COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NOS. 2008-CA-002000; 2008-CA-002019; 2008-CA-002036

INTERACTIVE MEDIA ENTERTAINMENT AND GAMING ASSOCIATION, INC. — PETITIONERS

AND

PLAYERSONLY.COM, SPORTSBOOK.COM, SPORTSINTERACTION.COM, MYSPORTSBOOK.COM, LINESMAKER.COM

AND

VICSBINGO.COM AND INTERACTIVE GAMING COUNCIL

v. COMMONWEALTH'S RESPONSE TO CONSOLIDATED PETITIONS FOR WRIT OF PROHIBITION

HON. THOMAS D. WINGATE, JUDGE — RESPONDENT

AND

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

* * * * *

INTRODUCTION 1

STATEMENT OF THE CASE 2

ARGUMENT 7

I. THE GAMBLING ASSOCIATIONS AND PSEUDONYMS DO NOT HAVE STANDING TO PETITION FOR A WRIT OF PROHIBITION 7

A. ONLY A PARTY WITH AN OWNERSHIP INTEREST IN THE PROPERTY HAS STANDING TO CONTEST THE FORFEITURE PROCEEDING 7

1. Seized Property Cannot Appear To Contest Its Own Forfeiture. 8

2. The Trial Court Correctly Held That the Internet Gambling Associations Lack Standing. 9

a. *A Claimant Must Show A Legal Ownership Interest In The Property* 10

b. *Associations Cannot Defend Civil Or Criminal Actions In Lieu Of Their Purported Members* 11

II. THE ILLEGAL GAMBLING DOMAINS SHOULD NOT BE REWARDED WITH THE EXTRAORDINARY REMEDY OF A WRIT OF PROHIBITION 14

A. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO CONDONE AN ADMITTEDLY ILLEGAL SCHEME 14

B. THE ANONYMOUS OWNERS OF THE DOMAIN DEFENDANTS HAVE AN ADEQUATE REMEDY ON APPEAL 16

1. A Writ Is Improper Because Both Petitioners And The Anonymous Owners Have A Remedy By Appeal 16

2. Forfeiture Of The Domains Will Work No Great Injustice To Petitioners Or The Anonymous Owners 17

C. THE TRIAL COURT CORRECTLY ASSERTED IN REM JURISDICTION OVER THE DOMAIN DEFENDANTS. 19

1. The Circuit Courts Have Jurisdiction Of In Rem Civil Forfeiture Actions. 19

2. The Domain Defendants' Use For Illegal Gambling Establishes Sufficient Minimum Contacts With Kentucky. 20

a. *The Domain Defendants Purposefully Created A Substantial Connection With Kentucky* 24

b. *The Forfeiture Action Arises Directly From Domain Defendants' Use In Illegal Gambling Activity* 26

c. *In Rem Jurisdiction Is Proper Over Domains Used To Illegally Gamble In Kentucky* 27

d. *Illegal Gambling Enterprises Cannot Use The Internet To Avoid Kentucky's Proper Exercise Of Jurisdiction Over Illegal Gambling Within Its Borders* 27

3. The Domain Defendants are "located" in Kentucky for Purposes of Civil Forfeiture. 30

4. Forfeiture Of Extra-Territorial Property Is Common And Consistent With Due Process. 37

a. *Though Unnecessary For The Exercise Of Jurisdiction, ICANN Policies Ensure The Effectiveness Of The Forfeiture Of Domain Defendants* 39

5. KRS 528.100 Is A Civil Forfeiture Statute Which Does Not Require A Criminal Conviction. 42

6. The Trial Court Agreed With All Reported Judicial Authority In Holding That Domain Names Are Property. 46

7. The Trial Court Correctly Determined That Domain Defendants Are A "Gambling Device" Under Krs §528.010 50

III. FORFEITURE WOULD NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF PETITIONERS' ANONYMOUS MEMBERS. 56

A. CIVIL IN REM FORFEITURE ACTIONS DO NOT VIOLATE THE DUE PROCESS RIGHTS OF THE ANONYMOUS DOMAIN DEFENDANT OWNERS 56

B. KENTUCKY'S ACTIONS DO NOT VIOLATE THE DORMANT COMMERCE CLAUSE 58

C. THE FIRST AMENDMENT RIGHTS OF THE ANONYMOUS OWNERS HAVE NOT BEEN VIOLATED 61

D. THE FIFTH AMENDMENT RIGHTS OF THE ANONYMOUS OWNERS HAVE NOT BEEN VIOLATED 63

E. THE TRIAL COURT CORRECTLY HELD THAT THE SECRETARY HAS STANDING TO BRING THE UNDERLYING ACTION 64

Comes the Respondent, Commonwealth of Kentucky *ex rel.* J. Michael Brown, Secretary, Justice and Public Safety Cabinet ("Commonwealth"), by and through counsel, and for its Consolidated Response to the Petitions for Writ of Prohibition filed by Interactive Media Entertainment & Gaming Association ("iMEGA"), Interactive Gaming Council ("ICG") and vicsbingo.com; and playersonly.com, sportsbook.com, sportsinteraction.com, mysportsbook.com, and linesmaker.com (the "Group of 5"), states the following:

