from a user or consumer from Kentucky;

4. Exhibit 4 consists of prints of computer screens ("screen shots") of the on-line gambling, i.e., 32redpoker, arcticstarpoker.com, nordicbet.net, with access or registration to those websites either blocked or denied.

5. Exhibit 5 consists of 137 pages of screen shots detailing the series of interfaces between the player (while at his desktop located in Kentucky) and the casino website. These interfaces included creation of a gambling account, on-line transfer of financial information where players are asked to "deposit" credits into his/her/their account/s created; the processing and confirmation of the financial information provided by the player; the funding of the gambling accounts through the use of the player's credit card, debit card, ecocard, click2pay card, or neteller card; and the debiting of the gambling account after a loss at the chosen game or play.

6. Exhibit 6 is a table/chart identifying the specific groups of domain names and their corresponding registrars

7. Exhibit 7 consists of hard copies of the printout of the active tracking for all internet gambling activity conducted.

8. Exhibit 8 consists of a table/chart identifying a specific group of domain names which uses Microgaming software when completing internet gambling transactions.

On the basis of the Commonwealth's presentation, the Court rendered Findings of Fact and Conclusions of Laws dated 18 September 2008.[11]

On the basis of the Commonwealth's presentation, the Court issued its Order of Seizure of Domain Names entered on September 18, 2008. In this Order, this Court found that probable cause existed to support a finding that the Defendants 141Domain Names are being used in connection with illegal gambling activity within the Commonwealth. The Order of Seizure directed the respective registrars of each of the Defendants 141Domain Names to transfer the registration to the account of the Commonwealth, without any changes to the domain names' configurations. The Court authorized the service of the Seizure Order upon each Registrar by using the procedures applicable in each Registrar's written polices and the written polices of the Internet Corporation for Assigned Names and Numbers (ICANN), including service by overnight courier. The Commonwealth was also directed to give notice by overnight courier, email, or facsimile to persons identified in the WHOIS information database as claiming ownership for each of the Defendants 141 Domain Names. Finally, the Seizure Order scheduled a hearing to determine whether any party who has a right to the Defendants 141 Domain Names is entitled to the return of his/her/its property. Upon motion of the Commonwealth, the hearing originally set for September 25 was re-scheduled for September 26. The September 26 hearing was for the purpose of forfeiture of the domain names.

This Court then received written motions in opposition to the present civil forfeiture action from IGC, IMEGA, and Group of 7. At the September 26, 2008 hearing, the

[11] The Court's September 18, 2008 Findings of Fact and Conclusions of Law were withdrawn and set aside on September 30, 2008.

lawyers for the Commonwealth, and other lawyers representing the Group of 7, Group of 2, IGC, IMEGA, and PPA, were before the Court. Counsel for the Commonwealth, Mr. Robert M. Foote,[12] objected to the standing of any lawyers purporting to represent the Defendants 141 Domain Names without specifying the identity of the actual owner or registrant concerned. On the basis of the foregoing, the Commonwealth's counsel further objected to all the written motions for intervention, motions to dismiss, and motions to vacate the seizure order.

Although standing was objected to by the Commonwealth's counsel, this Court allowed the representatives of the Group of 7, Group of 2, IGC, IMEGA, and PPA to be heard, but subject to the Court's further consideration on the issue of standing.

At the conclusion of the hearing, this Court granted the representatives of the Commonwealth and the Opposing Groups and Lawyers permission to file their respective briefs on the following issues: (a) standing; (b) jurisdiction of the Court; (c) nature or status of Defendants 141 Domain Names as property; (d) nature of Defendants 141 Domain Names as a 'gambling device" as defined in KRS 528.010; (e) exclusion of poker as a gambling activity as defined in KRS 528.010. *See* Order entered on October 2, 2008.

The Commonwealth and the Opposing Groups and Lawyers who were present during the September 26, 2008 hearing timely filed their respective Memoranda on the issues. ICA, who was not then represented at the September 26 hearing, filed its Motion for Leave to File Memorandum Amicus Curiae.

[12] Mr. Foote practices law with Foote, Meyers, Mielke & Flowers, LLC in Illinois and was authorized by this Court to practice pro hac vice in this case.

On October 7, 2008, this Court conducted a second hearing and allowed the representatives of the Commonwealth, the Group of 7, the Group of 2, IGC, IMEGA, PPA, ICA, and Network Solutions to be heard regarding their various motions.

This Court took all matters under advisement and now being sufficiently advised hereby issues its order.

DISCUSSION OF THE ISSUES

1. Does the Court have subject matter jurisdiction over a civil forfeiture action involving internet domain names?

Jurisdiction is a fundamental concept that goes to the very core of a court's authority and power to act or decide a case. *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W. 3d 422, 428 (Ky. Ct. App. 2008) (Discretionary Rev. Denied, Aug. 13, 2008). This Court's power to inquire into facts, apply the law, make decisions and declare judgment over the claims of the Commonwealth and over the Defendants 141Domain Names is both constrained by and a function of this Court's jurisdiction. *Id.*, 429 (citing *Nordike v. Nordike*, 231 S.W. 3d 733,737 (Ky. 2007)).

Kentucky Circuit Courts, like this Court, are courts of general jurisdiction with a wide range of authority over various types of cases. *Hisle*, 258 S.W. 3d 422, 432. The Kentucky Constitution §112(5) states: "The Circuit Court shall have original jurisdiction over all justiciable causes not vested in some other court." This constitutional mandate imbues the circuit courts with the general power to determine all matters of controversy arising under common law or equity, or by reason of statute or constitution, unless the constitution requires that the matter be resolved by another body of the government or another court. *Hisle,* 258 S.W.3d 422, 432. Even the General Assembly does not have the authority to limit or control the circuit court's subject matter jurisdiction. Id, 434.

According to the counsel of the Group of 7, this Court does not have subject matter jurisdiction over the Commonwealth's complaint for civil forfeiture. *See* Motion to Dismiss for Lack of Jurisdiction over the Subject Matter, etc. of Group of 7. The Opposing Groups and Lawyers echoed this objection during the hearings held on September 25 and October 7, 2008.

The Opposing Groups and Lawyers further contend that the language of KRS 528.100 has a bearing on the propriety of any exercise of judicial authority over the instant civil forfeiture action. KRS 528.100, as IGC's lawyers here present, contemplates forfeiture as a consequence of a conviction in a criminal proceeding. As suggested by IGC's counsel, "[w]ithout criminal conviction establishing a violation of some provision of Chapter 528, there can be no violation."[13] Therefore, the Defendants Domain Names cannot be proceeded against in a forfeiture action.

The text of KRS 528.100 reads as follows:

> "528.100 **Forfeiture**. Any gambling device or gambling record possessed or used in violation of this chapter is forfeited to the state, and shall be disposed of in accordance with KRS 500.900, except that the provisions of this section shall not apply to charitable gaming activity as defined by KRS 528.010(1)."

