COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. _____

INTERACTIVE MEDIA ENTERTAINMENT AND GAMING ASSOCIATION, INC. **PETITIONER**

v. **PETITION FOR ORIGINAL PROCEEDING PURSUANT TO CR 76.36**

HONORABLE THOMAS D. WINGATE, JUDGE, FRANKLIN CIRCUIT COURT **RESPONDENT**

AND

COMMONWEALTH OF KENTUCKY, EX REL. J. MICHAEL BROWN, SECRETARY, JUSTICE AND PUBLIC SAFETY CABINET **REAL PARTY IN INTEREST**

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Petitioner Interactive Media Entertainment and Gaming Association, Inc. ("iMEGA"), by counsel, hereby files this petition for original proceeding pursuant to CR 76.36.

INTRODUCTION

J. Michael Brown, the Secretary of the Justice and Public Safety Cabinet of the Commonwealth of Kentucky (the "Commonwealth") filed a civil *in rem* action in Franklin Circuit Court (the "trial court") seeking the forfeiture of 141 Internet domain names that are allegedly being possessed or used by their international owners in violation of Kentucky's gambling statutes. The Commonwealth alleged that the domain names were "gambling devices" under Kentucky law. Despite the fact that these domain names are not located in Kentucky and

do not meet the Kentucky's definition of "gambling device," the trial court ordered the seizure of the domain names in a secret proceeding.

No real defendants were named, no process was issued, and no owner of any domain names was notified. In short, this was an action by the Commonwealth to seize property without the slightest pretext of complying with the fundamental dictates of due process. The trial court lacked jurisdiction to act as it did for a variety of reasons detailed in this petition.

This court granted iMEGA's original petition on January 20, 2009 and issued a writ prohibiting seizure and forfeiture of the domain names. The court held that domain names are not gambling devices under Kentucky law. Judge Taylor concurred because there is no statutory authorization for *in rem* forfeiture of gambling devices absent a prior criminal conviction.

On appeal, the Kentucky Supreme Court found that "[n]umerous, compelling arguments endorsing the grant of the writ of prohibition have been presented," but it did not consider them because it held that iMEGA failed to identify any of its members that suffered a concrete injury in fact. (Mar. 18, 2010 Opinion of Kentucky Supreme Court at 13) ("Supreme Court Opinion").[1] The Court continued, "[t]his is not to say, however, that the failure to establish standing in this writ action completely forecloses relief by way of a writ in the future." (*Id.*) Upon establishing standing,

> the writ petition giving rise to these proceedings could be re-filed with the Court of Appeals. The Court of Appeals could then properly proceed to the merits of the issues raised, or upon a proper motion, this Court could accept transfer of the case, as the merits of the argument have already been briefed and argued before this Court.

(*Id.*)

In compliance with the Supreme Court's opinion, iMEGA herein properly asserts associational standing and with this petition seeks an order requiring the trial court to dismiss the

[1] A copy of the Kentucky Supreme Court Opinion is attached as Exhibit A.

case in its entirety. With this petition, iMEGA also moves this court to immediately stay proceedings in the Franklin Circuit Court, and moves the Kentucky Supreme Court to accept transfer of the case to decide the issues presented by this petition on the merits.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

I. THE PARTIES.

Petitioner is a trade association with members that are registrants of some of the 141 defendant domain names. It is a not-for-profit corporation organized in the state of New Jersey. Petitioner is a voluntary trade organization that collects and disseminates information regarding electronic and Internet-based gaming. Its members include some of the registrants of the subject domain names. Yatahay Limited, a member of iMEGA, owns truepoker.com, one of the 141 domain names that that Commonwealth seeks to forfeit in this case. (*See* Affidavit of Joe Brennan, Jr., Chairman of Interactive Media Entertainment & Gaming Association, Inc., attached as Exhibit B; *see also* Affidavit of Yatahay Limited, attached as Exhibit C).

On September 18, 2008, the trial court issued an Order of Seizure of Domain Names ("the Seizure Order"),[2] which scheduled a hearing "to determine if any party has asserted rights as an owner of the seized property." In response, iMEGA entered an appearance to assert its members' rights. iMEGA asserted associational standing pursuant to *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977). However, the Kentucky Supreme Court, in its opinion of March 18, 2010, concluded that iMEGA "must prove it represents at least one member with an injury in order to obtain relief." (Supreme Court Opinion at 13). "This may be done by reference to the facts in the underlying litigation or a verified assertion, such as in an affidavit, attached to the petition." (*Id.*)

[2] A copy of the Seizure Order is attached as Exhibit D.

In compliance with the Kentucky Supreme Court's instruction, iMEGA submits the affidavits from Joe Brennan, Chairman of iMEGA, and Yatahay Limited ("Yatahay"). (*See* Affidavit of Joe Brennan, Jr., Chairman of Interactive Media Entertainment & Gaming, Inc., attached to iMEGA's Petition as Exhibit B; Affidavit of Yatahay Limited, attached to iMEGA's Petition as Exhibit C). In the affidavits, Brennan and Yatahay state that Yatahay is an iMEGA member and that Yatahay is the registrant/owner of truepoker.com, one of the 141 domain names the Commonwealth has attempted to seize and forfeit in this action. (Brennan Aff. at ¶¶ 3-5; Yatahay Aff. at ¶¶ 2-4). Additionally, Brennan and Yatahay state that iMEGA has represented Yatahay's interests throughout this litigation. (Brennan Aff. at ¶ 6; Yatahay Aff. at ¶ 5). Finally, Brennan and Yatahay affirm that the Franklin Circuit Court's September 18, 2008 and October 16, 2008 Orders for seizure of domain names are directed at truepoker.com. (Brennan Aff. at ¶ 7; Yatahay Aff. at ¶ 6). Because iMEGA has established associational standing in accordance with the Court's Opinion by naming a member of its association that has alleged a concrete injury in fact, this court should now resolve the substantive and important issues this case presents.

The Respondent to this Petition is the Honorable Thomas D. Wingate, Judge of the Franklin Circuit Court.

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

II. THE UNDERLYING ACTION.

The underlying action is *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.

III. FACTS THAT ENTITLE PETITIONER TO RELIEF.

On August 26, 2008, the Commonwealth initiated his action. The Commonwealth seeks one thing in the case: forfeiture of Internet domain names. Also on August 26, the Commonwealth filed a Motion to Seal Case File.[3] The Commonwealth alleges that "owners of the Domain Defendants are purposely located outside the United States to avoid civil service or criminal prosecution, and in many cases go to great lengths to conceal the true ownership of the property; furthermore, upon notice of the Commonwealth's action, the owners will take actions to remove the property beyond the Court's jurisdiction." *Id.* [4]

The trial court granted the motion, sealed the record, and conducted a secret *ex parte* hearing lasting one hour and 18 minutes on September 18, 2008. The hearing was conducted without prior notice to any registrants of the domain names and without any notice to the public that records were being sealed or that a closed hearing was being scheduled.

The same day, September 18, 2008, the Commonwealth filed its Second Amended Complaint,[5] its Motion for Seizure of Domain Names[6] and supporting memorandum.[7] The trial court issued its Seizure Order the same day. The trial court found that probable cause existed to believe that the domain names "were and are being used in connection with illegal gambling activity" in Kentucky but did not specify by statute or otherwise the alleged illegal activity occurring in Kentucky. (*See* Seizure Order, Exhibit D, at 1).

A domain name is issued by a company known as a "registrar" and is utilized under a contractual arrangement by a "registrant." "Seizure" of a domain name does not amount to

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[3] Motion To Seal Case File is attached as Exhibit E.
[4] The claim that registrants will take actions to remove domain names beyond Kentucky was and is baseless given the fact that the names have never been in Kentucky.
[5] Attached as Exhibit F.
[6] Attached as Exhibit G.
[7] Attached as Exhibit H.

seizure of a website, any more than "seizure" of a telephone number would result in seizure of the telephone. However, in the same way that the commandeering and disabling of a telephone number could result in blocking calls to the telephone, the commandeering and disabling of a domain name blocks prospective users from reaching a website through the avenue of the domain name so seized.

The Seizure Order also ordered that the domain names "shall be immediately transferred" by registrars to the Commonwealth. *Id.* at 2. The trial court set a hearing "to determine if any party has asserted rights as an owner of the seized property pursuant to KRS 500.090." *Id.* iMEGA subsequently appeared at such hearing, on September 26, 2008, for the purpose of asserting the rights of its members.

At that hearing and a subsequent hearing October 7, 2008, the trial court heard objections from various interested parties, including iMEGA. In its Opinion and Order of October 16, 2008 ("Franklin Circuit Opinion and Order"),[8] the trial court held that it had jurisdiction to proceed, held that the prior seizure order was proper, denied motions to dismiss, and scheduled a forfeiture hearing for November 17, 2008.

On October 22, 2008, iMEGA filed a Petition for Original Proceeding Pursuant to CR 76.36 with this court. (*See* Petition for Original Proceeding, Case No. 2008-CA-2000). On October 28, 2008, iMEGA also filed a motion for intermediate relief seeking a stay of orders of the trial court entered September 18 and October 16, and seeking to suspend a forfeiture hearing the trial court had scheduled for December 3, 2008. (*See* iMEGA Motion for Intermediate Relief, 2008-CA-2000). This court granted the motion for intermediate relief on November 14, 2008. (*See* Nov. 14, 2008 Court of Appeals' Order, 2008-CA-2000).[9] The same day, the Court

[8] Attached as Exhibit I.
[9] Attached as Exhibit J.

of Appeals consolidated the iMEGA petition, 2008-CA-002000, with two others: one by Playersonly.com, Linesmaker.com, Mysportsbook.com, Sportsbook.com and Sportsinteraction.com, 2008-CA-002019; and one by Vicsbingo.com and Interactive Gaming Council ("IGC"), 2008-CA-002036. (*See id.*).

Following oral argument, this court granted the petition, and a writ issued on January 20, 2009. (*See* Court of Appeals' Opinion, 2008-CA-2000, Jan. 20, 2009) ("Court of Appeals' Opinion").[10] In it, this court held that "the trial court clearly erred in concluding that the domain names can be construed to be gambling devices subject to forfeiture under KRS 528.100." (*Id.* at 8). Judge Taylor, in his concurrence, also found that the writ should issue because Kentucky law did not authorize the Commonwealth to bring a civil *in rem* action absent a prior conviction. (*Id.* at 12-13.) The Commonwealth filed a notice of appeal.