INTRODUCTION

The underlying action is an *in rem* civil action to forfeit to the Commonwealth of Kentucky 141 Internet Domain Names ("Domain Defendants") that continue to be used as illegal "gambling devices" in violation of KRS Chapter 528. Petitioners are gambling associations or "dot-com" pseudonyms that purport to appear in this matter as surrogates for anonymous offshore entities engaged in illegal unregulated gambling within Kentucky. The illegal internet gambling operators may not, however, petition this Court through the guise of the purported associations or "dot-com" pseudonyms, because those associations and pseudonyms have no standing as "lawful claimants" or otherwise. Their appearance is a concerted attempt to allow the absconding operators to avail themselves of the protections of the Kentucky judicial system on the one hand, while simultaneously mocking both the judicial system and Kentucky law on the other.

Petitioners' argument, distilled to its essence, is that the illegal gambling operations can continue to purposefully target Kentucky residents from offshore, systematically violate Kentucky law and reap profits from illegal gambling in Kentucky - while the courts of the Commonwealth are powerless to act. Rather than countenance this scheme by allowing the illegal internet gambling enterprises to defend their property through surrogates, this Court

should affirm the Franklin Circuit Court's well-reasoned exercise of jurisdiction to seize the illegal gambling devices that continue to be used to conduct this illegal enterprise.

STATEMENT OF THE CASE

Kentucky has continually exercised its police power to enforce a strong public policy prohibiting unlicensed gambling. KRS Chapter 528 makes it illegal to conduct, promote, advertise, own, profit from, or conspire to profit from an illegal gambling operation – criminalizing virtually every aspect of unlicensed gambling. It is a felony under KRS 528.020 to knowingly advance or profit from unlawful gambling activity by engaging in bookmaking or setting up and operating a gambling device, and a misdemeanor under KRS 528.030 to knowingly advance or profit from unlawful gambling activity.[1]

In addition to the comprehensive civil and criminal remedies of KRS Chapters 372 and 528, enacted to stop illegal and unlicensed gambling, the General Assembly by KRS 528.100 mandated the forfeiture of any illegal gambling device used in promotion of illegal gambling. KRS 528.100 provides that "[a]ny 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… ." This critical tool allows recovery against the offending property even where the owners are disguised, owned through proxy, or located in foreign jurisdictions.

On August 26, 2008, pursuant to KRS 528.100 and KRS 500.090, the Commonwealth brought the underlying *in rem* civil forfeiture action (the "Circuit Court Action")[2] against 141 named Domain Defendants to stop unregulated, unlicensed illegal Internet gambling that is

---

[1] A person "advances gambling activity" when, acting other than as a player, he engages in conduct that materially aids any form of illegal gambling activity. "Conduct that materially aids any form of gambling activity" includes conduct directed toward: establishment of the particular game; acquisition or maintenance of premises, equipment, or apparatus; solicitation or inducement of persons to participate; actual conduct of the playing phases; arrangement of any of its financial or recording phases; or any other phase of its operation. KRS 528.010. A person "profits from gambling activity" when he receives or agrees to receive money pursuant to an agreement to participate in the proceeds of illegal gambling activity. *Id.*

[2] A copy of the Commonwealth's Second Amended Complaint is attached as Exhibit A.

occurring within the Commonwealth in blatant disregard for, and in violation of, Kentucky law. Unlicensed, unregulated internet gambling is a particularly pernicious form of illegal gambling because it provides extraordinary ease, availability and anonymity. Wagers are accepted in an unregulated underworld without effective age verification, identification, or financial accountability. Minors can illegally gamble without the knowledge of parents, and persons can instantly lose retirement savings or college funds in secrecy. Because of these threats, the Domain Defendants' internet gambling activities are illegal in all 50 U.S. states.

Due to the nature of the property and the contractual rules regarding domain disputes, the Commonwealth moved for an Order of Seizure. Fearing that the owners of Domain Defendants would transfer, redirect, conceal or otherwise try to evade seizure of the *res* if they became aware of the *in rem* forfeiture action, Judge Wingate temporarily sealed the case file until the Motion for Seizure could be heard.