The predecessor of KRS 528.100, as correctly pointed out by IGC's counsel, is KRS 436.280.[14] KRS 436.280 authorized forfeiture. See *A.B. Long Music Co. v. Com., 429 S.W. 2d 391, 395 (Ky. 1968)*. Our Supreme Court, in the case of *14 Console Type*

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[13] Memorandum in Support of Interactive Gaming Council's Motion to Dismiss, p. 19.
[14] The repealed KRS 436.280 was quoted in part in *Three-One-Ball Pinball Machines v. Commonwealth*, 249 S.W. 2d 144 at 145 (Ky. 1952), in pertinent part as follows : 'Any bank, table, contrivance, machine or article used for carrying on a game prohibited by KRS 436.230, together with all money or other things staked or exhibited to allure persons to wager, may be seized by any justice of the peace, sheriff, constable or police officer of a city, with or without a warrant, and upon conviction of the person setting up or keeping the machine or contrivance, the money or other articles shall be forfeited for the use of the state, and the machine or contrivance and other articles shall be burned or destroyed. * * *'

Slot Machines v. Com., 273 S.W. 2d 582 (Ky. 1954), held that a forfeiture proceeding under KRS 436.280 is a civil action in rem. Id, 583.

Looking to federal jurisprudence, we note that the United States Supreme Court draws a sharp distinction between a forfeiture proceeding that is criminal and punitive in nature, and that which is civil and remedial. See *U.S. v. Ursery,* 518 U.S. 267, 277 (1996); *United States v. One Assortment of 89 Firearms,* 465 U.S. 354 (1984).

Criminal forfeiture is part of a criminal sentence. *Libretti v. United States*, 516 U.S. 29, 42 (1995). Its fundamental purpose is punishment for a person's criminal wrongdoing. Id, 41; *Ursery,* 518 U.S. 267, 293 (J. Kennedy, Concurring Opinion). See also Horigan v. Commonwealth, 962 S.W. 2d 860 (Ky. 1998). It forms part of the *in personam* action against the criminal defendant. Criminal forfeiture is an aspect of sentencing. *Libretti v. United States*, 516 U.S. 29, 49.

In contrast, a civil forfeiture is not punitive. *Ursery,* 518 U.S. 267, 293. A civil forfeiture is a proceeding *in rem* to forfeit property used in committing an offense. *Id.* As unanimously held by the United States Supreme Court in *Waterloo Distilling Corp v. US*, 282 U.S. 577 at 581 (1931) :

> "[This] forfeiture proceeding … is in rem. It is the property which is proceeded against, and by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient."

An *in rem* civil forfeiture is a remedial civil action, distinct from potentially punitive *in personam* civil penalties such as fines. *Ursery,* 518 U.S. 267, 278. In the case of *Ursery,* 518 U.S. 267 at 284, the United States Supreme Court held that:

> "Civil forfeitures … are designed to do more than simply compensate the Government. Forfeitures serve a variety of purposes, but are designed primarily to confiscate the property used in violation of the law, and to require disgorgement of the fruits of illegal conduct."

Returning to the IGC's counsel's construction of KRS 528.100, if this section contemplates criminal forfeiture only, then there might be some merit in their contention that forfeiture must follow as a consequence of a criminal conviction. But we find this construction narrow in light of the discussions above. KRS 528.100 has broader remedial aims. It would be absurd for our General Assembly to emphasize the pernicious nature of gambling within the state and to its determination to punish all forms of gambling, yet restrict the remedial measures made available to its law enforcement agents. 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.

Considering the foregoing, the Commonwealth succeeded in presenting a justiciable cause in its *in rem* civil forfeiture complaint. The Commonwealth has presented overwhelming evidence that KRS Chapter 528 prohibits gambling in the Commonwealth; that the Defendants 141Domain Names have been and are being used in connection with on-line or internet gambling activities available and accessible within the Commonwealth; and that KRS 528.100 authorizes forfeiture actions of gambling devices. Based on the foregoing, this Court finds sufficient bases to exercise its authority and hear and adjudicate the civil forfeiture claim presented by the Commonwealth against the Defendants 141 Domain Names.

2 .Does the Court have in rem jurisdiction over the Defendants 141 Domain Names?

(a) Are the Defendants 141 Domain Names property?

The Opposing Groups and Lawyers before this Court collectively assert that domain names are akin to a telephone number or a business or residential address only; that

domain names are but a combination of letters and numbers, which serves as a mnemonic aid, nothing more. They argue that domain names are not property, but are rights in a service contract. As such, they conclude that Defendants 141 Domain Names can not be subject to this Court's *in rem* jurisdiction or to a civil forfeiture.

The authorities cited by the Opposing Groups and Lawyers reach the conclusion that domain names are only contract rights in a fairly limited context. *See* Warrin E.Agin, Esq., *I'm a Domain Name. What am I? Making Sense of Kremen v. Cohen,* 14 J. Bankr. L. & Prac. 3 Art. 3 (2005). Thus, the Court does not find those cases binding and conclusive of the status of a domain name.[15]

However, other courts have applied the intangible property theory to domain names in at least two cases : *Online Partners .Com, Inc. v. Atlanticnet Media Corp,* 2000 WL 101242 (N.D. Cal. 2000); *Harrods Ltd. V. 60 Internet Domain Names,* 302 F.3d 214 (4th Cir. 2002). But, neither case addressed head on the issue of a domain name as a form of property. See Warren E. Agin, Esq. *I'm a Domain Name: What am I? Making Sense of Kremen v. Cohen,* 14 J. Bankr. L. & Prac. 3 Art 3 (2005). It was in *Kremen v. Cohen,* 337 F. 3d 1024 (9th Cir. 2003) that a court dealt with this issue unambiguously. *Id.* The relevant legal issue in *Kremen v. Cohen* was whether a domain name was a form of property that could be stolen under California state law. The 9th Circuit found Network

[15] *Network Solutions Inc. v. Umbro Int'l, Inc.,*529 S.E. 2d 80 (Va. 2000) (statutory garnishment proceeding against domain name registrar as garnishee in order to satisfy a judgment debtor's debt was dismissed because a domain name registrar's services to the domain name registrant is not "liability" in the context of garnishment.) *Lockheed Martin Corp. v. Network Solutions, Inc.,* 194 F. 3d 980 (9th Cir. 1999) (third party action against a domain registrant for contributory service mark infringement, unfair competition and service mark dilution was dismissed because a registrar does not supply a "product" when it enters into a domain name registration service with a putative registrant). *BASF Agrochemical Prods. V. Unkel,* 2006 WL 3533133 (W.D. La. 2006) (action for conversion of intellectual property was dismissed because incorporeal or intangible property cannot be subject of a conversion under LA conversion laws). *Wornow v. Register.com,* 8 A.D. 3d 59 (N.Y. App. Div. 1st Dept., 2004) (action for conversion by domain name registrant against its registrar was dismissed on the ground that a domain name that is not trademarked or patented is not personal property, but rather a contract right that cannot exist separate and apart from the services performed by the defendant-registrar).

Solutions Inc., as a third-party defendant on the claim against Cohen, liable to Cohen for conversion. *Kremen,* 337 F. 3d 1024, 1035. Justice Kozinski applied an attributes approach in arriving at his determination of whether a property right exists in a domain name. *See* Warren E. Agin, Esq. *I'm a Domain Name: What am I? Making Sense of Kremen v. Cohen,* 14 J. Bankr. L. & Prac. 3 Art 3 (2005). The three-step analysis used included whether: (1) there is an interest capable of precise definition; (2) it is capable of exclusion possession or control; and (3) the putative owner can establish a legitimate claim to exclusivity. *Kremen,* 337 F. 3d 1024, 1030.[16]

Domain names surely have a significant place in our modern economy. See George Vona, *Sex in the Courts, Kremen v. Cohen and the Emergency of Property Rights in Domain Names*, 19 I.P.J. 393, 403 (2006). During the oral arguments held on October 7, 2008, the Commonwealth contended that the domain names, in general, and the Defendants Domain Names, in particular, have a market value, being auctioned for sale and bought regularly through registrars acting as brokers. The real issue lies in the tremendous value that domain names have generated apart from their technical function as Internet addresses.