The Kentucky Supreme Court, following briefing and oral argument, reversed this court, vacating the writ and remanding to this court with instructions to dismiss iMEGA's writ petition. (Supreme Court Opinion at 14). While the Supreme Court noted that "[n]umerous, compelling arguments endorsing the grant of the writ of prohibition have been presented" throughout the litigation, it held that "none of the arguments can even be considered unless presented by a party with standing." (*Id.*). Because iMEGA had not disclosed any person or entity who owns one of the domain names at issue in this case, the association failed to show that one of its members could have sued in their own right. (*Id.* at 13). However, the Court noted "[t]his is not to say, however, that the failure to establish standing in this writ action completely forecloses relief by way of a writ in the future." (*Id.*) If a proper party establishes standing,

> the writ petition giving rise to these proceedings could be re-filed with the Court of Appeals. The Court of Appeals could then properly proceed to the merits of the issues raised, or upon a proper motion, this Court could accept transfer of the

[10] Attached as Exhibit K.

> case, as the merits of the argument have already been briefed and argued before this Court.

(*Id.*)

The Court held that associational standing may be established by proving the association "represents at least one member with an injury in order to obtain relief." (*Id.*) "This may be done by reference to the facts in the underlying litigation or a verified assertion, such as in an affidavit, attached to the petition." (*Id.*)

In compliance with the Kentucky Supreme Court's instruction, iMEGA submits the affidavits from Joe Brennan, Chairman of iMEGA, and Yatahay Limited ("Yatahay"). (*See* Brennan Aff.; Yatahay Aff.). In the affidavits, Brennan and Yatahay state that Yatahay is an iMEGA member and that Yatahay is the registrant/owner of truepoker.com, one of the 141 domain names the Commonwealth has attempted to seize and forfeit in this action. (Brennan Aff. at ¶¶ 3-5; Yatahay Aff. at ¶¶ 2-4). Additionally, Brennan and Yatahay state that iMEGA has represented Yatahay's interests throughout this litigation. (Brennan Aff. at ¶ 6; Yatahay Aff. at ¶ 5). Finally, Brennan and Yatahay affirm that the Franklin Circuit Court's September 18, 2008 and October 16, 2008 Orders for seizure of domain names are directed at truepoker.com. (Brennan Aff. at ¶ 7; Yatahay Aff. at ¶ 6). Because iMEGA has established associational standing in accordance with the Court's Opinion by naming a member of its association that has alleged a concrete injury in fact, this Court should now resolve the substantive and important issues this case presents.

RELIEF SOUGHT

I. REQUEST FOR RELIEF.

iMEGA petitions the court under CR 76.36 to order the trial court to (1) immediately stay all proceedings in the Franklin Circuit Court; (2) vacate the Franklin Circuit Court Opinion and

Order entered October 16, 2008; (3) vacate the Seizure Order of September 18, 2008, and (4) dismiss the underlying case in its entirety.

II. THE RELIEF IS APPROPRIATE.

The Supreme Court's opinion clearly supports the prior finding of this court that the standard for issuance of a writ are met here by suggesting that the petition for a writ be refiled, by finding the arguments for the issuance of a writ "numerous [and] compelling," and by suggesting an immediate transfer of the case to the Supreme Court for a final adjudication. (Supreme Court Opinion at 3, 13). In the initial case, this court correctly held that the standard for issuance of a writ under Kentucky law was met completely in this case upon the finding that the trial court was proceeding without jurisdiction.

> If domain names cannot be considered gambling devices, Chapter 528 simply does not give the circuit court jurisdiction over them. Accordingly, petitioners have satisfied the criteria for obtaining a writ prohibiting enforcement of the circuit court's previous orders and the conduct of the scheduled forfeiture hearing. No showing of irreparable injury is required.

(Court of Appeals' Opinion at 9-10).

The Supreme Court has held that a

> writ of prohibition may be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted.

Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004). Because the trial court "clearly erred in concluding that the domain names can be construed to be gambling devices subject to forfeiture under KRS 528.100," (Court of Appeals' Opinion at 8), the *Hoskins* standard is met.

Even if a showing of great injustice and irreparable injury were required, Appellee would meet the requirement readily. The fact that the Commonwealth and the circuit court have moved unconstitutionally under an unauthorized forfeiture proceeding constitutes great injustice. Violation of constitutional rights constitutes irreparable harm. *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 578 (6th Cir. 2002). A writ is appropriate to prevent a trial court from violating fundamental constitutional rights. *James v. Hines*, 63 S.W.3d 602, 608 (Ky. App. 1998).

Additionally, "'[g]reat and irreparable injury' means 'something of a ruinous nature.'" *Newell Enterprises, Inc. v. Bowling*, 158 S.W.3d 750, 754 (Ky. 2005), citing *Bender v. Eaton,* 343 S.W.2d 799, 800 (Ky. 1961). Ruin is exactly what the Commonwealth said it wants to inflict upon iMEGA's members.[11] Such intent, coupled with the trial court's unconstitutional seizure order, satisfies any possible requirement of a showing of injustice and harm, were one to be applied.

In addition, there is no adequate remedy at law for what is occurring here. As set forth below, under the Commonwealth's theory there can be no appeal of the probable cause determination and subsequent seizure and forfeiture because no person or entity is involved in the initial, secret hearing and the only issue which can be contested thereafter is the "unaware owner" issue. There is no appeal right from the circuit court's finding of "probable cause" of criminality.

[11] *See, e.g.,* Tape of Hearing of September 18, 2008, hereafter referenced as Tape, Exhibit L, at 2:13:25 to 2:13:30 p.m. Counsel for the Commonwealth told the trial court that if a domain name registrant failed to communicate with the Commonwealth following issuance of the seizure order, "In a week or so, we are going to actually take the domain name and shut it down worldwide.".

MEMORANDUM OF AUTHORITIES IN SUPPORT OF PETITION

I. iMEGA PROPERLY ASSERTS ASSOCIATIONAL STANDING.

iMEGA has properly asserting associational standing in this case, as it has identified one of its members that owns one of the domain names the Commonwealth is attempting to forfeit.

As the Supreme Court held in its Mar. 18, 2010 opinion, associational standing inherently depends on the membership of the association. (Supreme Court Opinion at 9). The Court recited the familiar standard for associational standing used by federal courts pursuant to *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977):

> An 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.

Hunt, 432 U.S. at 334.

The Kentucky Supreme Court held that associations seeking to represent its members have the obligation to prove that at least one of its members would have standing in their own right. (Supreme Court Opinion at 10-13). Thus, the Court held that "a writ petitioner must prove it represents at least one member with an injury in order to obtain relief." (*Id.* at 13). This proof may be asserted by "reference to the facts in the underlying litigation or a verified assertion, such as in an affidavit, attached to the petition." (*Id.*).[12] iMEGA has complied with the Supreme Court's direction and now has properly asserted associational standing.

[12] Additionally, the Supreme Court noted with approval the federal district court's opinion in *Coalition for ICANN Transparency Inc. v. VeriSign, Inc.*, 464 F. Supp. 2d 948, 956 (N.D. Cal. 2006), *rev'd on other grounds*, 567 F.3d 1084 (9th Cir. 2009), as an example of how an association may cure standing problems. In that case, the federal district court dismissed the plaintiff's complaint because "CFIT failed to name even one member." *Id.* at 956. However, CFIT subsequently identified one of its members, Pool.com, Inc., which allegedly suffered injury in fact, and met the requirements for associational standing under *Hunt*. *Id.*

Attached to this petition, iMEGA submits the affidavits from Joe Brennan, Chairman of iMEGA, and Yatahay Limited ("Yatahay"). (*See* Brennan Aff., Exhibit B; Yatahay Aff., Exhibit C). In the affidavits, Brennan and Yatahay state that Yatahay is an iMEGA member and that Yatahay is the registrant/owner of truepoker.com, one of the 141 domain names the Commonwealth has attempted to seize and forfeit in this action. (Brennan Aff. at ¶¶ 3-5; Yatahay Aff. at ¶¶ 2-4). Additionally, Brennan and Yatahay state that iMEGA has represented Yatahay's interests throughout this litigation. (Brennan Aff. at ¶ 6; Yatahay Aff. at ¶ 5). Finally, Brennan and Yatahay affirm that the Franklin Circuit Court's September 18, 2008 and October 16, 2008 Orders for seizure of domain names are directed at truepoker.com. (Brennan Aff. at ¶ 7; Yatahay Aff. at ¶ 6). Because iMEGA has established associational standing in accordance with the Supreme Court's pinion by naming a member of its association that has alleged a concrete injury in fact, this court should now resolve the substantive and important issues this case presents.

II. DOMAIN NAMES ARE NOT "GAMBLING DEVICES" UNDER KRS 528.010(4).

As this court has already held, the trial court lacked subject matter jurisdiction because domain names do not fit the "gambling device" definition in KRS 528.010(4). "[I]t stretches credulity to conclude that a series of numbers, or Internet address, can be said to constitute a 'machine or any mechanical or other device . . . designed and manufactured primarily for use in connection with gambling.'" (Court of Appeals' Opinion at 8).

If Kentucky wants to criminalize Internet gambling, the General Assembly can pass a law. No less than eight other states have passed statutes specifically criminalizing Internet gambling. *See, e.g.*, 720 Ill. Comp. Stat. 5/28-1 (Illinois); IC 35-45-5-1 (Indiana); RCW 9.46.240 (Washington); LRS 14:90.3 (Louisiana); ORS 167.109 (Oregon); NRS Chapter 463

(Nevada); MC 23-5-112 (Montana); SDCL 22-25A-7 (South Dakota). Such statutes raise constitutional questions to the extent that they purport to regulate gambling that is legal where bets are placed, but the Kentucky legislature has enacted no similar legislation.

Gambling devices that are subject to forfeiture under Kentucky law are:

> (a) Any so-called slot machine or any other machine or mechanical device an essential part of which 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 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.

KRS 528.010(4) (emphases added).

A. This Court should give words their "common and approved" meaning.

The Commonwealth below argued that the trial court should ignore the definition of "gambling device" and instead look to the "intent" of the General Assembly. (*See* Reply Brief of Com. on In Rem Seizure of Domain Names and Standing of Intervenors, Oct. 6, 2008, at 9). However, the question before this court is not whether a domain name falls within the "intent" of KRS 528.010(4); it is whether it falls within the statute's plain meaning.

Statutes are to be construed according to "the common and approved usage of language." KRS 446.080(4). The first principle of statutory construction is to look at the plain meaning of the words used. *See Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005). "[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." *Commonwealth v. Plowman*, 86 S.W.3d 47,

49 (Ky. 2002). "A court may not interpret a statute at variance with its stated language." *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001).

