COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
ACTION NO. _____
(RELATED TO 2008-CA-2000 AND 2008-CA-2019)

ORIGINAL PROCEEDING FOR WRIT PURSUANT TO CR 76.36(1)
DIRECTED TO HON. THOMAS D. WINGATE, FRANKLIN CIRCUIT COURT,
CIVIL ACTION 08-CI-1409

VICSBINGO.COM — **PETITIONERS**
a Domain Name seized
and submitted to the dominion and control
of Franklin Circuit Court

AND

INTERACTIVE GAMING COUNCIL,
a trade association representing
an additional 61 Domain Names

v.

HONORABLE THOMAS D. WINGATE, — **RESPONDENT**
Franklin Circuit Court

AND

COMMONWEALTH OF KENTUCKY, — **REAL PARTY IN INTEREST**
ex rel. J. Michael Brown, Secretary, Justice
and Public Safety Cabinet

PARTIES

Petitioner Vicsbingo.com is one of the 141 Domain Names seized by Franklin Circuit Court on September 18, 2008, and one of seventeen domain names allegedly submitted to the "dominion and control" of Franklin Circuit Court effective September 25, 2008.

Petitioner Interactive Gaming Council (IGC) is a trade association representing 61 of the other 141 Domain Names seized on September 18, 2008.

Respondent is Hon. Thomas D. Wingate, Franklin Circuit Court.

Real Party in Interest is the Commonwealth of Kentucky, *ex rel* J. Michael Brown, Secretary, Justice and Public Safety Cabinet (the "Cabinet").

SUMMARY OF ARGUMENT

Petitioners seek extraordinary relief from extraordinarily improper orders issued in the civil action styled *Commonwealth of Kentucky, ex rel. J. Michael Brown, Secretary, Justice and Public Safety Cabinet v. 141 Internet Domain Names,* Case No. 08-CI-1409, Franklin Circuit Court.

Judge Thomas Wingate is ignoring due process, proceeding without jurisdiction, and threatening imminent irreparable harm. The only adequate remedy is a writ of prohibition pursuant to CR 76.36(1) directing Judge Wingate to halt and dismiss the action below.

Without notice or service of process, the court held secret, *ex parte* proceedings in August 2008 culminating in a September 18 order seizing all 141 Internet domain names identified in the civil complaint. The court justified its actions on the grounds that all the domain names are "gambling devices" physically present in Kentucky and subject to the court's *in rem* jurisdiction.

Petitioner Vicsbingo.com learned after the court's seizure that its registrar, GoDaddy.com, Inc., in Scottsdale, Arizona, responded to receipt of the court's order by

purportedly submitting Vicsbingo.com to the "dominion and control of the court." *See Appendix* 8. Vicsbingo.com strongly disagrees with the assertion that Franklin Circuit Court has any legal basis for asserting this alleged "dominion and control."

Petitioner Interactive Gaming Council (IGC), a trade association representing owners of 61 other seized domain names, learned about the seizure in the media and promptly moved to intervene in Franklin Circuit Court. *See Appendix* 9. IGC appeared by counsel, was granted intervention under CR 24, and thereafter presented detailed legal objections to the court's assertion of *in rem* jurisdiction over the 141 Domain Names. *See Appendix* 13.

In response to the motion of IGC and others, the trial court issued an opinion and order on October 16 overruling all due process, jurisdictional, and statutory objections and purporting to withdraw IGC's right going forward to represent the interests of more than a third of the seized domain names in further trial court proceedings. The October 16 order also scheduled a forfeiture hearing for November 17 to hear evidence on the permanent forfeiture of all the seized names. *See Appendix* 15.

On October 23, in response to a timely motion to stay further trial court proceedings, Judge Wingate denied the requested stay but pushed back the forfeiture hearing sixteen days to December 3, 2008, at 10:00 a.m. *See Appendix* 19.

Petitioners have no appellate remedy for the seizures already effected and the forfeiture that looms ahead. The trial court's *ex parte* seizure order is not subject to interlocutory appeal; and, by the time a legal appeal can be heard, forfeiture will be *fait accompli* and irreparable damage will be compounded.

A writ under CR 76.36(1) is necessary and proper when the trial court is acting without jurisdiction. *Hoskins v. Maricle,* 150 S.W.3d 1, 10 (Ky. 2004); *Bender v. Eaton*, 343 S.W.2d

799, 800 (Ky. 1961); and *Smith v. Shamburger*, 238 S.W.2d 844, 846 (Ky. 1951). No statute or decision issued by any state assembly or any court in the nation recognizes or condones the court's extraordinary jurisdictional assertions. There is no dispute that the domain names at issue are worldwide addresses used by countless Internet users, and there is no dispute that all are lawfully registered and owned under either U.S. and/or international law. And there is no changing the fact that no companies or entities associated with the 141 Internet domain names are located in Kentucky—not the registrars that issued the names, not the registries that maintain ownership information, and not the entities that own the domains.