On September 18, 2008 the Court conducted a probable cause hearing on the Motion for Seizure. At the hearing, the Commonwealth presented "overwhelming" evidence that the Domain Defendants were gambling devices used in connection with illegal gambling activity in Kentucky.[3] On the basis of the Commonwealth's evidence, the Trial Court found that probable cause existed to support a finding that the Domain Defendants were being used within Kentucky in violation of KRS Chapter 528. The Trial Court ordered that Domain Defendants be transferred to an account of the Commonwealth and that they "not subsequently be transferred, moved, cancelled or otherwise affected except by instruction of the Plaintiff or [the] Court..." A forfeiture hearing was scheduled for September 25, 2008 to allow any claimants claiming an ownership interest in the seized Domain Defendants to appear and assert whether the claimants

[3] The Commonwealth's evidence included computer screenshots of the gambling or promotional activity, email correspondence from the operators, account statements of electronic bank transactions, the reports of the Commonwealth's investigators, and video evidence of the illegal activity at each domain. Illustrative examples are attached as Exhibit B.

qualified for return of the property pursuant to KRS 500.090. A copy of the September 18, 2008 order is attached as Exhibit C.

The Commonwealth transmitted the Court's order to the registrars of each of the Domain Defendants, notifying each of the seizure and a forfeiture hearing originally scheduled for September 25, 2008, later continued until September 26, 2008. At the forfeiture hearing on September 26, 2008, no one claiming to be a lawful claimant appeared to assert an interest in any of the Domain Defendants. Instead, the owners of the Domain Defendants sought to sidestep civil liability by sending proxies. ICG and iMEGA, two internet gambling trade associations, appeared at the hearing hoping to defend purported members' interests in the illegal gambling devices[4]. Both claim that their purported members are owners of some of the Domain Defendants; however, IGC[5] and iMEGA have, so far, refused to identify a single owner that they seek to represent, instead asking the Court to assume their members include someone who has an interest in a Domain Defendant. In fact, iMEGA has even failed to identify which Domain Defendants their unidentified members claim to own. Frankly, there is nothing in the record to suggest that iMEGA is anything more than a K-Street lobbying firm hoping to attract a client.

In addition to the two trade organizations, separate counsel appeared purporting to represent five[6] Domain Defendants identified as playersonly.com, sportsbook.com, sportinteraction.com, mysportsbook.com and linesmaker.com (referred to as the Group of 5), making clear that the appearance was on behalf of the domain properties themselves, not the respective owners. Counsel for the Group of 5 has also refused to identify the owner(s) of the

[4] IGC purports to represent "the rights of the internet gaming community and its members", who own or operate 61 of the Domain Defendants. iMEGA "collects and disseminates information" regarding Internet gambling, and claims to appear for "its members as owners of subject domain names." *iMEGA Notice of Appearance and Motion to Stay*, p. 2. Neither in its filings nor on its website does iMEGA identify that it has any actual members - whether persons, entities or domains.

[5] IGC's Petition includes a co-Petitioner, "vicsbingo.com". This pseudonym did not appear in the court below, and is belatedly included as insurance for the failed associational standing argument. Its inclusion as a mere pseudonym may also correctly be seen as an admission of culpability by the absent owner.

[6] Counsel originally purported to represent seven Domain Defendants; however, counsel now only claims to represent five Domain Defendants. The additional two were pokerhost.com and sbglobal.com.

Domain Defendants they purport to represent. In other words, counsel has appeared on behalf of the *res*, not an owner who may have an interest in the *res* as required by KRS 500.090.

Finally, counsel appeared for the "registrants" of goldenpalace.com and goldencasino.com ("2 Domain Defendant Registrants"), while refusing to identify the respective registrants. The 2 Domain Defendant Registrants have not filed a Petition for Writ of Prohibition.

At the hearing on September 26, 2008, the opposing groups moved to intervene, stay further enforcement of the Trial Court's Order of Seizure and to dismiss the action. In response to the motions, the Trial Court ordered on October 2, 2008, that no person or party take any action regarding transfer, ownership or registration of the Domain Names unless and until further ordered by the Court." The Trial Court allowed the opposing groups to submit briefs on certain issues raised at the hearing, and set a date for a new hearing. A copy of the October 2, 2008 order is attached as Exhibit D. After receiving and carefully reviewing the briefs, the Trial Court conducted a second hearing on the various pending motions. The Court took all matters under advisement and subsequently entered a lengthy, reasoned Opinion and Order dated October 16, 2008, attached as Exhibit E.

The Trial Court concluded that 1) it has jurisdiction to adjudicate the civil forfeiture claim; 2) the court has reasonable basis to assert jurisdiction over the Domain Defendants and their owners/operators; 3) Domain Defendants are property subject to *in rem* jurisdiction; 4) Domain Defendants are "gambling devices" subject to seizure and forfeiture; 5) the seizure was consistent with Due Process; 6) the Secretary of Justice has standing to bring the Underlying Action on behalf of the Commonwealth; 7) IGC and iMEGA lacked associational standing to intervene, but may continue to appear as friends of the court; and 8) the lawyers for the Group of

5 and the two registrants must disclose the identities of the persons who engaged them and their interests in the *res*.