The plain language of KRS 528.010(4) shows that a "domain name" is simply not a "gambling device." Domain names are distinct from Web sites. Only the domain names, not Web sites themselves, were seized by the circuit court. The Internet Corporation for Assignment of Names and Numbers ("ICANN"), the quasi-governmental authority that assigns domain names and regulates Internet traffic, defines domain names as mere "mnemonic devices" or memory aids. The Domain Name System ("DNS")

> helps users to find their way around the Internet. Every computer on the Internet has a unique address—just like a telephone number—which is a rather complicated string of numbers. It is called its "IP address" (IP stands for "Internet Protocol"). IP Addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of the arcane IP address. So instead of typing 207.151.159.3, you can type www.internic.net. It is a "mnemonic" device that makes addresses easier to remember.

ICANN Glossary—Domain Name System, *available at* http://www.icann.org/en/general/glossary.htm#D (last visited May 19, 2009); *see also Am. Girl, LLC v. Nameview, Inc.*, 381 F. Supp. 2d 876, 879 (E.D. Wis. 2005) (similarly defining domain names). Calling a domain name a gambling device under the definition of 528.010(4) is as illogical as calling a telephone number a gambling device. Suppose, for example, that a sports gambling book operating legally in England or Australia were to accept wagers and credit card payments over the telephone from Kentucky. Applying the Commonwealth's logic, without ever moving against the sports betting operation, Kentucky could proceed *in rem* under KRS 528.100 to seize and seek forfeiture of the operation's telephone number as a "gambling device." Even more absurd is the notion that if an individual in England or Australia named John Smith were receiving wagers that were lawful in

the country in which he resided, the Commonwealth of Kentucky could proceed *in rem* to take the name "John Smith" as a gambling device.

Such a result clearly was not the intent of the General Assembly. Under KRS 528.010(4)(b), a "gambling device" is "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 gambling." The General Assembly envisioned its definition encompassing tangible gambling equipment, not words or numbers. "The definition of 'gambling device' in subsection (4) limits the application of the term to mechanical items used only for the purpose of gambling such as slot machines and roulette wheels." Kentucky Crime Commission/Legislative Research Commission ("LRC") Commentary to KRS 528.010(4) (1974) (emphasis added).

A domain name is not a "device" at all, and is not "manufactured." Moreover, when a domain name is "operated," the only thing that happens is that a user's Web browser connects with an IP address. Domain names, as mere connectors, are not operable, as software and Web sites are. While Kentucky cases have held that such machinery as slot machines[13] and pinball machines[14] were "contrivances" under a repealed statute, there are no Kentucky cases finding anything so remote, intangible and insubstantial as "domain names" to fit within the definition of KRS 528.010(4).

Neither the Commonwealth nor the trial court has articulated how a domain name is or can be "manufactured." The plain meaning of "manufactured" requires the creation of a tangible

[13] *See, e.g., 14 Console Type Slot Machines v. Commonwealth*, 273 S.W.2d 582 (Ky. 1954); *Pace Mfg. Co. v. Milliken*, 70 F. Supp. 740 (W.D. Ky. 1947).
[14] *See, e.g., Three One-Ball Pinball Machines v. Commonwealth*, 249 S.W.2d 144 (Ky. 1952); *A.B. Long Music Co. v. Commonwealth*, 429 S.W.2d 391 (Ky. 1968).

object, such as a roulette wheel or a craps table, not a series of letters and numbers.[15] KRS 528.010(4)(b) expressly requires that the "device" be "designed and manufactured." This is not an either/or proposition. If a "device" is not "designed and manufactured," it simply does not meet the statutory definition.

Instead, the trial court based its holding that domain names are "gambling devices" on antiquated Kentucky cases interpreting a gambling statute, KRS 436.280, repealed 35 years ago and on an unsupportable assertion that the General Assembly has a strong public policy prohibiting unregulated gambling operations. (*See* Franklin Circuit Opinion and Order at 12).

Hoping to shoehorn "domain name" into the modern statutory definition of gambling device, the Commonwealth and trial court rely upon *Gilley v. Commonwealth*, 229 S.W.2d 60 (Ky. 1950). (*See* Franklin Circuit Opinion and Order at 24). However, the *Gilley* court did not find that "number slips" were "gambling devices;" it found that they were "contrivances," a term not defined in the old statute and absent from the current statute.

However, "gambling device" is given a specific definition in KRS 528.010(4). As the LRC commentary states, the definition limits, not expands, the scope of the statute. The Commonwealth's assertion that the two terms are interchangeable is erroneous. Without any support under current law, the Commonwealth and the trial court attempt to vastly expand state law into a realm the legislature did not authorize.

Additionally, the trial court cited *Gilley*'s assertion that the General Assembly's intent was to "stop all forms of gambling." 229 S.W.2d at 63. However, this was not the General Assembly's intent when it enacted Chapter 528 in 1974. *Gilley* was decided twenty-four years earlier. The new statutory scheme adopted in 1974 narrowed the scope of the anti-gambling

[15] *See, e.g.,* Webster's New World Dictionary 2d College Ed. (1968). "Manufacture" is defined as "1. the making of goods and articles by hand or, esp., by machinery, often on a large scale and with division of labor 2. anything so made; manufactured product 3. the making of something in any way, esp. when regarded as merely mechanical."

statutes, inserted statutory defenses and exemptions, and limited the scope of a "gambling device" by giving it a specific statutory definition. The General Assembly's intent, then, was to make subject to forfeiture only those "gambling devices" as defined by the plain language of KRS 528.010(4).

The United States District Court for the Western District of Kentucky addressed a similar question of legislative intent.[16] The case presented the question of whether a hotel and motel room tax levied by local ordinance against "motor courts, motels, hotels, inns or like or similar accommodations businesses" could be assessed against amounts collected by companies that market hotel rooms on the Internet. The Louisville ordinance was promulgated under KRS 91A.350, *et seq.* The court held that Internet companies facilitating the renting of rooms could not fall within the meaning of "accommodations businesses." Internet room-rental businesses

> were truly creatures of the future at the time the statute and ordinance originally were enacted. Such businesses have long since made the leap from a capitalist's imagination to reality, however, and both pieces of legislation have been amended more than once since then. The Court will not now step in to do what the state and local legislative bodies—both of whom can be expected to be fully aware of the intent of their legislative forbears—either failed or chose not to do.

Hotels.com, Exhibit M at 9 (emphasis added). That is precisely the case here. When KRS 528.010(4) was enacted 35 years ago, the Internet was unknown in American life. The legislature could not have intended such a vastly expansive application of the definition as the Commonwealth and trial court put forth.

Kentucky courts have long recognized that courts are not permitted to "breathe into a statute that which the legislature has not put there." *Commonwealth v. Gaitherwright*, 70 S.W.3d 411, 413 (Ky. 2002). The General Assembly has had numerous opportunities to re-define

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[16] *See Louisville/Jefferson County Metro Government and Lexington-Fayette Urban County Government v. Hotels.com, LP, et al*, Case No. 3:06-CV-480-R, attached hereto as Exhibit M.

"gambling device" to encompass domain names. This court should "not now step in to do what the state and local legislative bodies . . . either failed or chose not to do." *Hotels.com*, Exhibit M at 9. In short, this court should decline to rewrite a statute. *Cf. Commonwealth v. Lundergan*, 847 S.W. 2d 729, 731 (Ky. 1993); *Roney v. Commonwealth*, 695 S.W.2d 863, 864 (Ky. 1985).

> The judiciary is but one of three component parts of our form of government. Its duty is to interpret and construe laws, not to enact them, and if a plainly warranted construction of a statute should result in a failure to accomplish in the fullest measure that which the Legislature had in view, the remedy is a legislative action, and not judicial construction.

Western & Southern Life Ins. Co. v. Weber, 208 S.W. 716, 718 (Ky. 1919).

An Internet domain name simply does not meet the statutory definition of "gambling device." Therefore, the trial court lacked subject matter jurisdiction.

B. The statute should be strictly construed against the Commonwealth.

Where forfeiture is involved, Kentucky has a policy of strict interpretation. *Bratcher v. Ashley*, 243 S.W.2d 1011, 1013 (Ky. 1951). Such statutes are to be read "in favor of the person whose property rights are to be affected." *Id.* The courts are "not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used." *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000). The Commonwealth and trial court cite KRS 446.080(1), which provides that "all statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." However, where forfeiture is involved, strict construction still applies. *Bratcher*, 243 S.W.2d at 1013.

Furthermore, the prohibition of "gambling devices," the definition of "gambling devices" and the statutory provision providing for forfeiture of "gambling devices" all appear in the Penal Code, which makes operating "gambling devices" in violation of statute a Class D felony

punishable by up to five years in prison. Because these are criminal statutes, a court must strictly construe these statutes.

Strict construction of criminal statutes dates at least to Chief Justice John Marshall. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820). As a principle of fundamental fairness, citizens must be advised what conduct is considered criminal:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.

McBoyle v. United States, 283 U.S. 25, 27 (1931). Holding that an airplane was not a "motor vehicle" for purposes of the National Motor Vehicle Theft Act, Justice Holmes held that "close enough" or "they would have included it had they thought of it" was not good enough in criminal statutes:

> When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies or upon the speculation that if the legislature had thought of it, very likely broader words would have been used.

Id. Citizens should not be required to guess at whether their actions may have penal consequences. *Winters v. New York*, 333 U.S. 507, 515 (1947). Strict construction of criminal statutes serves to "protect the individual against arbitrary discretion by officials and judges." 3 N. Singer, *Statutory Construction* § 59.03 at 12-13 (1986). Since the state makes the laws, the laws should be construed strongly against it. *Id.* at 13. This case is a prime example of the reason for this policy: it is intended to prevent the state from arbitrarily declaring an activity illegal when it is not defined as such by statute.

Although it is clear that the plain language of KRS 528.010(4) is not ambiguous and cannot include Internet domain names, were this court to find some ambiguity, the rule of lenity

would require that ambiguity to be resolved in Petitioner's favor. *White v. Commonwealth*, 178 S.W.3d 470, 484 (Ky. 2005); *see also Haymon v. Commonwealth*, 657 S.W.2d 239, 240 (Ky. 1983) (If "[i]t is not possible to determine which meaning the General Assembly intended . . . the movant is entitled to the benefit of the ambiguity."); *Commonwealth v. Colonial Stores, Inc.*, 350 S.W.2d 465, 467 (Ky. 1961) ("Doubts in the construction of a penal statute will be resolved in favor of lenity.").