A writ under CR 76.36(1) is necessary and proper when the trial court is proceeding erroneously and threatening irreparable harm. *Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610, 616 (Ky. 2005). The Cabinet did not initiate this civil action with a summons and complaint as required by CR 4 and did not obtain a temporary restraining order or a temporary injunction as required by CR 65. Instead, the Cabinet used private counsel to implement criminal forfeiture proceedings without any indictment or warrant. All of the Cabinet's presentation of evidence to Franklin Circuit Court occurred in secret without notice or an opportunity to be heard until after the seizure order was entered. Yet, Judge Wingate's October 16 opinion and order expressly relied upon this untested, *ex parte* evidence both in asserting jurisdiction and justifying proceeding to forfeiture.

Finally, a writ under CR 76.36(1) is necessary and proper to prevent the trial court from violating fundamental constitutional rights that cannot be remedied on appeal. *James v. Hines*, 63 S.W.3d 602, 608 (Ky. App. 1998). The court's October 16 order scheduling the forfeiture hearing requires international owners of 141 Internet domain names to appear in court and identify themselves or face automatic forfeiture of their lawfully-registered Internet names. This

highly improper order violates all notions of due process and fair play by using the threat of forfeiture as a lever to gain *in personam* jurisdiction over domain-name owners located outside of the Commonwealth of Kentucky and even outside the United States.[1]

PROCEEDINGS IN TRIAL COURT

On August 26, 2008, the Cabinet instituted covert proceedings in Franklin Circuit Court, under color of KRS 528.100 and KRS 500.090, seeking forfeiture of 141 Internet domain names allegedly in violation of Kentucky gambling laws. *See Appendix* 1–2. According to the Cabinet, the intangible Internet domain names constitute "gambling devices" used to promote, conduct, and/or advance illegal gambling activities in violation of the Kentucky Penal Code, KRS 528.020 and 528.030, making them subject to seizure and forfeiture pursuant to KRS 528.100. *See generally Appendix* 2.

The civil *in rem* action was filed by private, contingency-fee counsel retained by the Justice and Public Safety Cabinet. *See Appendix* 20. Neither the Attorney General nor any Commonwealth's attorney was involved. The Cabinet filed no criminal charges against any owners of the domain names and issued no warrants. The Cabinet did not serve the civil complaint on any owners of the domain names, nor did the Cabinet appoint a warning order attorney to effect constructive service pursuant to CR 4. After filing the complaint, the Cabinet sought *ex parte* an order seizing the domain names and directing registrars of the domain names to transfer them to an account held by the Commonwealth. *See Appendix* 2. That same day, the Cabinet persuaded the trial court to issue another *ex parte* order sealing the record for the express purpose of preventing any of the domain-name owners from learning of the action. *See Appendix* 3.

[1] The Cabinet admits that it plans to assert *in personam* jurisdiction over any domain-name owner who appears at the Forfeiture Hearing. *See Appendix* 17.

The trial court conducted a secret hearing on September 18, 2008. *See Appendix* 4. No notice of the hearing was given to the owners of the domain names or the domain name registrars. Despite electing to proceed via a civil action, the Cabinet's lawyers relied on the criminal standard of "probable cause" to justify the seizure. *Id.* at 4–8. The trial court granted the Cabinet's seizure motion that day, *see Appendix* 5, and signed Findings of Fact and Conclusions of Law tendered by the Cabinet's lawyers. *See Appendix* 6. The seizure order did not specify the date for a forfeiture hearing, but the trial court later set a forfeiture hearing for September 25, 2008. At the Cabinet's request, the hearing was moved to September 26, 2008.

Even though the trial court's September 18 order required the Cabinet to give advance notice to the owners of the domain names, advance notice was not given. Instead, a letter transmitted by email went only to out-of-state (and out-of-country) registrars of the domain names, such as GoDaddy.com, Inc., the registrar for Petitioner Vicsbingo.com. Letters accompanying the court's seizure order directed the recipients to transfer the domain names to an account held by the Commonwealth. *See Appendix* 7. The mailing addresses for these registrars show them to be located internationally in India, Germany, Canada, Australia, France, the United Kingdom, and New Zealand, and nationally in Washington, Louisiana, Virginia, New York, California, and Arizona. *Id.*

GoDaddy.com, Inc., in Scottsdale, Arizona, responded to the seizure order in an extreme way—by supposedly transferring Petitioner Vicsbingo.com and sixteen other Domain Names to the "dominion and control of the Court." *See Appendix* 8.

IGC and its members that own 61 Domain Names seized by the Cabinet learned of the trial court's seizure from media reports. IGC filed a motion for leave to permissively intervene, identified its 61 Domain Name members, and moved to dismiss the action below on

jurisdictional and constitutional grounds. *See Appendix* 9 and 13. IGC also moved the trial court to withdraw the earlier Findings of Fact and Conclusions of Law, *see Appendix* 10, and the motion was temporarily granted. *See Appendix* 11.