The Court looks to the treatment given by federal agencies to Internet domain names as relevant. The United States Treasury Department is currently advertising for public auction the Internet domain name www.DoctorTalk.com, after having been deemed to be

[16] Some experts and commentators believe that Congress has had this view even before *Kremen v. Cohen* was decided. *See* Jeffrey M Becker, *Suing An Electronic Address : In Rem Domain Name Actions Under the ACPA,* 8 Tex Wesleyan L. Rev. 629; George Vona, *Sex in the Courts, Kremen v. Cohen and the Emergency of Property Rights in Domain Names,* 19 I.P.J. 393, 420 (2006) (ACPA is about as forceful a recognition of a property right in domain names as exists.) In 1999, Congress enacted the Anti Cybersquatting Consumer Protection Act (ACPA), which is codified in 15 U.S.C. §1125(d). While not directly applicable in the present case, the Court notes that under the ACPA, Congress authorized *in rem* jurisdiction over domain names. This Court also views such an assignment of situs to a domain name as evidence of the treatment of domain names as property.

subject to levy, seizure and sale under 26 U.S.C. §6331.[17] According to the appraisal conducted by the Internal Revenue Service, the Internet domain name www.DoctorTalk.com has a net present value of $526,000.[18] The United States Department of Justice obtained forfeiture of www.software-inc.com after it was used in the sale and distribution of counterfeit computer software;[19] of www.isonews.com after it was used to traffic illegal modification of chips that allowed pirated videogames.[20] The fact that the existence of a domain name springs from the pairing of an alphanumeric name or so-called domain name with an Internet Protocol (IP) address, the registration of such pairing to the Domain Name System does not detract from the fact that, by virtue of its scarcity and desirability, the domain name has an economic value. George Vona, *Sex in the Courts, Kremen v. Cohen and the Emergency of Property Rights in Domain Names*, 19 I.P.J. 393, 403 (2006).

Property is about the relationships of people with respect to things, both tangible and intangible. *Id.* The analogy commonly used to describe property is the bundle of rights concept. *Id.*, 403-404. Those rights include the right to possession, management and control (the right to exclude), the right to income and capital, the right to transfer inter vivos and on death, and the right to the protection under the law. *Id.*

Considering the foregoing, this Court finds the Defendants 141Domain Names are property and therefore subject to this Court's *in rem* jurisdiction or to possible civil forfeiture.

(b) Do the Defendants 141 Domain Names have a presence in Kentucky?

[17] See Brief of the Commonwealth on the In Rem Seizure of Domain Names, p. 10.
[18] Id.
[19] Id., at p.11.
[20] Id.

The next inquiry is whether the Defendants Domain Names have a presence in Kentucky. This inquiry is critical to this Court's exercise of judicial authority over the Defendants 141 Domain Names.

The important case law to start this analysis with is *Pennoyer v. Neff*, 95 U.S. 714 (1877). In *Pennoyer*, the United States Supreme Court, through Justice Field, enunciated the then prevailing law on state court jurisdiction as follows:

> "[E]very State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction over persons or property without its territory. [citations omitted] The several States are of equal dignity and authority, and the independence of one implies the exclusion of power of all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decision. Any exertion of authority of this sort beyond this limit,' says Story, is a mere nullity, and incapable of binding such persons or property in any other tribunals.'

Pennoyer, 95 U.S. 714 at 722-723.

Pennoyer v. Neff stood for the then prevailing law on state court jurisdiction that a person had to be physically present in a state in order to be subject to the state court's authority and its judgment imposing liability on him, i.e., a "personal" judgment. *See* Restatement (Second) of Law on Judgments §5 cmt. b (1982). *Pennoyer v. Neff* also stood for the then prevailing law that property had to be physically present within a state in order that a judgment could be rendered determining claims to the property. *Id.* These two doctrines became the basic elements of constitutional doctrine governing state-court

jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186, 198 (1977) (citing Hazard, *A General Theory of State-Court Jurisdiction*, 1965 Sup. Ct. Rev. 241).

However, the doctrines enunciated in *Pennoyer v. Neff*, particularly that which dealt with territorial limits on jurisdictional power had been "moderated" by subsequent United States Supreme Court cases. *Shaffer,* 433 U.S. 186, 200. The concept of doing business in the State was deemed "presence" in the State, and so subject to service of process under the rule of Pennoyer. *Id,* 202 (citations omitted). With the advent of automobiles, a fiction, that the out-of-state motorist by having used the state's highways appointed a designated state official as his agent, was used in *Hess v. Pawloski,* 274 U.S. 352 (1927) to establish "presence" for purposes of the service of process consistent with the conceptual structure of *Pennoyer v. Neff. Id.*

In the case of *International Shoe v. Washington,* 326 U.S. 310, (1945), a unanimous United State Supreme Court declared that the demand for 'presence" as a prerequisite for state court authority may be met by "minimum contacts" with the state, such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Id* at 316.

Since *International Shoe*, the physical presence requirement for state court jurisdiction over *in personam* actions as enunciated in *Pennoyer v. Neff* has been modernized.

In *Shaffer v. Heitner,* the United States Supreme Court acknowledged that no equally dramatic change occurred in the law governing jurisdiction in rem. *Shaffer,* 433 U.S. 186, 205. But the *Shaffer* Court believed that the fairness standard in *International Shoe* can be easily applied in the vast majority of cases. *Id*, 211. The *Shaffer* Court further said, after implying the applicability of the fairness standard to jurisdiction *in rem*, that, "in

order to justify an exercise of jurisdiction in rem, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of the persons in a thing." *Id* at 207.

Thus, as the law stands on state court jurisdiction, the requirement of "presence" is seen through the lens of "minimum contacts," for both *in rem* and *in personam* actions.

Section 5 of the Second Restatement of Law on Judgments tracks the *in personam* state-court jurisdiction over persons under modern decisional law as follows:

> "A state may exercise jurisdiction over a person who has a relationship to the state such that the exercise of jurisdiction is reasonable. For relationships sufficient to support an exercise of such jurisdiction. *See* Restatement, Second, Conflict of Laws §§27-32, 35-44, 47-52." Restatement (Second) of Law on Judgments, §5 (1982).

Section 6 of the Second Restatement of Law on Judgments tracks the *in rem* state-court jurisdiction over property under modern decisional law as follows:

> "A state may exercise jurisdiction to determine interests in a thing if the relationship of the thing to the state is such that the exercise of jurisdiction is reasonable. For relationships sufficient to supports an exercise of jurisdiction. *See* Restatement (Second) of Law on Judgments, § 6 (1982).

On the legislative front, states and federal legislative bodies have enacted statutes, i.e., long-arm statutes, assigning a *situs* for purposes of determining presence. See KRS 452.210. The assignment of a situs is particularly relevant where the thing is an intangible property, which cannot be physically located anywhere. In cases of intangible property, fictional *situs* rules are generally assigned to the property by reference to its owners.

In the context of domain names, Congress has recently assigned them a *situs*, at least for purposes of an *in rem* civil action by a trademark owner against a domain name. Under the Antibybersquatting Consumer Protection Act, a domain name has as its situs the judicial district in which:

> "(i) the domain name registrar, or other domain name authority that registered or assigned the domain name is located; or
>
> (ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court."