Therefore, for multiple reasons that include the principles of strict construction and lenity, domain names are not "gambling devices" and the trial court was without jurisdiction to act otherwise.[17]

III. THE TRIAL COURT LACKED JURISDICTION WITHOUT A CONVICTION.

All forfeiture must be authorized by statute. The General Assembly has not authorized forfeiture of a gambling device under KRS 528.100 without a criminal conviction. Therefore, the trial court lacked jurisdiction to act as it did.

The legislative history and structure of KRS Chapter 528 show that its forfeiture provision presumes a conviction before it is triggered. No Kentucky case has held that KRS 528.100 and KRS 500.090 are civil in nature, and any assertion otherwise is misleading. The Commonwealth's view of the statute misinterprets the plain language and legislative history of the gambling forfeiture provisions, mocks due process, and defies basic logic.

The Commonwealth argued, and the trial court held, that an action under KRS 528.100 and KRS 500.090 is civil and that no conviction is required. This argument rests on four erroneous premises: (1) that cases decided under the pre-1974 gambling device forfeiture statute,

[17] In an amicus filing in the prior Court of Appeals' action, the Poker Players Alliance argues that poker is a game of skill, not a game of chance, and does not qualify as gambling. The principles of strict construction and lenity would counsel in favor of a holding that poker is not gambling so long as the question is close. *See generally* Br. of *Amicus Curiae* Poker Players Alliance, *Interactive Media Entm't & Gaming Ass'n, Inc. v. Wingate*, 2009 WL 142995, 2008-CA-2036, Jan. 20, 2009.

KRS 436.280, support the idea that forfeiture proceedings for gambling devices today are civil in nature; (2) that the legislative intent of the General Assembly when enacting 528.100 and 500.090 in 1974 was to punish all forms of gambling; (3) that cases decided under KRS 218A.410, the controlled substances statute, are analogous; and (4) that *United States v. Ursery*, 518 U.S. 267 (1996), provides support for allowing civil forfeiture under KRS 528.100 and KRS 500.090. These premises are either inapplicable or flatly untrue. The General Assembly withdrew a civil remedy for forfeiture of gambling devices when it repealed KRS 436.280 and enacted KRS 528.100 and KRS 500.090 in 1974.

A. There is no statute authorizing this civil forfeiture proceeding.

The General Assembly extinguished the civil forfeiture provision for gambling devices in 1974 when it enacted KRS 528.100 and KRS 500.090 making conviction a requirement prior to forfeiture. Absent statutory authorization, the Commonwealth has no ability to bring a civil action like the one in this case.

At English common law, only criminal forfeiture existed, and the right of forfeiture did not attach "until the offending person had been convicted and the record of conviction produced." *Ursery*, 518 U.S. at 275. In this country, however, forfeiture exists only by statute. *See id.* at 276. "A forfeiture proceeding is a special one existing only by act of the Legislature." *Bratcher*, 243 S.W.2d at 1015; *see also* OAG 77-734 ("Forfeiture is not a part of the common law. It exists only by statute."). Because forfeitures are not favored in the law, Kentucky courts must "construe forfeiture statutes strictly against a forfeiture and liberally in favor of the person whose property rights are to be affected." *Bratcher*, 243 S.W.2d at 1013. Absent an explicit statute, property cannot be forfeited without a conviction under Chapter 528.

The forfeiture statute repealed in 1974, KRS 436.280, stated in its entirety:

> 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. Though no person is convicted as the setterup or keeper of the machine or contrivance, yet, if a jury, in summary proceedings, finds that the money, machine or contrivance or other articles were used or intended to be used for the purpose of gambling, they shall be condemned and forfeited.

(Emphasis added). Thus, prior to 1974, gambling devices were subject to forfeiture under two scenarios: (1) upon conviction of any person using the gambling device as prohibited by statute; or (2) upon a finding by a jury that the device was used for gambling. The statute at that time explicitly authorized seizure and forfeiture of gambling property absent a conviction. In turn, the Kentucky courts appropriately and explicitly relied on this provision when holding that KRS 436.280 contemplated a civil forfeiture proceeding. *See, e.g.*, *Hickerson v. Commonwealth*, 140 S.W.2d 841, 842 (Ky. 1940); *Sterling Novelty Co. v. Commonwealth*, 271 S.W.2d 366, 368 (Ky. 1954); *14 Console Type Slot Machines v. Commonwealth*, 273 S.W.2d 582, 583 (Ky. 1954). Even under this statute, however, there would be a jury trial, presumably open to the public—unlike the procedure applied by the trial court in this case. Each and every reported case concerning civil forfeiture of gambling property in Kentucky was decided under the prior statute. No Kentucky court has recognized that KRS 528.100 is a civil forfeiture statute. Only the long-repealed KRS 436.280, with its unambiguous authorization of a civil forfeiture proceeding, has been recognized as such.

Under that repealed statute, "possession" of a gambling device was not a criminal offense. Only "use" of a gambling device was prohibited. However, the General Assembly had concerns that the civil forfeiture proceeding "resulted in a forfeiture of gambling devices

possessed although possession was previously not an offense." Kentucky Crime Commission/LRC Commentary to KRS 528.100 (1974). To remedy this problem, the General Assembly eliminated the civil, *in rem* procedure in 1974 when it enacted KRS 528.100 and repealed KRS 436.280.

As such, it is simply incorrect to call KRS 436.280 a "predecessor" statute to KRS 528.100. The entire pre-1974 anti-gambling scheme, KRS 436.200-436.330, was repealed, and KRS Chapter 528 was adopted, eliminating the civil forfeiture provision. KRS 528.100 now provides:

> 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 500.090, except that the provision of this section shall not apply to charitable gaming activity as defined by KRS 528.010(10).

(Emphasis added). As Judge Taylor recognized in his concurring opinion in the prior decision by this court, "Considering the legislative history of KRS 528.100 and the unambiguous language of the current statute, it is clear that the General Assembly intended to extinguish the civil *in rem* forfeiture proceeding as to gambling devices." (Court of Appeals' Opinion, Jan. 20, 2009). Without a finding that (1) a "gambling device or record" exists, and (2) that it was "possessed or used in violation" of Chapter 528, forfeiture cannot go forward under the current statute. There can be no finding of a violation of Chapter 528 until there is a criminal charge and a conviction. Until there is a conviction, it is impossible to know whether any property is possessed or used in violation of Chapter 528.

This intent is further elucidated by the General Assembly's decision to tie forfeiture to KRS 500.090. KRS 528.100 mandates that forfeited gambling property be disposed of in accordance with KRS 500.090. KRS 500.090(1)(a) provides that "property other than firearms

which is forfeited under any section of this code may, upon order of the trial court, be destroyed by the sheriff of the county in which the conviction was obtained." (Emphasis added).

KRS 500.090, the general statute governing disposal of any property subject to forfeiture under the Penal Code, assumes that a conviction under the Penal Code has occurred, and is not triggered until there is such a finding. Because a conviction by a trial court is a prerequisite, KRS 500.090 gives no further due process protection; it assumes due process was afforded prior to conviction. Instead, once KRS 500.090 is triggered, the ability of parties to retain their property is sharply circumscribed. The initial finding of illegality cannot be challenged (because this was determined by the conviction), and the scope of any forfeiture hearing is limited to the following "innocent" or "unaware" owner exception:

> (4) The trial court shall remit the forfeiture of property when the lawful claimant:
>
> (a) Asserts his or her claim before disposition of the property pursuant to this section;
> (b) Establishes his or her legal interest in the property; and
> (c) Establishes that the unlawful use of the property was without his or her knowledge and consent . . . .

KRS 500.090(4).

Thus, the Penal Code forfeiture provisions are logical and internally consistent. Once a person is indicted and convicted for an activity prohibited by the Penal Code, if property has been forfeited pursuant to statute, KRS 500.090 is triggered. Due process is protected by the conviction requirement, and absent the assertion of a claim by an "unaware owner," forfeiture is mandatory. *Commonwealth v. Fint*, 940 S.W.2d 896, 897 (Ky. 1997).

The Commonwealth's construction of Chapter 528, by contrast, is incoherent when analyzed within the Penal Code's statutory scheme. The Commonwealth's position and actions in this case can be summarized as follows: it can declare an activity "illegal," obtain a

generalized "probable cause" finding from a circuit court judge in a secret, *ex parte* hearing held without notice to affected parties, seize property, and proceed straight to a forfeiture hearing under KRS 500.090(4), where the owner of the property is limited to arguing that it was an "unaware owner" of the property in question. This all happens with no indictment, no conviction, no trial, or even the naming of any defendant.[18]

This position is deeply flawed. Chapter 528 provides a number of defenses to prosecution under the gambling statutes and a criminal defendant always has the right to litigate jurisdictional defenses. However, under the Commonwealth's position and the trial court's reasoning, these defenses can never be asserted and become superfluous.

Moreover, the offenses alleged by the Commonwealth require that the Commonwealth prove that the defendant "advanced," "profited from," or "intended to advance or profit from" gambling activity. KRS 528.020-528.030. The Commonwealth introduced no such proof, and there has been no such finding. Under the Commonwealth's approach, it need never prove beyond a reasonable doubt that any individual or entity over whom it can assert proper jurisdiction engaged in a criminal act.

Instead, the Commonwealth's position is that, once it shows "probable cause" in a closed, *ex parte* hearing, and finds a judge to issue a seizure order, then the initial allegation of criminality cannot be challenged and none of its evidence can be tested.[19] It need never prove beyond a reasonable doubt that the owner of property was more than a player; an activity was not

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[18] Indeed, the Commonwealth has charged no one with any criminal wrongdoing in this action. In fact, it has not specified any activity occurring within the Commonwealth that is illegal.

[19] This concern is only amplified by review of the Commonwealth's closed, *ex parte* "probable cause" hearing on September 18, 2008. In the seventy-eight minute proceeding, counsel made numerous unchallenged, unsubstantiated assertions. The Commonwealth's key fact witness, Officer Gregory Howard, needed three tries to identify the purported "device" used to gamble in the Commonwealth. He first identified "software" as the device used to gamble. Asked again, he identified "the website." Only after that did he identify the "domain name" as the alleged gambling device. (Tape, Exhibit L at 03:15:09 to 3:15:44 p.m.).

charitable; a party advanced, profited from or intended to advance or profit from gambling activity; or even that an activity like poker qualified as gambling activity.