On September 26, 2008, the trial court elected not to conduct the forfeiture proceeding. Instead, the court permitted IGC and other affected parties represented by counsel to intervene and submit briefs on jurisdictional and constitutional issues. *See Appendix* 12. On October 7, 2008, following briefing, the trial court heard more than three hours of oral argument on procedural, jurisdictional, and constitutional questions. *See Appendix* 14.

On October 16, 2008, the trial court entered a lengthy Opinion and Order that denied all parties' motions to dismiss and re-scheduled the forfeiture hearing for November 17, 2008. *See Appendix* 15. The court's October 16 Opinion and Order contemplates that all 141 Domain Name owners or registrants will appear in Franklin Circuit Court and present evidence sufficient to establish that their domain names can no longer be accessed by any Internet user in Kentucky. Failure to appear or failure to produce this evidence will result in permanent forfeiture of the domain names to the state. *See id.*

The October 16 order also addressed, in a confusing way, IGC's right to continue representing its members in Franklin Circuit Court. In the exact words of the trial court: "Neither IGC nor IMEGA [another trade association] has shown that the individual participation of their members, whose rights over any of the Defendants 141 Doman Names will be determined at the forfeiture proceeding, is not indispensable for the complete and proper resolution." Opinion and Order at 37. Based on this reasoning, the trial court said that IGC has "no claim to bring before the court for adjudication." *Id.*

On October 16, 2008, anticipating the filing of this petition for a writ, Petitioner IGC and

five domain name defendants moved to stay the proceedings below, which motion was heard on October 22, 2008. *See Appendix* 16, 18. The Cabinet's private attorneys opposed delay of the forfeiture proceedings in part because the Cabinet needs "leverage" against the domain-name owners. *See Appendix* 17, at 32. The Cabinet also stated in writing that any domain-name owner who appears at the forfeiture hearing will be considered subject to the court's *in personam* jurisdiction. *See Appendix* 17. On October 23, Franklin Circuit Court denied the motion to stay, but delayed the forfeiture until December 3, 2008. *See Appendix* 19.

Because the 141 Domain Names identified in the complaint are Internet addresses registered by diverse businesses around the world, multiple writ petitions are likely to be filed with this Court. Regardless of the names of the petitioners or the approach they employ, all present the same essential complaint: Franklin Circuit Court is proceeding without jurisdiction, proceeding erroneously, and threatening substantial and irreparable harm.

BASIS FOR ISSUING THE WRIT

1. The Court is acting without jurisdiction.

A writ is the only remedy for the trial court's extraordinary disregard for the most fundamental jurisdictional principles. The court claims to be proceeding *in rem*, but—as discussed in detail below—*in rem* jurisdiction requires that the property at issue be physically within the jurisdiction of the court and the property's owner have constitutionally-required "minimum contacts" with the forum.

Even if domain names qualify as "property," which is a proposition unsettled in Kentucky law, the trial court's basis for *in rem* jurisdiction boils down to the claim that any Kentucky user of the worldwide web who accesses an Internet address brings that address into the Commonwealth. In addition, the court claims that owners or registrants of a domain name that Kentucky residents chose to access meet the "minimum contacts" test of *International Shoe Co. v. Wash.*, 326 U.S. 310 (1945). By the court's unprecedented rationale, every Internet domain name is not just subject to *in rem* jurisdiction in Kentucky, every domain name is subject to *in rem* jurisdiction in every state, every province, and every country in the world. The law does not condone these tactics. *See, e.g., Rush v. Savchuk,* 444 U.S. 320 (1980).

"Founded on physical power . . . the *in rem* jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States. *The basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State.*" *Hanson v. Denckla*, 357 U.S. 235, 246 (1958) (emphasis added). *See also Hisle v. Lexington-Fayette Urban County Gov't*, 258 S.W.3d 422 (Ky. App. 2008) ("Generally, state courts of general jurisdiction have *in rem* subject matter jurisdiction over real property in the state.").

The corollary principle is that state courts have no *in rem* jurisdiction over property beyond their borders. There is "good reason" for the presumptive invalidity of any attempt to

exercise *in rem* jurisdiction over property outside a given state. *See Hanson*, 357 U.S. at 246. As the U. S. Supreme Court held in *Hanson,* "Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, *it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction.*" 357 U.S. at 250 (emphasis added). Kentucky recognizes that this fundamental principle applies to forfeiture laws. *See Hickerson v. Comm.*, 140 S.W.2d 841, 843 (Ky. 1940) (holding that the court may consider whether property has been forfeited by statute "*provided the property is found within its jurisdiction.*") (emphasis added).