15 U.S.C. §1125(d)(2)(C). The rationale for this assignment of situs is that the data in the computer at the registry is the defendant res.

The Opposing Groups and Lawyers, relying on the Anticybersquatting Consumer Protection Act (ACPA), argue that Defendants Domain Names have no *situs* within Kentucky because there are no registrars or other domain name authorities found in Kentucky. They assert that a domain name has no presence in Kentucky. Therefore, the Opposing Groups and Lawyers contend that this Court has no jurisdiction over the Defendants 141 Domain Names.

We disagree. The ACPA is not applicable in the present case, which does not involve cybersquatting. Moreover, we do not believe Congress intended to foreclose other bases for assigning "presence" for purposes of reasonable exercise of jurisdiction over persons and things, such as that developed by the United States Supreme Court in *Shaffer v. Heitner.* Even if we assume, for the sake of argument, that Congress intends to adopt a similar framework for other Internet-related matters, 15 U.S.C. §1125(d)(2)(C) is unlikely to be the only standard for purposes of recognizing "presence" of persons or property connected with the Internet. 15 U.S.C.§1125(d)(2)(D)(4) is on point. It reads, "[t]he *in rem* jurisdiction established in paragraph (2) is in addition to any other jurisdiction that otherwise exists, whether *in rem* or *in personam*." (emphasis supplied).

The evidence in the record shows that the gambling operations that the Commonwealth's team of investigators executed on the Internet from their desktop in Kentucky are multi-faceted: after a player (i.e., Commonwealth agents) has accessed a

gambling website through the use of a domain name, the gambling website entices the Kentucky player with the potential of making money (i.e., "Get a 30% deposit match up to $300 for free);"[21] provides the player with an assortment of games to choose from, i.e., slots, roulette, blackjack, craps, video poker.[22] One Defendant Domain Name, vegasvilla.com, offers "166 games for the ultimate online casino experience;"[23] invites the player to download a casino software, i.e., Microgaming front-end software, that will allow the player's computer to run games; to create a casino account which enables the player to play with real money and as a real account user; to play progressive games. After the casino software is downloaded to the player's computer, the casino website notifies the player whether or not he has an existing casino account. If not, the website asks the player whether he wants to create an account for the purpose of purchasing credits to bet or play with. At that point, the financial or banking arm of the gambling website interfaces with the player and invites the player to purchase credits with his credit card, debit card, ecocard, click2paycard or neteller card. If the player chooses to continue, the casino website invites the player to provide information regarding where he chooses to fund the purchase of credits and the amount of money the player chooses to use the source of the funds. After the player provides that information and after the casino website processes that information and confirms that the source with which to fund the casino credits are available, the player's computer screen is returned to the home page of the casino website to proceed with play.

[21] Commonwealth Exhibit "5."
[22] *Id.*
[23] *Id.*

The Court perused more than 130 screen shots documenting and detailing the series of interfaces which the Commonwealth agents and the various casino websites with the corresponding domain names. All those interfaces are rooted in the domain name.

The domain name was ubiquitously present in every interface, not just at the initial access of the gambling casino's home page.[24]

The counsel for Goldenpalace.com represented during the October 7 hearing that the operation of Goldenpalace.com is limited to maintaining the website and providing advertisement for third-party gambling websites. Thus, the Court's seizure order should be withdrawn as to them.

The Court agrees that the maintenance of a website or Internet advertisement alone, without more, is not enough to constitute presence for purposes of state court jurisdiction analysis. See *Cybersell Inc. v. Cybersell, Inc.*, 130 F. 3d 4144, 418 (9th Cir. 1997). Thus, the Court recognizes that as to any of the Defendants 141 Domain Names that identifies websites which are providing information only, the Seizure Order must be appropriately rescinded and will be rescinded in due course. The appropriate time to make that determination, i.e., whether the operations of the website identified with the domain name goldenpalace.com, however, is not in this proceeding, but during the forfeiture hearing pursuant to KRS 500.090.[25] The proper party to raise that defense would be a person who makes a claim over the seized *res* or his duly authorized agents.

For now, however, and considering the foregoing discussion and based on the other evidence offered by the Commonwealth during the seizure hearing on September

[24] The Court is also made aware by counsel that notwithstanding the seizures of the Defendants 141 Domain Names, the games that can be played through the gambling websites are still operational. According to counsel, the gambling operations have not been shut down by the Seizure Order of September 18, 2008.

[25] Under KRS 528.100, KRS 500.090 governs and provides the mechanism for the uniform disposition of forfeited property.

18, 2008, the Court finds that the Commonwealth has established a prima facie case that the presence of the operators of the casino websites and the Internet domain names which identify these gambling operators with is continuous and systematic, constituting reasonable bases for the exercise of this Court's jurisdiction. As the evidence in the record stands, the Defendants 141 Domain Names transport the virtual premises of an Internet gambling casino inside the houses of Kentucky residents, and are not providing information or advertising only. The Defendants 141Domain Names perform a critical role in creating and maintaining connection by way of the various interfaces to transact a game or play. Accordingly, but subject to further review during the forfeiture hearing, the Court finds reasonable bases to conclude that the Internet gambling operators and their property, the Internet domain names, are present in Kentucky. Therefore, the Court has reasonable bases to assert its jurisdiction over them.[26] As stated best in *Gorman v. Ameritrade Holding Corp.,* 293 F.3d 506, 510 (C.A.D.C. 2002), "[c]yberspace is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar."

(c) Are Domain Names, by reason of their illegal or unlawful use, gambling devices?

The Opposing Groups and Lawyers contend a domain name does not fit the definition of a gambling device that may be subject of forfeiture under KRS 528.100. According to IGC's counsel, a gambling device, upon the plain meaning of terms of KRS 528.010(4)(a) & (b) is a tangible device, which is designed and manufactured. A domain

[26] There are commentators on similar matter who have proposed the principle of "targeting" for the purpose of sanctioning behavior in the Internet as a possible standard for evaluating jurisdiction for the regulation of Internet content. See Thomas Schultz, *Carving Up the Internet : Jurisdiction, Legal Orders and Private/Public International Law*, 19 Eur. J. Int. 799 (September 2008). According to Mr. Shultz, under the model of the "targeting" principle looks to more than just the effects of Internet content, but less than physical presence as basis of exercising jurisdiction.

name is not tangible property. Therefore, a domain name cannot be subject of a forfeiture.

KRS 528.010 (4) (a) and (b) reads as follows:

> "(4) 'Gambling device' means:
>
> a. Any so-called slot machine or any other machine or mechanical device an essential part of which when operated is a drum or reel with insignia thereon, and which when operated may deliver, as a result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
>
> b. Any other machine or any mechanical or other device, including but not limited to roulette wheels, gambling tables and similar devices, designed and manufactured primarily for use in connection with gambling and which when operated may deliver, as the result of the application of an element of change, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of change, any money or property."[27]

The Commonwealth has established, however, that the Defendants Domain Names are virtual keys for entering and creating virtual casinos from the desktop of a resident in Kentucky. The domain name is indispensable in maintaining the player's continuing access to the virtual casinos which serve as the Internet gambling operators premises for conducting illegal gambling activity.