For example, an issue raised in this case is the question of whether poker is a game of chance or skill. This is a possible defense to a criminal charge of promoting gambling. However, under the Commonwealth's scheme, a person can be deprived of property under the Penal Code without ever having opportunity to make that argument. The Commonwealth apparently believes that it may file a civil, *in rem* action under KRS 528.100 against property where poker is promoted and advanced. It argues that it can institute a secret, *ex parte* hearing and persuade a court to find "probable cause" that KRS Chapter 528 was violated. The court in secret could order seizure of any equipment used or possessed in the poker operation. The poker operation then would be left to seek its relief in KRS 500.090. There, however, it could not challenge the probable cause finding or assert the "game of skill" defense.[20] KRS 500.090 provides for remission only where a violation was found and the owner shows he was unaware of the violation.

Finally, the trial court made a series of unsubstantiated assertions regarding the legislative intent underlying KRS 528.100.[21] It is clear, however, that the General Assembly did not determine "to punish all forms of gambling," as the trial court asserted, when it enacted Chapter 528. Prior to 1974, gambling, other than on horse racing at a licensed track, was strictly prohibited in all forms. The General Assembly expressly limited the reach of the anti-gambling statutes when it enacted Chapter 528:

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[20] *See generally* Br. of *Amicus Curiae* Poker Players Alliance, *Interactive Media Ent'mt & Gaming Ass'n, Inc. v. Wingate*, 2009 WL 142995, 2008-CA-2036, Jan. 20, 2009 (In record of companion petition 2008-CA-2036).

[21] For example, it states that "[i]t would be absurd for our General Assembly to emphasize the pernicious nature of gambling within the state and ... to punish all forms of gambling, yet restrict the remedial measures made available to its law enforcement agents."

> Under the Kentucky Penal Code, no criminal sanctions are imposed against the player. The controversial proposition, not peculiar to Kentucky, making every person who gambles in any manner whatsoever subject to a criminal penalty, unless he gambles within the confines of a licensed racetrack, is eliminated. Previously, KRS 436.270 imposed criminal sanctions against the card or dice player as well as the player of other gambling devices, and KRS 436.200 made it a crime for a person to engage "in any hazard or game on which money or property is bet, won or lost . . . ." Thus, players at a church or charitable bingo game and players of wheels at a social picnic or county fair are subject to criminal penalties. Such activity is commonplace and there is in actuality no widespread condemnation of the conduct. Recognition of these facts is the principal reason for excluding the player from criminal liability.

Kentucky Crime Commission/LRC Commentary to KRS Chapter 528 (1974).

Therefore, in 1974, the General Assembly acknowledged that gambling is commonplace. Consistent with this, KRS 528.010(7) expressly allows the defense of "player" to any prosecution under Chapter 528. The General Assembly actually decriminalized some gaming activities. The General Assembly contemporaneously chose to extinguish the civil forfeiture procedure about which it expressed concern. The General Assembly expressed its intent quite clearly in 1974, and that intent is contrary to the assertions of the trial court.

The Commonwealth made up, and persuaded the trial court to adopt, an unauthorized civil forfeiture procedure that flouts the language, legislative history, and expressed intent of the General Assembly. This secret "process" offers no notice to a property owner of the nature of the specific allegations, no opportunity to contest the Commonwealth's assertions of criminality, no opportunity to test the Commonwealth's evidence, nor any opportunity to allow the property owner to assert defenses for a charge under Chapter 528. The trial court simply had no jurisdiction to act as it did, and this court should issue a writ prohibiting it from taking further action and dismissing the case in its entirety.

B. Chapter 218A's forfeiture process is irrelevant to the Penal Code.

The Commonwealth inappropriately relies upon cases interpreting the statute authorizing forfeiture of controlled substances under KRS 218A.410. (*See* Reply Brief of Com. on In Rem Seizure of Domain Names and Standing of Intervenors, Oct. 6, 2008, at 2) (citing, *e.g., Smith v. Commonwealth*, 205 S.W.3d 217 (Ky. App. 2006)). These cases are not analogous, however, because Chapter 528 is located within the Kentucky Penal Code and KRS 500.090 is applicable only to violations of the Penal Code, while Chapter 218A is not part of the Penal Code and contains separate forfeiture provisions. The Attorney General saw this distinction over thirty years ago:

> KRS 500.090 sets out the forfeiture provisions applicable to the Kentucky Penal Code. Each reference under this provision specifically limits itself to the Penal Code. The scope of this section is therefore only applicable to the forfeiture of property used or possessed in violation of the Code. . . . [I]t is clear that Chapter 218A, dealing with controlled substances, is not considered a part of the code.

OAG 77-734.

Chapter 218A sets out a procedure for a civil action. The Penal Code does not.

KRS Chapter 218A outlines a detailed procedure for seizure and forfeiture of controlled substances and property used to manufacture and distribute them. KRS 218A.410-218A.415. Controlled substances themselves can be "seized and summarily forfeited to the state," even if the owner is unknown. KRS 218A.410(1)(b). Other property, however, is subject to civil standards of preponderance of the evidence to show it was not traceable to the controlled substances. *Harbin v. Commonwealth*, 121 S.W.3d 191, 195-96 (Ky. 2003). "[I]t is clear from the language contained in 218A.410, that the Legislature intended for an individual to be afforded the basic constitutional protections of due process prior to forfeiture of <u>otherwise legal property</u>." *Olden v. Commonwealth*, 203 S.W.3d 672, 678 (Ky. 2006).

The "statutorily-mandated burdens of proof, and presumptions favoring the Commonwealth, render these forfeiture actions more akin to a civil proceeding that to a criminal trial . . . ." *Smith v. Commonwealth*, 205 S.W.3d 217, 222 (Ky. App. 2006). Moreover, KRS 218A.410, unlike forfeiture provisions under the Penal Code, allows for judicial discretion in determining whether the property is traceable to a controlled substances transaction. *Olden*, 203 S.W.3d at 678 ("[T]he trial court had discretion in finding whether Appellant has indeed met his burden in rebuttal and ultimately ordering the forfeiture . . . .").

This makes sense. The statute allows seizure and immediate forfeiture of controlled substances, because they are illegal *per se*. However, for "otherwise legal property"—a car allegedly used to transport illegal drugs, for example—it requires the Commonwealth to make a showing that the property was traceable to the drug transaction, then gives the owner an opportunity to prove otherwise. The trial court, after a public hearing or trial, has discretion whether to order forfeiture of the property. In short, Chapter 218A provides a due process procedure for the Commonwealth to seek forfeiture of property using civil burdens of proof. It is, therefore, a civil forfeiture proceeding.

The forfeiture provisions within the Penal Code are very different from those found in Chapter 218A. A "device" is only illegal and subject to forfeiture if it: (1) meets the statutory definition of "gambling device" under KRS 528.010(4); and (2) is possessed or used in violation of Chapter 528. The offenses the Commonwealth has alleged require a finding that the party "advanced," "profited from," or "intended to advance or profit from" gambling activity. KRS 528.020-528.030. Upon such a showing beyond a reasonable doubt, the gambling device "is forfeited."

For example, a deck of cards is not analogous to cocaine, because a deck of cards by itself is not illegal in the Commonwealth. Cards become subject to forfeiture only when used to advance or profit from gambling activity. *See* KRS 528.020(1); KRS 528.030(1). This is the key distinguishing characteristic between offenses triggering KRS 500.090 under the Penal Code and controlled substance offenses under Chapter 218A. The Commonwealth, under the Penal Code, has the burden of proving this element of intent and the rest of its case under criminal burdens of proof. Due process is provided prior to forfeiture by the criminal trial process under the Penal Code.

C. These forfeiture proceedings are criminal, not civil, proceedings.

The Kentucky Supreme Court has answered the question of whether the Penal Code forfeiture provisions are punitive. In *Commonwealth v. Fint*, a defendant entered a guilty plea to four counts of felony theft, and the Commonwealth moved for forfeiture of a truck used in the theft. 940 S.W.2d 896, 896. The theft chapter in the Penal Code has a forfeiture provision similar to KRS 528.100 mandating that property "used in commission or furtherance" of a theft offense "shall be forfeited as provided in KRS 500.090." *Id.* at 897; KRS 514.130(1). The trial judge denied the Commonwealth's motion to forfeit the truck, and the Court of Appeals affirmed. *Id.*

The Supreme Court reversed, noting that the forfeiture statute gave the trial judge no discretion; forfeiture was mandatory. *Id.* "When a statute mandates forfeiture of property used in a criminal offense, the forfeiture amounts to an additional penalty for the offense." *Id.* (citing *Austin v. United States*, 509 U.S. 602 (1993)) (emphasis added). The forfeiture provisions under the Penal Code are punitive and criminal in nature.

Both the Commonwealth and trial court cited *United States v. Ursery*, 518 U.S. 267 (1996), as justification for this action. However, *Ursery* simply stands for the proposition that the key distinction between a criminal and civil forfeiture is whether it was intended to be punitive or remedial in nature. Because the Supreme Court has already held that the mandatory forfeiture provisions under the Penal Code are punitive, *see Fint*, it stands to reason that a punishment under the Penal Code would require a conviction before it is enforced. Therefore, even under *Ursery*, KRS 528.100 and KRS 500.090 are criminal in nature, requiring a criminal proceeding and a conviction prior to forfeiture.

IV. INTERNET GAMBLING DOES NOT VIOLATE KENTUCKY STATUTES.

The Commonwealth is incorrect in its unceasing assertions that the 141 Internet domain names are devices that enable "illegality." The Commonwealth has not shown that any element of any Kentucky gambling offense has been committed within the Commonwealth.[22] The General Assembly in 1974 decriminalized gambling by gamblers, and it has never prohibited any form of Internet gambling, as other states have.