"[P]roperty, like an individual, must have, in contemplation of law, some place of abode, and likewise when its situs becomes fixed at one place it must in law remain there until it acquires another situs. *Comm. v. Bingham's Adm'r.*, 223 S.W. 999, 1000 (Ky. 1920). Locating tangible real or personal property is a simple matter: it exists wherever it is found. *See Millett's Ex'r v. Comm.*, 211 S.W. 562 (Ky. 1919) (discussing taxation of tangible property as being proper in place where property is found). Intangible property is "universally recognized" to be located at the place of its owner's domicile. *Bingham*, 223 S.W. at 1000. As noted by the Kentucky Supreme Court, this recognition may be a "legal fiction," but it nonetheless is a "legal necessity without which laws of descent and distribution, comity between states and nations, and many others as well as taxation, would become a hopeless tangle utterly incapable of just administration." *Id.*

In rare circumstances, intangible property may acquire a situs apart from its owner, such as when intangible property becomes taxable in a place where it has become an integral part of a local, separate, and independent business activity in that jurisdiction. *Comm. ex rel. Luckett v. L&N R.R. Co.*, 479 S.W.2d 15, 17–18 (Ky. 1972). The Legislature also has the ability to assign

intangible property a situs for particular purposes. *See Comm. v. Sun Life Assur. Co. of Canada*, 170 S.W.2d 890, 895–96 (Ky. 1943) (discussing Legislature's ability to assign situs to intangible property for taxation purposes).

Assuming domain names qualify as property rather than contract rights, the names alone plainly are intangible. Under settled Kentucky law, intangible property is located only where its owner resides unless the Legislature has assigned a different situs. At most, analogizing to situations involving intangible property that acquired a different situs by virtue of being an integral part of an independent operation, domain names could only be subject to *in rem* jurisdiction in the state (or country) where the domain name registrar or registry is located. *Accord*, 15 U.S.C. § 1125(d), et seq., Anticybersquatting Consumer Protection Act (ACPA); *See also, infra, Supplemental Legal Principles*, "What is a Domain Name?" and "How is Jurisdiction Over Domain Names Properly Asserted?"

Franklin Circuit Court's October 16 order relies heavily on *Shaffer v. Heitner*, 433 U.S. 186 (1977), for jurisdictional authority, but the court misreads and misapplies this important decision. The trial court reads *Shaffer* as dispensing with the foundations of *in rem* jurisdiction and using only a diluted version of the minimum contacts analysis in *International Shoe*. In the trial court's opinion, *Shaffer* removed the requirement of physical presence of property for *in rem* proceedings and substituted instead "presence" viewed solely "through the lens of 'minimum contacts.'" *See Appendix* 15, at 18. The trial court's contrived reading of *Shaffer* disregards the true ruling of the Supreme Court. Because of the trial court's heavy reliance on this single decision, *Shaffer* warrants close examination.

Shaffer was decided in 1977, after *in personam* jurisdiction had undergone dramatic changes, even though *in rem* jurisdiction was essentially unchanged since the 100 years since

Pennoyer v. Neff, 95 U.S. 714 (1877). At the time of *Shaffer*, not only were courts deemed to have *in rem* jurisdiction over property within their borders, the mere presence of property within a forum was sufficient to support the exercise of jurisdiction sufficient to compel the property owner's appearance. *See Shaffer*, 433 U.S. at 199–200. Indeed, for the first part of the 20th Century, due process did not require notice to the owner of an *in rem* proceeding—seizure of the property was enough. *See id.* at 200.

Meanwhile, following the landmark holding in *International Shoe*, *in personam* jurisdiction had evolved to require that an individual or entity must have sufficient "minimum contacts" with the forum state for due process to be satisfied. *Id.* at 202–05. The evolution of *in personam* jurisdiction stood in contrast to the stagnation of *in rem* jurisdiction. Although *International Shoe* held that an individual could no longer be sued in a forum where he lacked minimum contacts, the mere presence of any property in that forum still was enough to support *in rem* jurisdiction over an owner's rights to that property, even if the property had nothing to do with the claim presented to the *in rem* court. *See id.* at 205–06.

In the face of this jurisdictional disconnect, the Supreme Court was called upon in *Shaffer* to determine whether, in the absence of valid *in personam* jurisdiction, a defendant's interests in his property could be adjudicated using *in rem* jurisdiction solely because the defendant's property was located in the forum state. *See id.* at 205–06.

At issue in *Shaffer* was a Delaware statute allowing the seizure of property to force non-resident defendants to appear and submit to the court's jurisdiction or face their property being sold by the court to satisfy plaintiff's claim. *See id.* at 190–91 and n.4. The statute in *Schaffer* was used to seize stock of a Delaware corporation owned by non-resident defendants to force them to appear in Delaware or risk losing the stock. *See id.* at 189–92.

The Supreme Court held Delaware's coercive jurisdictional statute unconstitutional. Repudiating the very tactic being employed in Franklin Circuit Court, the Supreme Court ruled that all state court jurisdiction, whether *in rem* or *in personam*, must comport with the minimum contacts standard articulated in *International Shoe*. *See id.* at 205–12.