While the Court finds the presentation on the proper construction of the literal text of KRS 528.010(4) by IGC's counsel exhaustive, the Court is not persuaded. Like most

[27] Tracing the legislative history of KRS 528.010 (4) (a) and (b) confirms that the current text is the same as its original iteration in Act of 1974, c 406, §240. Although KRS 528.010 underwent several amendments, those amendments did not touch upon the definition of a gambling device. Act of 1978, c 321, §5 amended (4) (c) (2) which read, "react only to the deposit of 1, 5 or 10 cent coins" to read "react only to the deposit of coins." The Act of 1980, c 188, §307 deleted the text "and no more" to the phrase "react only to the deposit of coins" in (4) (c) (2), while c 267, §9 added (10) defining "charitable gaming." Act of 1988, c 423, §1 amended (10) on the definition of "charitable gaming" further. Act of 1990, c469, §1 made stylistic changes to the first line of (4) (c) and the section (4)(c) (2). Act of 1992, c 254, , §1 added (4)(c) (3), which excluded devices used in the conduct of charitable gaming from the definition of gambling devices. Act of 1994, c 66, §19 inserted (3)(b) which provided that Gambling does not mean charitable gaming which is licensed and regulated under the provisions of KRS Chapter 238.

endeavors, a person who adheres to the literal text of the law, but violates its spirit, cannot succeed. *Welch v. Commonwealth,* 200 S.W. 371 (Ky. 1918). Our legislature has made it clear that all statutes should be interpreted to carry out its intent. *See* KRS 446.080(1). In *Gilley v. Commonwealth*, 229 S.W.2d 60 (Ky. 1950), Kentucky's highest court found numerous "number slips" to be a gambling device or contrivance that was subject to seizure and destruction by the statute. *See also Albright v. Muncrief,* 176 S.W. 2d 426 (Ark. 1943) (teletype machines, because of their use, are treated as gambling devices.)

We are unable to see that the domain name which is an intricate and integral part in creating and maintaining connection to the virtual casino from one's computer terminal is any less tainted by the unlawful activity because it is argued that it is not a manufactured machine, designed to be used in gambling activities. To this Court's mind, domain names in this particular case are designed: they are designed to attract players. Once a player accesses the virtual casino, and maintains connection, with the use of the domain name, a player's propensity to gamble is tickled. Internet domain names, when used as virtual keys to access, create and maintain a virtual casino, contain the vice at which the statute is directed.

More significantly, the Defendants 141 Domain Names, which identify Internet gambling casinos, have been "designed" to reach our state. According to the Commonwealth's counsel during the hearings held on September 26 and October 7, if owners of the Defendants 141 Domain Names operators so chose, they can filter, block and deny access to a website on the basis of geographic locations. There are software that are available, which can provide filtering functions on the basis of geographical location, i.e., geographical blocks. The Court further infers based on the

Commonwealth's Exhibit 3 that there are such Internet gambling operators which have filtering mechanism or devices to block. The blocks denied the Commonwealth's investigative team's further access of an Internet gambling website, i.e, websites identified with the domain names 32redpoker.com, arcticstarpoker.com, nordicbet.net. If there is available technology that allows any Internet gambling operator to so "design" their business activities as to filter access to geographical locations that have local laws regulating their business, then having those filtering mechanisms should be a protocol that may be reasonably required in the "design" of their business plan and their domain name use.[28]

The Court is aware that the Domain Name System was never intended to avoid compliance with or violate International or Municipal laws, the fact remains that Domain Name System is not (or at least not yet) full-proof from vice and abuse. The Defendants Domain Names here were used and are still being used in connection with Internet gambling transactions in violation of the spirit of KRS Chapter 528. Accordingly, the Defendants 141 Domain Names fall within the meaning of a gambling device and are subject to seizure and possible forfeiture as a gambling device.

(d) Is poker "gambling" as defined by KRS 528.010(3)?

PPA argues that the game of poker is one of skill, and that a poker player will prosper according to his or her level of skill. *Fall v. Commonwealth*, 245 S.W.3d 812 (Ky. Ct. App. 2008) and KRS 528.010(3) are instructive on this matter. KRS 528.010(3) states:

[28] These facts support a finding of jurisdiction under the "targeting" principle described in Schultz, *Carving Up the Internet : Jurisdiction, Legal Orders and Private/Public International Law*, 19 Eur. J. Int. 799 (September 2008).

> "Gambling" means staking or risking something of value upon the outcome of a contest, game, gaming scheme, or gaming device which is based upon an element of chance, in accord with an agreement or understanding that someone will receive something of value in the event of a certain outcome."

The statute clearly delineates three components of gambling activity: the element of chance, the risking of something of value in consideration for the chance to win a prize, and the receipt of a prize for the successful player. *Commonwealth v. Malco-Memphis Theatres*, 169 S.W.2d 596 (Ky. Ct. App. 1943). PPA has not denied that its customers risk something of value, namely money, or that they stand to receive a prize if they win. Instead, PPA urges this Court to deny the element of chance inherent in poker and place domain names offering poker for profit beyond the reach of this statute. We decline to do so. KRS 528.010(3) does not require that chance be the only factor in the outcome of a gambling enterprise; just as "(n)o owner of a racehorse or a rooster would ever guarantee a winner" of a race or a fight, even a master poker player cannot guarantee victory. *Fall*, 245 S.W.3d 812 at 871. Chance, though not the only element of a game of poker, is the element which defines its essence. In the end, no matter how skillful or cunning the player, who wins and who loses is determined by the hands the players hold.

(e) Has this Court acquired control over the res?

In the previous discussion, we have examined that it is reasonable for this Court to exercise jurisdiction over the Defendants 141 Domain Names in Kentucky, consistent with the Due Process Clause as enunciated in *Shaffer v. Heitner*. We next turn to the issue of whether the Court has in fact exercised its jurisdiction over them.

For the court to acquire *in rem* jurisdiction over property, the court must take possession of property through an act of seizure. *United States v James Daniel Good Real Property,* 114 S.Ct. 492, 503 (1993). The seizure of the *res* can be either actual or

constructive. See *Miller v. United States*, 78 U.S. (11 Wall.) 268, 294 (1870); *The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815) (Story, J.); *United States v. $84,740*, 900 F.2d 1402, 1404 (9th Cir.1990); *United States v. $10,000*, 860 F.2d 1511, 1513 (9th Cir.1988). Since many of the Domain Names have been "seized" through ICANN, the question is begged, is there possession?

In the context of revenue and admiralty cases, a seizure is necessary to confer upon a court jurisdiction over the thing when the proceeding is in rem. *Miller v. U.S.*, 78 U.S. 268, 294 (1870). In most cases the res is movable property, capable of actual mancupation. *Id.* Unless taken into actual possession by an officer of the court, it might be eloigned before a decree of condemnation could be made, and thus the decree would be ineffectual. *Id.* It might come into the possession of another court, and thus there might arise a conflict of jurisdiction and decision, if actual seizure and retention of possession were not necessary to confer jurisdiction over the subject. *Id.*

In *Miller*, the property to be forfeited were shares of stock and dividends. *Id, 292.* The question presented then to the *Miller* Court was whether the mode of seizure employed by the marshal was sufficient to place the property within the jurisdiction or control of the court hearing the confiscation and condemnation proceeding. *Id, 293.* The mode of seizure employed by the marshal was giving notice upon the vice-president and president of the companies who issued the stocks. *Id.*

The *Miller* Court found this mode of seizure as good and effective, sufficient to give the court jurisdiction over the property. *Id*, 296. The Miller Court emphasized that the mode of seizure may be adapted to the nature of the property directed to be seized. *Id.* "The modes of seizure must vary. Lands cannot be seized as movable chattels may. Actual mancupation cannot be taken of stocks and credits. But it does not follow from

this that they are incapable of being seized." *Id.* An assertion of control, with a present power and intent to exercise it, is sufficient. *Id.* These are, indeed proceedings to compel appearance, but they are, nevertheless, attachments or seizures, bringing the subject seized within the control of the court, and what is of primary importance, they show that, in admiralty practice, rights in action, things intangible, as stocks and credits, are attached by notice to the debtor, or holder, without the aid of any statute.