A Kentucky circuit court lacks subject matter jurisdiction to adjudicate alleged criminal acts unless they are committed in Kentucky. *Commonwealth v. Cheeks*, 698 S.W.2nd 832, 834 (Ky. 1985). "In simple terms, the commission of a statutory offense in Kentucky gives rise to

[22] Remarkably, the Commonwealth's investigators did not even gamble on all Web sites they visited by using the 141 Internet domain names. During the secret, *ex parte* hearing on September 18, 2008, the trial court asked counsel for the Commonwealth if investigators employed by the Commonwealth placed bets on all sites. Counsel answered, "Just about." (Tape, Exhibit L at 2:18:00 p.m.) Counsel stated that investigators were not able to gamble on sites reached through some of the 141 domain names. (*Id.* at 2:17:50 to 2:20:40 p.m.) However, the trial court did not compel counsel to specify those sites on which gambling occurred and those on which it did not occur. This raises additional, serious questions as to how the trial court reached its "probable cause" finding as to any specific domain name, and how venue could have been proper for a showing of criminal conduct as to any name. Furthermore, counsel for the Commonwealth argued that the offense of promoting gambling occurred even on those sites where investigators were unable to gamble because such sites advertised gambling. (*Id.* at 2:18:25 to 2:18:32 p.m.) There is no prohibition in Kentucky statutes upon advertising, and such commercial speech is protected by the First Amendment. Therefore, this is a patently absurd interpretation of law. It also illustrates the unfairness and due process violations of the secret, *ex parte* hearing process from which there is no appeal. The trial court did not question counsel's assertion that advertising gambling on Web sites constitutes a criminal offense in Kentucky. (*Id.*) These unchallenged assertions illustrate the fundamental unfairness of the process invented by the Commonwealth.

the authority i.e. 'jurisdiction' of the courts of this state to preside over the prosecution of the case." *Id.* (emphasis added). The Penal Code sets this out:

> Except as otherwise provided in this section, a person may be convicted under the law of this state of an offense committed by his own conduct or the conduct of another for which he is legally accountable when:
> (a) Either the conduct or the result which is an element of the offense occurs within this state; ...

KRS 500.060. (emphasis added).

To determine whether any alleged illegal conduct occurred in Kentucky, it is necessary to analyze statutory elements. The trial court appeared to operate under the misconception that gambling constituted the illegal act. In the secret, *ex parte* hearing, the Commonwealth stated that it "created a team which engaged in at least 500 man-hours on-line, randomly accessing various internet gambling websites available in Kentucky." The circuit court concluded that domain names "are being used in connection with illegal gambling activity within the Commonwealth." Nothing in the opinion elaborates or specifies how elements of statutory violations were shown.

However, there is nothing illegal in Kentucky in "accessing various internet gambling websites." KRS 528.010(7) defines "player" as "a person who engages in any form of gambling solely as a contestant or bettor," without receiving profit "other than personal gambling winnings" and without "otherwise rendering any material assistance to" operating the gambling activity. "The status of a 'player' shall be a defense to any prosecution under this chapter." KRS 528.010(7). Gambling, therefore, is not prohibited. The secret testimony did not establish that any players violated Chapter 528.

Rather, the Commonwealth alleges violations of KRS 528.020, "Promoting gambling in the first degree," and KRS 528.030, "Promoting gambling in the second degree." A person may

be guilty of those offenses "when he knowingly advances or profits from unlawful gambling activity." A person commits first-degree promoting by also "setting up or operating a gambling device." (*Id.*) A person advances gambling activity when, "acting other than as a player, he engages in conduct that materially aids any form of gambling activity." KRS 528.010(1).

Promoting gambling is not a "result" offense such as homicide or assault, in which the result of death or bodily injury is an element of the crime. *Commonwealth v. Hager*, 41 S.W.3d 828, 831 (Ky. 2001). The elements of promoting gambling all entail conduct of those who allegedly commit the crime. Accordingly, under KRS 500.060, the relevant jurisdictional inquiry is whether such conduct occurred "within this state."

Under KRS 528.100, to successfully seek forfeiture of a gambling device, the Commonwealth must prove that someone within this state possessed or used it to advance or profit from gambling. But, the Commonwealth admits that "owners of the Domain Defendants are purposely located outside the United States." The Commonwealth admits that all alleged acts that constitute a possible crime occurred outside Kentucky. The Commonwealth does not allege that any person while in Kentucky profited from gambling activity. The Commonwealth does not allege that anyone while in Kentucky committed any act advancing gambling.

The forfeiture provision of KRS 528.100 simply cannot be triggered where there was no possession or use of a gambling device "in violation of this chapter." Therefore, there is no construction of facts in this case under which the trial court could have jurisdiction over any conduct alleged by the Commonwealth.

V. THE DOMAIN NAMES ARE NOT SUBJECT TO JURISDICTION IN KENTUCKY.

A. The Trial Court Violated The Due Process Clause.

The Internet domain names are not subject to *in rem* jurisdiction in Kentucky. Any action by a Kentucky court with regard to the domain names is void under the Due Process Clause of the Fourteenth Amendment because the names are not located within the jurisdiction of Kentucky courts.

It is well settled that *in rem* jurisdiction is valid within a state only if the property is within that state. "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). *See also Durfee v. Duke*, 375 U.S. 106, 107-08 (1963) ("The Nebraska court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska."). A state's attempt to exert *in rem* jurisdiction over property outside the state violates due process and is presumptively invalid. *Hanson*, 357 U.S. at 246-50.

Kentucky recognizes that this fundamental principle applies to forfeiture laws. *Hickerson v. Commonwealth*, 140 S.W.2d 841, 843 (Ky. 1940) (holding that a court may consider whether property has been forfeited "provided the property is found within its jurisdiction"). The trial court here simply has no jurisdiction over the domain names.

The trial court misstated the holding of *Shaffer v. Heitner*, 433 U.S. 186 (1977). It erroneously cited *Shaffer* for the proposition that *in rem* actions only require "minimum contacts" between the forum state and the property, and it erroneously held that *Shaffer* somehow abrogated the basic requirement that only property located within the jurisdiction of the court is subject to an *in rem* action. *Shaffer* actually held that in addition to the fundamental requirement that property subject to *in rem* jurisdiction be located in the state, the state must

have an interest in the persons who own the property, as analyzed through *International Shoe*'s "minimum contacts" prism. 433 U.S. at 205-12. Thus, *Shaffer* in fact limited *in rem* jurisdiction by holding that physical presence of the property alone does not give the state a *per se* right to seize it.

In *Shaffer*, the state of Delaware attempted to seize non-resident defendants' stock located in Delaware in order to force their consent to personal jurisdiction. *Id.* at 189-92. In finding the action unconstitutional, the Court reasoned, "[I]f a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible." *Id.* Thus *Shaffer* repudiated the very tactic being employed by the Commonwealth in this case.

B. Domain Name *Situs* Is In The District Of The Registrar.

The *situs* of intangible property is one of two locations: (1) the domicile of the property owner; or (2) the location of the intangible instrument (i.e., a stock or bond certificate), if there is one. *Commonwealth v. Bingham's Adm'r*, 223 S.W. 999, 1000 (Ky. 1920); *see also, e.g., In re De Lano's Estate*, 315 P.2d 611 (Kan. 1957) (holding that Kansas courts had no jurisdiction to adjudicate dispute over stock and bond certificates located in Missouri). Congress applied this principle in the Federal Anticybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. § 1125(d), *et seq.*, as to domain names.

To regulate Internet traffic, the Internet Corporation for Assigned Names and Numbers ("ICANN") was established in 1998. *See* http://www.icann.org/tr/english.html (last visited May 19, 2009). An international, quasi-governmental partnership, ICANN allocates Internet space and oversees the Domain Name System ("DNS"). Internet users may reach Web sites by entering Internet Protocol ("IP") numbers, which might appear as something resembling

"192.0.34.163," into their Web browsers, or by entering domain names instead, e.g., "www.icann.org." ICANN licenses domain name "registrars," which in turn grant domain names to applicants, or "registrants." *Mattel, Inc. v. Barbie-club.com*, 310 F.3d 293, 296 n.2 (2d Cir. 2002). For a fee, the registrant obtains the exclusive right to use a domain name for a specified time. The registrar holds, and holds title to, a certificate, which the ACPA establishes is a "document sufficient to establish [a court's] control and authority regarding" the name's use. 15 U.S.C. § 1125(d)(2)(C)(ii).

No Kentucky case or statute addresses domain name *situs*. However, the ACPA allows *in rem* jurisdiction over a domain name only "in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located." *Id.* § 1125(d)(2)(A). Such district is the *situs* of a domain name in an *in rem* action. *Id.* § 1125(d)(2)(C).

In *Mattel*, the trial court dismissed an action brought by Mattel against several domain names under the ACPA in the Southern District of New York. The trial court found lack of *in rem* jurisdiction on the ground that the defendants' registrar was in Maryland. *See Mattel*, 310 F.3d at 294. The Second Circuit affirmed, stating that allowing an *in rem* action in any federal court against a domain name accessible in every state may offend due process or international comity. *See Mattel*, 310 F.3d at 302. Requiring a "nexus" between the registrar and the court "satisfies due process." *Mattel*, 310 F.3d at 302. This analysis has been followed in nearly all litigation under the ACPA. *See, e.g., Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214 (4th Cir. 2002) (holding Virginia had *in rem* jurisdiction consistent with due process when domain name was registered there). At least one court has adopted this reasoning in a non-ACPA case. *See Office Depot, Inc. v. Zuccarini*, No. C 06-mc-80356 SI, 2007 WL 2688460, at *4

(N.D. Cal. Sept. 10, 2007) ("[T]his Court will follow Congress' suggestion in ACPA that a domain name exists in the location of both the registrar and the registry.").

Permitting any court anywhere in the U.S. to claim *in rem* jurisdiction over a domain name and thus requiring any party that registers a domain name to defend itself in any jurisdiction, would surely "offend traditional notions of fair play and substantial justice" that anchor the due process requirement. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Here, the trial court was without *in rem* jurisdiction.

C. Domain Names Have Not Consented To Jurisdiction In Kentucky

The Commonwealth argues that the trial court has jurisdiction over Defendants by virtue of the *ICANN Uniform Domain Name Dispute Resolution Policy* ("UDRP"). It argues that all domain name holders must comply with the UDRP and that the UDRP requires they consent to jurisdiction "through any court . . . that may be available." *Id.*; *see also* ICANN UDRP § 5.[23] However, this is not the case. The UDRP does not require registrants to submit to jurisdiction in Kentucky.

The UDRP was adopted by ICANN in January, 2000, specifically to "permit the owner of a [trade]mark to initiate an administrative complaint against an alleged cybersquatter." 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 25:74.75 (4th ed. 2008). Cybersquatting is the act of a person who "registers, traffics in, or uses a domain name that—in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark . . . ." 15 U.S.C. § 1125(d)(1)(A)(ii). Cybersquatting typically occurs when a person registers an unused domain name of a famous

[23] Available at http://www.icann.org/en/dndr/udrp/policy.htm (last visited May 19, 2009).

person or corporation and attempts to sell the rights to it for substantially more than the standard price.[24]

The UDRP requires all domain name registrants to submit to a mandatory administrative proceeding if a third party alleges that a name infringes upon rights in a trademark or service mark, if the registrant has no "legitimate interests" in the name, and if the registrant's registration and use of the name were in bad faith. UDRP § 4. The UDRP as a whole is concerned only with cybersquatting. It is irrelevant to a state's attempt to seek forfeiture of a domain name for an alleged criminal violation.