Shaffer, therefore, raised the bar for *in rem* jurisdiction by requiring more than mere presence of property. In addition to physical property present in the forum, *Shaffer* added the minimum contacts requirement necessary for *in personam* jurisdiction. *See id.* The *Schaffer* decision was a limitation on the traditional exercise of *in rem* jurisdiction, not an expansion to allow jurisdiction over property located beyond a state's borders. Not incidentally, *Schaffer* also made clear that adequate notice is a pre-requisite for proper *in rem* jurisdiction—and not, as the Cabinet persuaded the trial court to hold, an excuse for secret *ex parte* hearings. *Id.*

The trial court's assertion of "minimum contacts" jurisdiction based on a Kentucky resident's ability to access a website is simply not the law. *See, e.g., Digital Control, Inc. v. Boretronics, Inc.*, 161 F. Supp. 2d 1183, 1186-87 (W.D. Wash. 2001) ("The medium, by its very nature, provides immediate and virtually uncontrollable worldwide exposure....Until the [website operator] is actually faced with and makes the choice to dive into a particular forum, the mere existence of a worldwide web site, regardless of whether the site is active or passive, is an insufficient basis on which to find that the [website operator] has purposely directed its activities at residents of the forum state.").

The trial court's extraordinary expansion of *in rem* jurisdiction and seizure of domain names located in other states or nations is expressly condemned by the U.S. Supreme Court as unconstitutional. On the strength of *Shaffer* alone, this court should find insufficient jurisdiction below and issue a writ.

2. The Court is Acting Erroneously and Threatening Irreparable Harm.

Even if the trial court could exercise jurisdiction over foreign entities' domain names, the trial court violated all principles of due process in its attempt to do so, and irreparable harm is imminent.

(a) Violation of Due Process

The Cabinet seized the domain names in a civil proceeding that relied on criminal standards without notice to the owners of the domain names and without an opportunity to be heard. The Cabinet did not undertake even constructive notice through a warning order attorney authorized under CR 4.07. Nor did the Cabinet cause process to be issued under CR 4.01. These actions violate due process because judgment *in rem* can only occur if the defendant is notified by constructive process. *Gayle v. Gayle*, 192 S.W.2d 821, 822 (Ky. 1946)

There was also no indictment issued for alleged criminal activity, and no warrant was requested. The only "evidence" of alleged criminal acts was videotaped activity by persons directed and funded by the Cabinet's private attorneys—and none of the people paid by the Cabinet's attorneys to gamble on line were subject to cross-examination. In place of all normal procedures for commencing a lawful action, the Cabinet substituted secrecy.

Despite the fact that the owners of the domain-name defendants operate lawful businesses that are licensed, regulated, and taxed in their home jurisdictions—indeed, some are publicly traded companies (*see Appendix* 14, at 81–82)—at least one registrar, GoDaddy.com, Inc., submitted to the court's "dominion and control" Petitioner Vicsbingo.com and sixteen other Domain Name defendants identified by the Cabinet.

The trial court's treatment of IGC's right to intervene under Rule 24—first permitting intervention then trying to withdraw it—is another due process violation. IGC filed in the trial court a timely motion to intervene, and it was granted based on sound legal authority. *Winn v.*

First Bank of Irvington, 581 S.W.2d 21, 23 (Ky. App. 1978); *Nat'l Office Mack Dealers Assoc. v. Monroe, The Calculator Co.*, 484 F. Supp. 1306, 1307 (N.D.Ill. 1980). IGC identified for the court 61 domain names whose interests it represents, and on their behalf IGC's counsel briefed and argued the court's jurisdictional and constitutional missteps. After overruling IGC's motion to dismiss—thereby giving IGC no choice but to seek this writ—the trial court now wants to treat IGC as a "friend-of-the-court," nothing more. Opinion and Order at 38.

Faced with an imminent forfeiture proceeding affecting 61 of its members' domain names, depriving IGC of its legal right to continue representing its members is depriving IGC of due process.

(b) Irreparable Harm

If allowed to proceed, the trial court's wrongful confiscation of the domain names will cause irreparable harm. *See Hoskins v. Maricle, supra; Bender v. Eaton, supra.* Once a domain name is under the court's control or forfeited, the Cabinet can block access to the associated website or simply shut down the domain name. When this occurs, the domain name is gone to the entire world. The rights of individuals around the world to use the websites accessed via these domain names will be effectively eliminated.[2] The goodwill and intangible value associated with the domain names will be lost to their owners, likely crippling their legitimate business operations.

There is no adequate remedy on appeal for this harm because the ripple effect of seizing and freezing the domain names is incalculable and irreparable. The domain-name owners cannot identify would-be users of the seized domain names, nor do the owners have a way of restoring to those users the loss of access that forfeiture will inflict. Moreover, the trial court ruled that the

[2] Individuals using the domain names have more to lose than access. Any individuals in the world doing business with entities owning the seized domain names are also likely to suffer monetary loss if the domains suddenly disappear due to the Cabinet's seizure.

only way domain-name owners throughout the world can prevent forfeiture is to appear before the trial court. But if the domain-name owners show up and identify themselves, as the Cabinet insists and the court ordered, the Cabinet intends to tap the owners with *in personam* jurisdiction—this in a court without jurisdiction in the first place. *See Appendix* 17.