In the context of domain names, the domains names are clearly not capable of mancupation or physical seizure. However, it does not follow that it cannot be seized. Adapting the mode of seizure to the nature of the property, and considering the protocols of the Internet Corporation for Assigned Names and Numbers (ICANN), particularly the Uniform Domain Name Dispute Resolution Policy,[29] the service of the Seizure Order upon the registrars would be well-suited.

Here, the Seizure Order was served upon the registrars. Accordingly, this mode of service brought the Defendants 141 Domain Names within the control of this Court for purposes of exercising its control over the Defendants 141 Domain Names.

(f) Does the ex parte seizure of the res violate the Due Process Clause?

The Opposing Groups and Lawyers have ardently argued that the pre-notice and pre-hearing seizure of the Defendants Domain Names violated the Constitution and Kentucky's Rules of Civil Procedure (CR). They allege that the registrants and true owners of the Defendants Domain Names should have been served with summons of the complaint and given the opportunity to be heard. They also allege that the seizure before any prior notice and hearing flies in the face of the Due Process Clause of the U.S. Constitution.

[29] See http://www.icann.org/en/dndr/udrp/policy.htm (last visited October 16, 2008).

It should be remembered that the present action is an action against property. As earlier mentioned, the nature of an *in rem* civil forfeiture proceeding is that the property violated the law and is sought to be condemned. At least for purposes of initiating and styling the action, the *in rem* civil forfeiture action is directed towards the property, not its owners. From a practical point of view, there is no summons to serve on a person when there is no person named in the complaint. The seizure of the property, discussed earlier, is the mechanism by which the Court acquires control over the property and is, for practical purposes, the mechanism which triggers the notification process to any person who claim an interest in the seized property.

Seizure, obtained without prior notice or hearing, is constitutionally permissible in certain situations. In *Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974)*, the United States *Supreme Court* agreed that seizure for purposes of forfeiture is one of those "extra-ordinary situations" that justify postponing notice and opportunity for a hearing. *Id.,* at 667 (citing *Fuentes v. Shevin*, 407 U.S. 67, 86-87 (1972)).

The situations in which immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible, includes circumstances in which "the seizure has been directly necessary to secure an important government or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Id* at 91.

The United States Supreme Court denied claims of due process violation where postponement of notice and hearing was necessary to protect the public from

contaminated food, *North American Cold Storage Co. v. Chicago,* 211 U.S. 306 (1908); from a bank failure, *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928); or for misbranded drugs, *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950); or to aid in the collection of taxes, *Philips v. Commissioner,* 283 U.S. 589 (1931).

The Court finds that there is factual support here to justify the postponement of notice and hearing to the owners and claimants of the Defendants 141 Domain Names present here. First, seizure of the domain names serves a significant governmental purpose: seizure permits the Commonwealth to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property as a device in accessing virtual gambling casinos and in enforcing criminal sanctions. Second, pre-seizure notice and hearing might frustrate the interests served by the statutes, since the property seized – domain names – like a yacht in the case of *Calero-Toledo,* 416 U.S. 663 at 679, will often be a type of property that could be removed from the reach of the Commonwealth, if advance warning of confiscation is given. Finally, the seizure was only effected after determination by this Court that probable cause existed based upon the evidence presented by the Commonwealth that the domain names were being used in connection with illegal gambling activity available and accessible in Kentucky.

Considering the foregoing, the pre-notice and ex parte seizure authorized on September 18, 2008 is consistent with the requirements of the Due Process Clause of the 14th Amendment.

3. Question of Standing

The issue of standing has been a heated area of discussion between the Commonwealth and the Opposing Groups and Lawyers.

Standing is a judge-made rule designed to ensure that courts are presented with an actual case or controversy. See *Flast v. Cohen*, 392 U.S. 83 (1968).

At the federal level, the doctrine of standing was intended to prevent federal courts from answering abstract questions that are better left to the respective branches of government. See *Flast*, 392 U.S. 83, 99; *Valley Forge Christian Coll. v. Ams. United for Separation of Church & States, Inc.* 454 U.S. 464 (1982). The standing doctrine has three elements: (1) there must be an actual or threatened injury; (2) the injury is traceable to the alleged conduct of the other party, and (3) the injury must be redressable by the court. *Valley Forge Christian Coll.*, 454 U.S. 464, 472.

At the state level, i.e., Kentucky, the standard for standing to sue is "a judicially recognizable interest in the subject matter." *Yeoman v Commonwealth of Kentucky Health Policy Bd.*, 983 S.W. 2d 459, 473 (Ky. 1998). The interest may not be "remote and speculative," but must be a present and substantial interest in the subject matter. *HealthAmerica Corporation of Kentucky v. Humana Health Plan, Inc.*, 697 S.W.2d 946, 947 (Ky. 1985). Our courts have recognized the difficulty of formulating a precise standard to determine whether a party has standing and held that the issue must be decided on the facts of each case. *See Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989) (a party has standing if he is charged with a statutory duty to promote public education).

For purposes of organization, this Court turns first to examine whether the Secretary of the Justice and Safety Cabinet has standing or capacity to initiate and prosecute the present *in rem* civil action.

(a) Does the Commonwealth, through the Secretary of Justice and Safety Cabinet, have standing to bring this civil forfeiture action?

The Commonwealth alleges that the violation of its criminal laws, i.e,. KRS Chapter 528 on Gambling is being flaunted. The Commonwealth's witnesses provided testimony indicating how these domain names relate to multi-faceted transactions completed on-line with casino operators. These casino operators are unidentified and unknown, except by way of their domain names. The Commonwealth pointed out that, based on the WHOIS database, its law enforcement agents have identified who are the registrars with whom the casino operators have registered their domains names. The Commonwealth represented to this Court that, pursuant to the Uniform Domain Name Dispute Resolution Policy established by ICANN, registrars of domains names can cancel, transfer or otherwise make changes to domain name registrations upon receipt of an order from a court of competent jurisdiction requiring such action.

The Opposing Groups and Lawyers questioned the procedural standing of the Secretary of Justice and Safety Cabinet to initiate and prosecute the present suit on behalf of the Commonwealth. According to the IGC, it is the Attorney General, as provided by law who has been given the procedural capacity to bring suits of this nature on behalf of the Commonwealth. KRS 15.020. Since, under KRS 12.270, bringing suits on behalf of the people of the Commonwealth is not included as one of the duties of any cabinet secretary, Justice and Safety Cabinet Secretary Brown is not authorized to bring the present suit.