Additionally, the Commonwealth does not cite any case or UDRP decision supporting the idea that domain names have assented to jurisdiction in Kentucky. Section 5 states in its entirety that "[a]ll other disputes between you and any party other than us regarding your domain name registration that are not brought pursuant to the mandatory administrative proceeding provisions of Paragraph 4 shall be resolved between you and such other party through any court, arbitration or other proceeding that may be available." UDRP § 5 (emphases added). The ICANN Staff Report[25] stated:

> [T]he basic two-part approach of the posted documents is fair to all parties (in the case of accredited registrars, domain-name holders have themselves submitted to jurisdiction in the location of the registrar), but that an additional option should be added so that in all cases the submission to jurisdiction can, at complainant's option, be at the location of the domain-name holder . . . .

ICANN—Second Staff Report on Implementation Documents for the UDRP § 4.9 (emphases added). This makes clear that the intent of the policy is that, when a covered dispute arises, the

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[24] The UDRP and ACPA were specific responses to cybersquatting. For example, in *Charo Rasten v. URLPro*, NAF FA0412000384835 (Feb. 2, 2005), decided under the UDRP, the defendant registered over 900 domain names of famous names and marks and registered *charo.com* shortly after the performer celebrity known as "Charo" inadvertently allowed her own registration of the same domain name to lapse. Defendant's action was a bad faith attempt to prevent "Charo" from re-registering her name.

[25] *See* http://www.icann.org/udrp/udrp-second-staff-report-24oct99.htm (last visited May 19, 2009.)

holder should submit either in the location of the registrar or that of the domain name holder. This provides only two jurisdictional options, and neither one is the Kentucky courts. Thus, if a woman in Frankfort, Kentucky registers a domain name to share pictures with family in other states, it is not plausible that ICANN intends that she submit to jurisdiction in Asia should a dispute emerge there regarding the registration.

Additionally, by its plain language section 5 applies to all other disputes regarding domain name registration. This case does not concern registration; at issue is use. Therefore, the UDRP does not give Kentucky courts a basis for exerting jurisdiction in this action. There is no dispute regarding the domain registrations, and the domain names have not consented to jurisdiction regarding this dispute.

VI. THE TRIAL COURT'S CLOSINGS VIOLATED THE FIRST AMENDMENT.

The trial court unconstitutionally closed the case file and the proceedings in this action between August 26, 2008 and the issuance of an order unsealing the record on September 23, 2008, all in violation of the First Amendment. This rendered the secret, *ex parte* hearing conducted September 18 invalid, and it rendered the trial court's orders of September 18 and October 16 invalid because of their reliance upon the invalid hearing.

The First Amendment right of access is most commonly asserted by representatives of the press. However, the right is one held by any member of the public, with the press commonly exerting the right merely as "the public's representative." *Courier-Journal and Louisville Times Co. v. Peers*, 747 S.W.2d 125, 128 (Ky. 1988). In this case, iMEGA is asserting this right of access as a member of the public.

The United States Supreme Court has made clear that the First Amendment to the United States Constitution mandates a strong presumption of open judicial proceedings and records.

Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 14-15 (1986) ("*Press-Enterprise II*"). "Openness . . . enhances both the basis fairness of the . . . trial and the appearance of fairness so essential to the public confidence in the system." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-71 (1980).

The Supreme Court has reiterated the strong presumption of openness in courts throughout the years and has imposed an extraordinary burden on those who would seek closure. *See Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658 (Ky. 1983); *Peers*, 747 S.W.2d 125. The presumption is overcome only in the face of an overriding interest. So strong is the presumption of public access to court proceedings and records that the Supreme Court in *Meigs* mandated that, before any closure, there must be a public hearing at which the "trial judge should consider the utility of other reasonable methods available to protect the rights of the [party] short of closure." 660 S.W.2d at 663.

If a trial court decides that closure is essential to protect the interest alleged by the party seeking closure, it must make specific written findings as to why the records should be sealed. *See id.* Second, the "burden of proof is on those who would infringe the First Amendment right of access, not on those who assert it." *Id.* (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59, 569-70 (1976)). Third, the burden is stringent, requiring:

(a) specifically identify a fundamental right that so outweighs the public's constitutional and common law rights of access to court records that "in no other way can justice be served" but to seal them, *Lexington Herald-Leader Co., Inc. v. Tackett*, 601 S.W.2d 905, 906 (Ky. 1980);

(b) "show that the asserted right or interest probably cannot be adequately protected by less restrictive alternatives to closure," *Meigs,* 660 S.W.2d at 663; and

(c) "show that the right or interest he seeks to protect . . . will be protected by" closure.

Id. The U.S. Supreme Court has further held that findings must be "specific enough that a reviewing court can determine whether the closure order" was proper. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*").

Here, the trial court sealed the file by issuance of a perfunctory order signed August 26, 2008. It said simply that the record "shall be kept under seal . . . until further orders of this Court. The Clerk shall allow the record to be reviewed only by parties and counsel of record." It made no other findings.

Beyond doubt, the trial court violated the requirements of *Meigs* and related Kentucky cases. The trial court failed to make specific written findings as to why the records should be sealed. It failed to specifically identify any fundamental right that so outweighed the public's constitutional and common law rights of access to court records that "in no other way can justice be served" but to seal them, as set out in *Lexington Herald-Leader Co., Inc. v. Tackett.* It failed to "show that the asserted right or interest probably cannot be adequately protected by less restrictive alternatives to closure," as *Meigs* requires. It also failed to show how the state's interest would be protected by closure, or whether the court considered the utility of other reasonable methods available to protect the rights of the state's claimed interest, as set out in *Meigs*. Nor was the Order of August 26 "specific enough that a reviewing court can determine whether the closure order was properly entered," as *Press Enterprise II* requires.[26]

Therefore, the August 26 order sealing the records was invalid and a violation of the First Amendment and due process rights of those with interests in the domain names.

[26] At the secret, *ex parte* hearing on September 18, 2008, the trial court made only one statement regarding the closing of the record. The court asked counsel for the Commonwealth, "Do you still want the record sealed in this?" (Tape, Exhibit L at 3:18:40 to 3:18:44 p.m.) The trial court made no inquiry into, and took no testimony regarding, the First Amendment implications of the closing.

Likewise, the closure of the hearing on September 18 was unconstitutional and invalid. The trial court issued no order authorizing the closing or indicating that it had conducted a hearing on any of the related First Amendment issues.

Therefore, both the seizure order issued September 18 and the trial court's order of October 16, 2008 based upon evidence put forth *ex parte* and in secret on September 18 violated the First Amendment and due process rights of the registrants.

VII. THE TRIAL COURT'S SEIZURE VIOLATED THE DORMANT COMMERCE CLAUSE.

The trial court's seizure order violated the dormant Commerce Clause. Because a state trial court has no authority to seize Internet domain names used in worldwide commerce, the seizure order represents an ongoing and continuing violation of the Constitution of the United States. iMEGA's members continue to be irreparably harmed by the fact that its domain names continue to be subjected to the unconstitutional order.

A. The Seizure Order Was *Per Se* Invalid.

Article 1, Section 8 of the Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The dormant Commerce Clause cases decided by the United States Supreme Court generally involve state attempts to regulate interstate commerce. It is also clear that no state can regulate commerce with foreign nations.

The Supreme Court has made clear that the dormant Commerce Clause prohibits states from discriminating against interstate commerce in order to favor in-state economic interests over out-of-state economic interests. *See Am. Trucking Ass'n v. Mich. Pub. Service Comm'n*, 545 U.S. 429, 433 (2003); *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). Since *Gibbons v. Ogden*, 9 Wheat. 1, 188, 6 L. Ed. 23 (1824), the Court has recognized the

implied power of the Commerce Clause to strike down regulations interfering with interstate commerce, especially a state's practice of economic protectionism. In addition, foreign commerce is afforded even broader protection than is interstate commerce. *Japan Line Limited v. County of Los Angeles*, 441 U.S. 434, 435-36 (1979). States are restrained from excessive interference in foreign affairs. *Id.* at 448-51.

As the Supreme Court explained in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786, 1792 (2007), a state law or action motivated by economic protectionism is subject to a "virtually *per se* rule of invalidity" that can "only be overcome by a showing that the state has no other means to advance a legitimate local purpose." *See also Brown-Forman Distillers v. New York State Liquor Authority*, 476 U.S. 573 (1986). Thus, a state action motivated by protectionism is subject to the "strictest scrutiny" that is "so heavy that 'facial discrimination' by itself may be a fatal defect." *See Camps Newfoundland/Owatonna, Inc. v. Harrison, Me.*, 520 U.S. 564, 581-82 (1997).

Accordingly, "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" *Granholm v. Heald*, 544 U.S. 460, 472 (2005), (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994)). In *Granholm*, the Supreme Court struck down under the "virtually *per se* rule of invalidity" statues enacted by Michigan and New York that allowed in-state wineries to sell their wares directly to those state's consumers but—by mandating separate licensure and distribution networks for out-of-state producers—deliberately made it economically difficult for out-of-state wine producers to do so.

Here the Commonwealth's own pronouncements in press conferences and to the media have made it clear that the Governor's motivation for this seizure action is to protect Kentucky's own gaming operations, both now and in the future, while at the same time collecting tax revenues. Governor Beshear, when referring to Internet gambling websites, has called them "leeches on our communities." (Stephenie Steitzer, *Beshear Wins Web Site Round*, Courier-Journal (Louisville, Ky.), Oct. 17, 2008, at B1.) (Attached as Exhibit N). But the real reason for attempting to seize the domain names is to "protect the signature industry," namely horse racing. (*Id.* at R. 239.) Reacting to the trial court's ruling, Beshear stated, "Closer to home, we know they siphon off ten of millions of dollars from legal gaming efforts in Kentucky, such as horse racing, the lottery, and charitable gaming . . . ." (Governor Steve Beshear, "About Kentucky" Radio Commentary (Oct. 17, 2008)).[27] The motive behind this action is to shore up the state's economic interests. The Commonwealth's action amounts to economic protectionism.

If the Commonwealth were truly worried about the dangers of gambling, an easier way would be simply to outlaw gambling among its citizens, including pari-mutuel betting and the lottery, which it has chosen not to do. Moreover, Governor Beshear is supportive—by his own admission—of expanding gambling within the Commonwealth.