Also looming over these proceedings is the entirely foreseeable possibility that Kentucky's unilateral assertion of jurisdiction over domain names it considers nefarious will prompt retaliation in kind. Another country or state could just as easily decide to seize twinspires.com, a Churchill Downs-owned website where visitors can "watch and wager on races from historic Churchill Downs racetrack . . . and other popular racing venues." *See* www.twinspires.com.[3] Fundamental jurisdictional principles, including physical possession of the *rem* and "minimum contacts," exist to preclude this very sort of tit-for-tat jurisdictional warfare.

An appeal from an ultimate forfeiture ruling by the trial court cannot stop and will not cure this imminent irreparable harm, particularly when the trial court's actions involve 141 different domain names registered around the world. Accordingly, the Court should enter a writ prohibiting the trial court from proceeding with the current action and ordering dismissal of the suit.

3. The Court is Violating Fundamental Constitutional Rights.

The Cabinet began this action *ex parte* by invoking Kentucky's criminal gambling laws and employing a criminal "probable cause" standard. But this is a civil action, not a criminal proceeding. In violation of CR 4, the Cabinet failed to issue a summons or warning order

[3] This is not a hypothetical concern. The Interstate Horse Racing Act (IHRA), the legal basis for interactive horserace wagering at www.twinspires.com, is the subject of an international dispute in the World Trade Organization (WTO) where the statute is alleged to be discriminatory and in violation of the General Agreement on Trade in Services (GATS); amidst these proceedings, the United States Department of Justice opined that the IHRA does not authorize offering interactive horseracing wagering.

necessary to commence a civil action. Compounding the procedural errors, the Cabinet sealed the record to prevent the domain-name owners from learning of the case until after the trial court entered its seizure order of September 18, 2008.

(c) The Trial Court Action Never Commenced.

The failure to issue summons or a warning order as required by CR 4 means that the case never legally commenced. KRS 413.250 states that "[a]n action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action." *See Gayle v. Gayle*, 192 S.W.2d 821, 822 (Ky. 1946) ("A judgment *in rem* or *quasi in rem* may [only] be pronounced in an action where the defendant has been notified by constructive process."). Without at least constructive service, the case cannot begin. *Nolph v. Scott*, 725 S.W.2d 860, 861–62 (Ky. 1987). *Shaffer, supra,* stands for the same principle.

Simply put, appropriate notice, either through actual summons or constructive service via warning order, is essential to the legitimacy of any order adjudicating rights in property. *See Isaacs v. Fields, et al.*, 87 S.W.2d 936, 936 (Ky. 1935). Because of the Cabinet's failure to comply with the notice requirements of CR 4, the trial court has no jurisdiction and its actions should be set aside. *See W.G.H. v. Cabinet for Human Resources, Commonwealth of Kentucky*, 708 S.W.2d 109, 110–11 (Ky. App. 1986) (holding that judgment is void unless warning order notice requirements of CR 4.06 are met).

In derogation of these decisions, the trial court held that the seizure of the domain names alone was sufficient to give notice of the action to their owners. *See Appendix* 15 at 29. This view ignores ample precedent to the contrary and fundamental principles of due process; reasonable efforts to locate property owners and provide notice of an *in rem* proceeding are always the necessary first steps. *See Shaffer*, 433 U.S. at 206.

By failing to follow principles established by the Supreme Courts of Kentucky and the United States, the trial court acted erroneously. To allow the trial court to proceed with forfeiture under these circumstances would irreparably harm the domain-name owners and worldwide users of the affected Internet addresses.

(d) The Trial Court Seized the Domain Names Without Due Process of Law.

"For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). The trial court not only allowed the Cabinet to operate in secret, it assisted this effort by sealing the record while it considered whether the domain names should be seized. The court sealed the record and entered its seizure order based solely on a one-sided presentation, consisting primarily of invectives against Internet gambling and evidence manufactured by private attorneys. The Cabinet conspicuously omitted any reference to the lawful nature of the businesses owning the domain names and failed to acknowledge that the businesses are licensed, regulated, and taxed in their home jurisdictions. *Compare Appendix* 2, 4 *with Appendix* 14, at 81–82.

Instead of insuring that the domain-name owners have an opportunity to be heard, the trial court simply granted the Cabinet's motion to seize the domain names. With the October 16 order overruling the Petitioners' jurisdictional challenges, the domain-name owners face a Hobson's Choice, i.e., a choice without any real alternative. The owners must appear at the hearing on December 3 and plead their case—subjecting themselves to *in personam* jurisdiction and litigation promised by the Cabinet's attorneys—or the domain names are automatically forfeited. Even though IGC and others intervened on behalf of the domain names and their owners, the trial court rejected their arguments, removed them as parties, and entered the order

forcing domain-name owners to appear in court to show why their property should be returned to them. By proceeding in violation of simple and straightforward procedural and due process requirements, the trial court is perpetrating a substantial miscarriage of justice that must be remedied by this Court through a writ if the orderly administration of justice is to be preserved.