While the Court is aware that the language of KRS 15.020 vests in the Attorney General the authority to initiate suits on behalf of the Commonwealth, and as legal counsel for the Commonwealth, the Attorney General is the natural state official to seek a vindication of the Commonwealth's sovereign interest, this does not foreclose other competent officials in the Commonwealth having the same procedural capacity as the

Attorney General. We agree with the assertion of the Commonwealth that Governor Steve Beshear, as the chief executive of the state, retains the authority to direct other responsible officers in his Cabinet to bring a suit of this kind before this Court. Moreover, Secretary Brown is the law enforcement official (second only to the Governor) primarily responsible for promoting and preserving justice and safety in the Commonwealth. As such, he is, at least in the instant case, an appropriate and natural choice for bringing the present *in rem* civil action, which is civil forfeiture, not any regular civil suit. The Opposing Groups and Lawyers lose sight of the fact that Secretary Brown is the chief law enforcement officer in the Executive Branch and, notwithstanding his title as Secretary, acts here as the police or sheriff who, in a regular gambling operation, would take actions to seize and forfeit gambling devices. The only difference with a seizure conducted by a regular street cop is that Secretary Brown is dealing with the Internet. The actions remain the same as found in KRS 528.100, 500.090, and 528.010.

Considering the foregoing discussion, the Court is satisfied that the law enforcement interest of the Commonwealth, to curb Internet casino gambling, is a judicially cognizable interest sufficient to bring this suit. The Commonwealth has shown that there was a violation of KRS Chapter 528 that is ongoing. Thus, the Commonwealth's interest is neither remote nor speculative. Secretary Brown, as a law enforcement police office and duly authorized by Governor Beshear, has the procedural capacity to initiate and prosecute this instant suit on behalf of the Commonwealth. The Attorney General, from a strictly procedural context, is not a real party in interest, nor is he an indispensable party for purposes of proceeding with the instant action.

(b) Do the other entities before this Court have standing?

(i) Standing of PPA, ICA, and NSI

The Commonwealth's counsel zealously argued during hearings held in this case that none of the members of the Opposing Groups and Lawyers have standing to be heard. According to the Commonwealth's counsel, none of the Opposing Groups and Lawyers should be allowed to present arguments in opposition to the Commonwealth's civil forfeiture action.

The representatives of the PPA and the ICA filed their respective written motions for leave from this Court to file memoranda as *amici curiae* or friends of the court, and for the sole purpose of providing the Court background and technical information relating to the Internet and the Domain Name System. Neither the PPA nor the ICA purports to seek any reliefs from this Court.

The PPA and ICA have been and still are permitted to appear before this Court. But, as *amici curiae*, the Court emphasizes that they are not parties to the present *in rem* civil action. The Court, at its own discretion at any time, can withdraw this authority to participate in the proceedings in this case, as the Court sees fit and when their participation would unduly delay or prejudice the adjudication of the rights of the original parties.

The Court treats NSI and its representatives similarly as *amici curiae*, even if the NSI admitted in open court that it was one of the registrars of some (but not all) of the named Defendants 141 Domain Names, and who had been notified of the Seizure Order of September 18, 2008. Until such time that the NSI actually stakes a claim on any of the Defendants 141 Domain Names, the NSI and its representatives will be treated as friends of the Court.

(ii) Standing of IGC and IMEGA

IGC and IMEGA invoke the right of associational standing for the purpose of intervening as a party-defendant in the instant civil forfeiture action. In that capacity, both IGC and IMEGA filed separate motions to dismiss the instant civil forfeiture action.

IGC filed a written motion before this Court to intervene pursuant to CR 24, in a representative capacity and asserting the interests of its members whose domain names were impleaded as party-defendants. IGC seeks to intervene as a matter of right pursuant to CR 24.01, as well as a matter of this Court's discretion pursuant to CR 24.02.

IMEGA, on the other hand, did not file any formal motion to intervene under either CR 24.01 or CR 24.02. This notwithstanding, the Court will treat IMEGA as having filed a motion to intervene under CR 24.01 and 24.02.

Associational standing is the doctrine that allows associations generally to assert claims or defenses on behalf of its members of the association. *Warth v. Seldin,* 422 U.S. 490, 511 (1975). This is called representational standing, as opposed to a situation where an association seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. *Id.*

On the federal court level, when an association seeks to bring claims in its representative capacity, the United States Supreme Court applies a 3-part test for determining an association's standing to assert representational claims. In *Washington State Apple Advertising Commission,* 432 U.S. 333 (1977), the United States Supreme Court announced the three-part test as follows:

> "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit."

In Kentucky, our state courts have had their share of associations invoking associational standing in a representative capacity in order to prosecute a claim, *City of Ashland v. Ashland F.O.P. No. 3, Inc.*, 888 S.W.2d 667 (Ky.,1994) (the association had standing after showing that more than 50% of its members were the aggrieved policemen); pursue an appeal, *Louisville Retail Package Liquor Dealers' Ass'n v. Shearer.* 313 Ky. 316, 231 S.W.2d 47 (Ky.,1950). Unlike the federal courts, however, our rules on associational standing are not as developed. In these cited cases, we only emphasized that the members represented must have a clearly recognizable interest in the dispute or controversy.

Intervention, upon the other hand, is a procedural device through which a person who is not a party to an existing lawsuit is allowed to interject himself into a lawsuit, cutting against the grain of traditional notion that a plaintiff controls his suit. Friedenthal, Miller, Sexton & Hershkoff, *Civil Procedure: Cases and Materials* 652 (9th ed. 2005).

Kentucky's CR 24.01 (intervention as of right) closely follows the language of Federal Rule on Civil Procedure (FRCP) 24. Kurt A. Phillips, Jr., David V. Kramer, & David W. Burleigh, 6 Ky. Prac. R. Civ. Proc. Ann. rule 24.02, (6th ed. 2008). CR 24.02 (permissive intervention), on the other hand, is substantially the same as Federal Rule on Civil Procedure 24(b), respectively. *Id.* Thus, the standards developed on the federal court level are, to an extent, applicable to Kentucky's state courts.

Following the language of CR 24.01, there are four parts of CR 24.01 that must be satisfied in order for an applicant may qualify for intervention as a matter of right. See 6 Ky. Prac. R. Civ. Proc. Ann rule 24.02 (6th ed. 2008), comment §3. These 4 parts are : (1) a timely application is filed by the proposed intervenor, (2) who claims an interest relating to the property or transaction that is the subject of the action, (3) who is so

situated that the disposition of the action may as a practical matter impair or impeded the applicant's ability to protect his or her interest, and (4) his interest is not adequately represented by existing parties. *Id.* In Kentucky, the interest means a significantly protectable interest. *Id*. Moreover, the interest in the proceeding be direct, substantial and legally protectable. *Id.*

Applying the federal three-part test enunciated in *Washington State Apple Advertising Commission* for evaluating standing, the Court does not find IGC or IMEGA to have associational standing for purposes of representing the interests of the purported owners or claimants to the Defendants 141 Domain Names. The present civil forfeiture action involves a determination of the specific rights of persons with interest or claims over each of the Defendants 141 Domain Names. Neither IGC nor IMEGA has shown that the individual participation of their members, whose rights over any of the Defendants 141Domain Names will be determined at the forfeiture proceeding, is not indispensable for the complete and proper resolution. Accordingly, the third prong of the test for associational standing in *Washington State Apple Advertising Commission* will not be satisfied. The registrants or other persons with an interest in the *res* must present their claims over the seized *res*, if they wish to be fully heard.

Not having associational standing in the matter, neither IGC nor IMEGA may be allowed to intervene as a matter of right. Their absence will not impair or impede none of their legally protectible interests. Neither would permissive intervention be allowed, absent associational standing. Without associational standing, both IGC and IMEGA have no claim to bring before the court for adjudication, save the perspective they bring as lobbyists on the issue of governance of the Internet.