State action of this sort constitutes a *per se* violation of the Commerce Clause if done to protect private sector in-state economic interests. Where, as here, the Commonwealth itself is or plans to be an industry actor on its own behalf, this *per se* violation only becomes even more aggravated. This court should issue a writ to enjoin the trial court.

[27] *Available at* http://governor.ky.gov/media/commentary.htm ("Internet Gaming" link) (last visited May 19, 2009). A transcript of the speech is available at Exhibit O.

B. The Order's Burdens On Commerce Outweigh Local Benefits.

Even if the trial court's seizure were not a *per se* violation of the dormant Commerce Clause by virtue of economic protectionism, it would be invalid under the *Pike v. Bruce Church* balancing test because of burdens it places on interstate commerce.

Where a statute regulates evenhandedly "to effectuate a legitimate local public interest," Courts may still find a constitutional violation where "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). "In balancing the burden versus benefit, 'the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.'" *Id.* In *American Libraries Association v. Pataki,* 969 F. Supp. 160 (S.D.N.Y. 1997),

> the court invalidated a New York statute criminalizing the dissemination of material harmful to minors, ruling that the statute violated the Commerce Clause in three particulars: (1) it sought to regulate conduct occurring wholly outside New York state, (2) its burden on interstate commerce far exceeded the benefits of the statute and (3) any regulation of the Internet by the states exposed users to inconsistent regulations.

Am. Booksellers Found. for Free Expression v. Strickland, 512 F. Supp. 2d 1082, 1102 (S.D. Ohio 2007) (quoting *Pataki*, 969 F. Supp. at 169). In other words, state regulation has been deemed violative of the dormant Commerce Clause where it "reached to all Internet communications." *Am. Booksellers,* 512 F. Supp. 2d at 1103.

The application by the trial court of KRS 528.100 to Internet domain names falls well within the *Pataki* test, and in turn the *Pike* test. If this action succeeds, 141 Internet domain names will be forfeited to the Commonwealth. It is unlikely that the Commonwealth plans to proceed against every gaming domain name created on the Internet around the world. It has neither the time, money, nor manpower to do so. If the General Assembly were to outlaw all

gambling within the state, it would have a finite population to regulate, and would likely be more effective in achieving its purported objective. It could then police actions in Kentucky instead of attempting to police the entire world. Through the seizure of domain names, the court beyond question has reached to, and has blocked, Internet communications entirely outside of Kentucky and throughout the world. The burden on those affected communications is absolute, and excessive, far exceeding the benefit of the application of the statute. The chilling effect on interstate commerce is quite real. Subjecting Internet "business transactions to restrictive state regulation threaten[s] its continued development as a means of interstate commerce." Kenneth D. Bassinger, *Note: Dormant Commerce Clause Limits on State Regulation of the Internet: The Transportation Analogy*, 32 Ga. L. Rev. 889 (1998). Clearly the burdens of this action on interstate commerce outweigh any potential benefits to the state, and the application of KRS 528.100 in this manner fails the test under *Pike*.

VIII. THE TRIAL COURT WRONGLY RESTRAINED COMMERCIAL SPEECH.

Domain names are commercial speech protected by the First Amendment. The trial court thus has imposed an unconstitutional prior restraint upon protected speech.

The First Amendment protects commercial speech from unwarranted governmental regulation. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York,* 447 U.S. 557, 561 (1980) (citing *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)). "If the communication is neither misleading nor related to unlawful activity," restrictions by a state are subjected to intermediate scrutiny. *Central Hudson*, 447 U.S. at 564. The state must (1) assert "a substantial interest to be achieved by" any restriction on commercial speech; (2) assure that the regulation is "in proportion to that interest," and (3) assure that "the limitation on expression must be designed carefully to achieve the State's goal."

Id. The restriction on commercial speech "must directly advance the state interest involved," and "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Id.*

Domain names constitute commercial speech. "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Id.* at 561-62. "The rooftops of our past have evolved into the internet domain names of our present. We find that the domain name is a type of public expression, no different in scope than a billboard or a pulpit . . . ." *Taubman Co. v. Webfeats*, 319 F.3d 770, 778 (6th Cir. 2003). Domain names "could be used for 'an expressive purpose such as commentary, parody, news reporting or criticism,' comprising communicative messages by the author and/or operator of the website in order to influence the public's decision to visit that website, or even to disseminate a particular point of view." *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 586 (2d Cir. 2000); *see also Sunlight Saunas, Inc., v. Sundance Sauna, Inc.*, 427 F. Supp. 2d 1032, 1057 (D. Kan. 2006).

Domain names are protected commercial speech if they are "part of a communicative message" and do not infringe on trademark rights. *Planned Parenthood Federation of America, Inc. v. Bucci*, 1997 WL 133313, 10-11 (S.D.N.Y. 1997); *Yankee Publishing, Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267 (S.D.N.Y. 1992).

A state may not "bar a citizen of another State from disseminating information about an activity that is legal in that State." *Bigelow v. Virginia,* 421 U.S. 809, 825 (1975). Billboards that advertise casinos in Indiana and Illinois, for example, are commonly seen in Kentucky, even though casino gambling is illegal in Kentucky.

Domain names serve an expressive purpose, make clear communicative statements about the websites they advertise, and seek to persuade people to visit them. They enjoy First Amendment protection. The trial court seized the names without conducting the intermediate scrutiny analysis required by *Central Hudson.* The government interest is not substantial, the restriction is not in proportion to that interest, and the limitation is not properly drawn.

CONCLUSION

The issues raised in iMEGA's petition have been raised with the Kentucky Supreme Court. The Supreme Court found these arguments "numerous [and] compelling," but held that iMEGA had not established associational standing. It suggested that iMEGA correct the standing problem, re-file its petition with the Court of Appeals, and move to transfer the case to the Kentucky Supreme Court. iMEGA has corrected its standing problems, and is filing contemporaneously with this petition a Motion for Intermediate Relief in this court and a Motion to Transfer this case with the Kentucky Supreme Court

For the reasons stated herein, iMEGA moves this court to immediately stay all proceedings in the Franklin Circuit Court, order the trial court to vacate its Seizure Order of September 18 and its Opinion and Order of October 16, 2008, and to dismiss the underlying action in its entirety.

Respectfully submitted,

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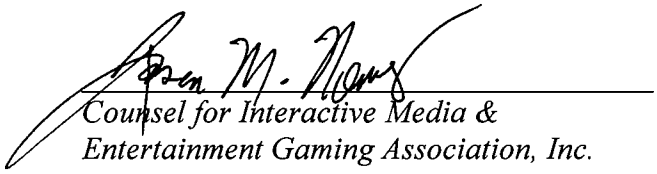
CERTIFICATE OF SERVICE

It is hereby certified that a true copy to the foregoing Petition for Original Proceeding Pursuant to CR 76.36 was served via U.S. Mail, postage prepaid, this 23rd day of March, 2010, upon the following:

Hon. Thomas Wingate, Judge, Franklin Circuit Court, P.O. Box 40601-0678, Frankfort, KY 40601-0678; D. Eric Lycan, William H. May, III, William C. Hurt, Jr., Aaron D. Reedy, Hurt, Crosbie & May, PLLC, 127 W. Main Street, Lexington, KY 40507, and Robert M. Foote, Foote, Meyers, Mielke & Flowers, LLC, 28 North First Street, Suite 2, Geneva, IL 60134, *Counsel for Appellant Commonwealth of Kentucky;* John L.Tate, Ian T. Ramsey, Joel T. Beres, Stites & Harbison, PLLC, 400 West Market Street, Suite 1800, Louisville, KY 40202, Bruce F. Clark, Stites & Harbison, PLLC, 421 West Main Street, Frankfort, KY 40601, and A. Jeff Ifrah, Jerry Stouck, Greenberg Traurig LLP, Suite 1000, 2101 L Street, N.W., Washington, DC 20037, *Counsel for Interactive Gaming Council and vicsbingo.com*; William E. Johnson, Johnson, True & Guarnieri, LLP, 326 West Main Street, Frankfort, KY 40601, Patrick T. O'Brien, Greenberg Traurig LLP, 401 East Las Olas Blvd., Suite 2000, Fort Lauderdale, FL 33301, and Kevin D. Finger, Paul D. McGrady, Greenberg Traurig LLP, 77 West Wacker Drive, Suite 2500, Chicago, IL 60601, *Counsel for playersonly.com, sportsbook.com, sportsinteractive.com, mysportsbook.com, and linesmaker.com*; P. Douglas Barr, Palmer G. Vance II, Alison Lundergan Grimes, Stoll Keenon Ogden PLLC, 300 West Vine Street, Suite 2100, Lexington, KY 40507, *Counsel for goldenpalace.com and goldencasino.com*; Lawrence G. Walters, Weston, Garrou, Walters & Mooney, 781 Douglas Avenue, Altamonte Springs, FL 32714, *Counsel for goldenpalace.com;* Charles M. Pritchett, Jr., Bart L. Greenwald, Joshua T. Rose, Frost Brown Todd LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202-3363, *Counsel for Amicus Curiae Poker Players Alliance;* Michael R. Mazzoli, Cox & Mazzoli PLLC, 600 West Main Street, Suite 300, Louisville, KY 40202, and Timothy B. Hyland, Jason M.A. Twining, Stein, Sperling, Bennett, De Jong, Driscoll & Greenfeig, PC, 25 West Middle Lane, Rockville, MD 20850, *Counsel for Amicus Curiae Network Solutions, LLC;* Laura D'Angelo, Wyatt, Tarrant & Combs, LLP, 250 West Main Street, Suite 1600, Lexington, KY 40507-1746, and Daniel G. Dougherty, eBay Inc., 2065 Hamilton Avenue, San Jose, CA 95125, *Counsel for Amicus Curiae eBay Inc.*; David A. Friedman, General Counsel, William E. Sharp, ACLU of Kentucky, 315 Guthrie Street, Suite 300, Louisville, KY 40202, Matthew Zimmerman, Senior Staff Attorney, Electronic Frontier Foundation, 454 Shotwell Street, San Francisco, CA 94110, and John B. Morris, Jr., General Counsel, Center for Democracy and Technology, 1634 I Street NW, Suite 1100, Washington, DC 20006, *Counsel for Amici Curiae The Electronic Frontier Foundation, The Center for Democracy and Technology, The American Civil Liberties Union of Kentucky, The Media Access Project, The United States Internet Industry Association, The Internet Commerce Coalition, and The Internet Commerce Association.*



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