Further, the seizure itself was impermissible. The Commonwealth did not indict a single individual or entity for any criminal activity. The Cabinet's sole claim is that the domain names are used for criminal gambling, yet the Cabinet sought to prove the criminal allegation in a civil *in rem* action. In a civil *in rem* action, the Cabinet claimed "probable cause" to conclude that the domain names were gambling devices subject to forfeiture. In contrast to other forfeiture statues such as KRS 218A.415, KRS 528.100 contains no provision for seizure of property prior to forfeiture. The predecessor statute to KRS 528.100, KRS 436.280 (an earlier gambling forfeiture statute repealed in 1974), did allow for seizure of gambling devices, but no such language appears in KRS 528.100. The Legislature is presumed to know the state of the law when it enacts a statute, including judicial construction of any statutes. *St. Clair v. Comm.*, 140 S.W.3d 510, 570 (Ky. 2004). The Legislature's decision not to include seizure provisions in KRS 528.100 indicates an intent *not* to allow outright seizure of gambling devices before a forfeiture trial. Seizure prior to trial thus can only be accomplished by appropriate existing means such as a criminal warrant or a civil writ of possession.

Since none of the domain names can be found in Kentucky, none of the domain names can be taken from Kentucky. The assertion that an unconstitutional seizure of property beyond the jurisdiction of the court is itself the basis for securing jurisdiction, as the trial court expressly held here, is simply nonsense. The trial court erroneously allowed the Cabinet to violate procedural and due process requirements designed to ensure affected parties an opportunity to be

heard. The trial court did so without following proper criminal or civil procedure, instead fashioning a hybrid procedure in which a criminal seizure was accomplished in civil proceedings. The trial court's actions constitute a substantial miscarriage of justice that should be remedied by this Court to preserve the orderly administration of the judiciary.

CONCLUSION

Misled by the Cabinet's private, contingency-fee lawyers, Franklin Circuit Court is following a dangerously unprecedented and unconstitutional path. Unless the proceedings below are halted by a writ, no one will be able to restore the loss of access by domain-name users around the world, and no one will be able to undo the constitutional harm caused by blackmailing the domain-name registrants or owners to appear in a Kentucky court.

Accordingly, the writ should issue.

SUPPLEMENTAL LEGAL PRINCIPLES

Although not necessary for issuing the requested writ, these supplemental legal principles may be helpful to the Court in understanding issues peculiar to the Internet, the use of Domain Names, and the operation of legitimate and legal gaming sites.

(a) What is a Domain Name?

Every computer connected to the Internet throughout the world is assigned a unique, numerical Internet Protocol (IP) address that functions much like a street address or telephone number for the computer to which it is assigned. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 409–10 (2d Cir. 2004). All of the Internet's actual functions are accomplished through these IP addresses, which are used to route data between the computers connected to the Internet. *See id.* IP addresses consist of a series of numbers separated by dots. For example, the Commonwealth of Kentucky's public Internet home page (which provides a wide range of information about Kentucky and its government) has the IP address 205.204.237.65. It would be difficult for the average person searching for Kentucky's home page to find this IP address, much less to remember it. Thus, domain names serve as memorable substitutes for numerical addresses.

A domain name is an "alphanumeric text representation (often a word) that identifies a numerical IP address, thus making it easier to remember." *Id.* at 410. Kentucky, for example, obtained the domain name "kentucky.gov" for its public home page IP address. Instead of trying to remember the eleven-digit IP address, a person seeking to access Kentucky's home page on the Internet can simply type "www.kentucky.gov" into a web browser, and the Internet Service Provider translates the domain name into its associated IP address so that a request for data may be sent from the user's IP address to Kentucky's IP address. In simplest terms, a domain name is akin to a speed dial entry in a phone that associates a mnemonic tag such as "Home" with a particular telephone number.

To obtain a domain name for an IP address (or group of IP addresses), one first must apply to one of the domain name registrars located throughout the world for the right to use a desired domain name. *See id.* at 415. The registrar then screens the domain name using a registry containing information on registered domain names, the associated IP address(es), and the registrant/owner information, to ensure it does not duplicate an existing domain name registered to another individual or entity. *See Smith. v. Network Solutions, Inc.*, 135 F. Supp. 2d 1159, 1161–62 (N.D. Ala. 2001). If the domain name does not match one in existence, the registrar may contractually agree for a fee to associate the domain name with the chosen IP address(es) of the registrant for a period of time. *See id.* at 1162–63. The unique nature of domain names caused a split of authority as to whether a domain name is properly considered an intangible contract right, *e.g.*, *Network Solutions, Inc. v. Umbro International, Inc.*, 529 S.E.2d 80, 86 (Va. 2000), or a form of intangible property, *e.g.*, *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003) (rejecting the majority view, based on the Restatement of Torts, and holding that California likely would recognize a domain name as intangible property even in the absence of a physical representation of the intangible right). Though Kentucky has never decided this issue, the trial court action plainly could not be allowed to exercise *in rem* jurisdiction over a contract right that is not a *res*.