However, like PPA, ICA, and NSI, both IGC and IMEGA will be allowed to continue to present briefs and memoranda for purposes of informing the court of the ever-changing facets of the Internet. In essence, all have friend-of-the-court status. IGC and IMEGA, however, do not have intervenor status.

(iii) Standing of Group of 7 and Group of 2

The lawyers of the Group of 7 and the Group of 2 filed motions to dismiss and motions to vacate or alter the Seizure Order of September 18, 2008. These lawyers manifested to the Court that they represent some (but not all) of the *res*, but without identifying their principals' identities or whether they are representing persons making a claim to or having an interest in the identified *res*.

The Commonwealth's counsel objected to the "standing" of the lawyers of the Group of 7 and the Group of 2 on the ground that they must identify the persons or corporations they represent. The Commonwealth's counsel moved for striking all the motions filed by these attorneys.

The Court finds that striking the motions and pleadings filed by these lawyers of the Group of 7 and the Group of 2 is too harsh a penalty for a lawyer's failure to disclose the identity of his client. Obviously, these domain names could not have engaged the lawyers who purport to appear on their behalf, but they are nonetheless beneficiaries of legal services obtained by another.

Considering, however, that the identity of a lawyer's client is not privileged information, the Court is inclined, as it has already ordered on the bench during the hearings on these lawyers' motion to dismiss and motion to vacate or alter the Seizure Order, to direct said lawyers to disclose to the Court the names and identities of the

persons who engaged them to represent the 9 Defendants Domain Names and to describe the nature of their clients' interest as it relates to the aforementioned *res*.

CONCLUSION AND ORDER

We note that Opposing Groups and Lawyers argue any judicial interference of the Internet will create havoc. This doomsday argument does not ruffle the Court. The Internet, with all its benefits and advantages to modern day commerce and life, is still not above the law, whether on an international or municipal level. The challenge here is to reign in illegal activity and abuse of the Internet within the framework of our nation's and Commonwealth's existing common law norms and principles, until expressed guidelines from state and federal legislative bodies say otherwise.

ACCORDINGLY, IT IS HEREBY ORDERED that further proceedings will be held in the instant civil forfeiture action without delay. Moreover, **IT IS HEREBY ORDERED AND ADJUDGED** as follows:

1. The Motions to Dismiss filed on behalf of the Group of 7, the Group of 2, of Interactive Gaming Council, of Interactive Media Entertainment & Gaming Association, Inc., are all hereby DENIED.

2. The Motion of the Interactive Gaming Council to intervene is DENIED.

3. The Court's Seizure Order of September 18, 2008 is hereby AMENDED so that any of the Defendants 141Domain Names, their respective registrants or their agent, or any other person with an interest or a claim who, on or before 30 days from entry of this Opinion and Order, installs the applicable software or device, i.e, geographic blocks, which has the capability to block and deny access to their on-line gambling sites through the use of any of the Defendants 141 Domain Names from any users or consumers within the territorial boundaries of the Commonwealth, and reasonably establishes to the

satisfaction of the Kentucky's Justice and Safety Cabinet or this Court that such geographical blocks are operational, shall be relieved from the effects of the Seizure Order and from any further proceedings in the instant civil forfeiture action. The Court acknowledges that *in rem* jurisdiction is not unlimited. Once the domain name is satisfactorily shown as not being used in the Commonwealth for illegal or unlawful gambling, this Court relinquishes jurisdiction.

4. Upon a showing of proof that geographic blocks and/or such other similar software or device have been installed and are operational by any registrant or person with interest over any of the Defendants 141Domain Names, the COMMONWEALTH is hereby DIRECTED to serve prompt written notice upon the registrar/s and/or registry/ies of the corresponding defendant Internet Domain Name that the Seizure Order, as to the said relevant Internet domain name, has been withdrawn or rescinded.

5. The Court hereby sets the final hearing on forfeiture on the 17th of November 2008, at 10:00 a.m./EST.

6. The Seizure Order of September 18, 2008, REMAINS IN EFFECT as amended by this Order.

SO ORDERED, this 16 day of October 2008.

THOMAS D. WINGATE
Judge, Franklin Circuit Court

ANNEX "1'

LIST OF THE DEFENDANTS 141 DOMAIN NAMES

123bingo.com
777dragon.com
7sultans.com
absolutepoker.com
aceshighcasino.com
alljackpots.com
allslots.com
arthuriancasino.com
atriumcasino.com
aztecrichescasino.com
bellavegas.com
bet21.com
betroyalcasino.com
bigtimebingo.com
bingoknights.com
bingoville.com
bingoworkz.com
blackjackballroom.com
bodoglife.com
bonuslevelslots.com
bookmaker.com
bugsysclub.com
cakepoker.com
capitalcasino.com
captaincookscasino.com
caribbeangold.com
casinobar.com
casinoclassic.com
casinoextreme.com
casinofortune.com
casinograndbay.com
casinokingdom.com
casinoshare.com
casinous.com
cirruscasino.com
ukcasinoclub.com
clubusacasino.com
cocoacasino.com
coolcatcasino.com
countycasino.com
crazypoker.com
crazyvegascasino.com
desperatehousewivesbingo.com
doylesroom.com
dsipoker.com
englishharbour.com
ezbets.com
firstwebcasino.com
fortunejunction.com
fortuneroom.com
fulltiltpoker.com
galaxiworld.com
gamblingboard.com
goldencasino.com
goldgatecasino.com
goldenpalace.com
grandmondial.com
highrollerslounge.com
indiancasino.com
inetbet.com
itsrealpoker.com
ivegas.com
jackpotcapital.com
jackpotcity.com
jackpotkingscasino.com
jackpotwheel.com
jupiterclub.com
kingneptunescasino.com
lakepalace.com
lasvegasusacasino.com
linesmaker.com
luckycoincasino.com
luckynugget.com
luckypyramidcasino.com
magicislandcasino.com
mapau.com
maplecasino.com
miamiparadisecasino.com
microgaming.com
mightyslots.com
millionairecasino.com
musichallcasino.com
mysportsbook.com
oneclubcasino.com
orbitalcasino.com
orchidcasino.com
paradise8.com
phoeniciancasino.com
pitbullpoker.com
platinumplay.com
playersonly.com
pokerhost.com
pokerroyaleonline.com
pokerstars.com
pokertime.com
powerbet.com
redflush.com
redstarpoker.com
reeferpoker.com
riopartycasino.com
riverbelle.com
rivernilecasino.com
roadhousereels.com
royalbetcasino.com
royalvegas.com
rushmorecasino.com
sbgglobal.com
showdowncasino.com
simonsayscasino.com
slotfever.com
slotocash.com
slotsoffortune.com
slotsplus.com
sportsbetting.com
sportsbook.com
sportsinteraction.com
sunpalacecasino.com
sunvegas.com
superslots.com
thisisvegas.com
thunderluckcasino.com
tridentlounge.com
truepoker.com
ultimatebet.com
usabingo.com
vegascasinoonline.com
vegaslucky.com
vegasmagic.com
vegaspalms.com
vegasusacasino.com
vegasvilla.com
vicsbingo.com
viploungecasino.com
virtualcitycasino.com
wildjack.com
win4real.com
winabingo.com
worldwidevegas.com
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