(b) How is jurisdiction over domain names properly asserted?

Congress wrote and passed landmark legislation governing the situs of domain names. The Anticybersquatting Act, 15 U.S.C. § 1125(d)(2), provides that an *in rem* action may be brought against a domain name wherever the registry, registrar, or other authority assigning or registering the domain name is located. Thus, Congress opted to treat domain names as a form of property and assigned them a situs for purposes of an *in rem* action. *Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 300 n.7 (2d Cir. 2002) (noting that Congress clearly intended to treat

domain names as property for purposes of this statute); *Caesar's World, Inc. v. Caears-Palace.com*, 112 F. Supp. 2d 502, 504 (E.D. Va. 2000) ("There is no prohibition on a legislative body making something property. Even if a domain name is no more than data, Congress can make data property and assign its place of registration as its situs.").

While federal law does not govern this action, it is instructive on how domain names should be treated in an *in rem* situation. Federal law allows for *in rem* proceedings against domain names where the entity registering or maintaining the domain name is located. This federal treatment of domain names, *i.e.*, requiring suits to be brought in certain locations, is comparable to Kentucky's recognition of the settled rule that intangible property exists where its owner is domiciled or where the property is an integral part of an independent operation or otherwise assigned a situs by the legislature. For intangible property such as a domain name to exist somewhere other than its owner's domicile, there must be something to tether the property to another location.

Under either Kentucky or U. S. law, the intangible domain names involved here are not located in Kentucky. No owners of those domain names are in Kentucky. There are no domain name registries, registrars, or other authorities assigning or registering the domain names that are located in Kentucky. Kentucky's legislature did not attempt to assign domain names a situs, assuming it would be constitutionally valid for it to do so. The trial court simply ignored these guidelines, choosing instead to act as a legislature unto itself—and using a strained reading of *Shaffer*—to determine that the domain names have sufficient contacts with Kentucky to support *in rem* jurisdiction.

(c) Why poker is not "gambling."

Without an evidentiary hearing, the trial court ruled as a matter of law that Internet poker is a game of chance prohibited by Kentucky's gambling law. Specifically, the court ruled on

October 17 that "[c]hance, 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.' *See Appendix* 15, at 26. An impartial fact-finding would have demonstrated just the opposite; poker is not "gambling" because poker is a game of skill.[4]

Had the trial court considered the evidence, it would have realized that there are two ways a player can win a hand of poker: the player can have the best hand of the remaining hands at a showdown, or he/she can be the last player in the hand after everyone else has folded. It is necessary to examine showdown hands and no-show hands separately to understand the roles of skill and chance in each. Although skill predominates over chance even in showdown hands, the chance element in a showdown has drawn far too much and improper attention and has obscured two overwhelmingly important facts: (1) most poker hands do not end in showdowns; and, (2) in no-show hands, the cause of the outcome is primarily skill—chance plays only a small role and is not material to the ultimate outcome.

The fundamental difference between the random distribution of cards and the strategic decisions made by each poker player explains why, even in the short-term, the outcome in the majority of games is determined by skill, not chance. Although a player's strategic decisions may be influenced by the initial cards dealt, it is skill, not chance, that determines the voluntary decisions a player makes regarding whether or not to fold those cards, how many token chips to place at risk in that hand (and to cause other players to place at risk in that hand), and how to persuade other players who may have been dealt "luckier" cards to fold those "luckier" cards.

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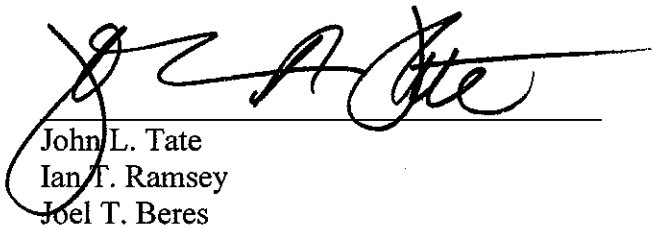
[4] The question of skill and chance, and which predominates, is a factual determination that is made on a case-by-case basis. Ky Atty. Gen. Op. OAG 80-409; *Fall v. Commonwealth*, 245 S.W.3d 812 (Ky. 2008) *4-351 Caldwell's Kentucky Form Book § 351.00*; *See also*, *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973); *Ruben v. Keuper*, 43 N.J.Super. 128, 130 (Ch.Div. 1956); *People v. Mason*, 68 Cal. Rptr. 17, 21 (Cal. App. 2d Dist. 1968).

Therefore, although the random distribution of the cards (the shuffle and the deal) is subject to chance, it is primarily the strategic skill of each player that determines the outcome of a given hand.



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I hereby certify that a copy of the foregoing Motion and attached Memorandum in Support were served by hand delivery on William C. Hurt, Jr, HURT, CROSBIE & MAY, PLLC, and by first-class mail and/or e-mail this 28th day of October, 2008 upon:

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