The Trial Court denied all Motions to Dismiss and the Motion of IGC to intervene, and amended the September 18, 2008 Seizure Order as follows:

> [S]o that any of the [Domain Defendants], their respective registrants or their agent, or any other person with an interest or a claim who, on or before 30 days from entry of [the] Opinion and Order, installs the applicable software or device, *i.e.*, geographic blocks, which has the capability to block and deny access to their on-line gambling sites through the use of any of the [Domain Defendants] from any users or consumers within the territorial boundaries of the Commonwealth, and reasonably establishes to the satisfaction of the Kentucky's Justice and Safety Cabinet or this Court that such geographical blocks are operational, shall be relieved from the effects of the Seizure Order and from any further proceedings in the instant civil forfeiture action.

The Seizure Order of September 18, 2008, remained in effected as amended by this order. The Court [set a] final hearing on forfeiture on the 17th of November 2008, at 10:00 a.m./EST.[7] The Commonwealth met its burden to show probable cause that the Domain Defendants were used in connection with unregulated, unlicensed illegal gambling; in fact, the Trial Court found "overwhelming evidence" to that effect. Having made that finding, the Court has no discretion but to order forfeiture of the Domain Defendants. See *Commonwealth v. Fint*, 940 S.W.2d 896 (Ky. 1997).

IGC and the Group of 5 immediately filed a Motion to Stay that Order and to hold the forfeiture hearing in abeyance. Additionally, counsel for goldenpalace.com filed a Motion for Relief from the Court's Seizure Order claiming that it did not accept U.S. play, but only advertised internet gambling for other websites.[8] A hearing on the Motions was held on October 22, 2008, following which the Court re-scheduled the forfeiture hearing for December 3, 2008

[7] The forfeiture hearing was postponed by the trial court until December 3, 2008 and subsequently suspended by this court's November 14, 2008 Order.

[8] The Commonwealth objected on the basis that 1) goldenpalace.com's motion mischaracterized the Trial Court's finding, 2) the proper time for the owners of goldenpalace.com to present evidence that they are not violating KRS Chapter 528 is at forfeiture hearing, and 3) goldenpalace.com was intimately connected to and shared revenues with other internet gambling websites.

and held that the appropriate time to handle the evidentiary matters raised by goldenpalace.com would be at the forfeiture hearing. A copy of the October 23, 2008 Order is attached as Exhibit F. In response to the Trial Court's Orders, iMEGA, IGC and the Group of 5 filed petitions for writ of prohibition in this Court.

ARGUMENT

I. THE GAMBLING ASSOCIATIONS AND PSEUDONYMS DO NOT HAVE STANDING TO PETITION FOR A WRIT OF PROHIBITION

A. ONLY A PARTY WITH AN OWNERSHIP INTEREST IN THE PROPERTY HAS STANDING TO CONTEST THE FORFEITURE PROCEEDING

Petitioners do not have standing to appear in the Circuit Court or to prosecute this original action in the Court of Appeals. Only a party with proper standing may petition the Court of Appeals for a writ of prohibition. *Schroering v. McKinney*, 906 S.W.2d 349 (Ky. 1995)(surviving widow with personal interest in the outcome did not have standing to seek writ). In order to have standing, there must be a present, real and substantial, judicially recognizable interest in the subject matter of the litigation. *Cf. Kraus v. Kentucky State Senate,* 872 S.W.2d 433 (Ky. 1994). Petitioners do not have the legal interest in the property required by the forfeiture statute, or a direct interest in the subject matter of the litigation to qualify as a real party in interest as required by the Rule. The burden is on the claimant to establish standing, and Petitioners herein cannot sustain that burden. 36 Am. Jur. 2d *Forfeitures and Penalties*, § 38; *accord*, *U.S. v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998)] None of the Petitioners claim to be owners of a single Domain Defendant. As such, the Trial Court correctly held that the Internet gambling associations lacked standing to appear on behalf of the Domain Defendants. Likewise, the Internet gambling associations lack standing to bring an original action in this Court.

1. Seized Property Cannot Appear To Contest Its Own Forfeiture.

The seized property cannot contest its own forfeiture. Nonetheless, without identifying the owners, separate counsel seeks to appear on behalf of the Group of 5 and vicsbingo.com. It is, of course, a physical impossibility for property to represent itself in a court proceeding, to communicate with counsel, to contract or pay for legal services, or make informed decisions regarding representation. In the words of the Franklin Circuit Court, "[o]bviously, these domain names could not have engaged the lawyers who purport to appear on their behalf...." October 16, 2008, Opinion and Order, p. 38. The forfeiture statutes do not allow for such appearances, which specifically restrict the right to contest forfeiture to the "lawful claimant". KRS 500.090(4) and (5). The purported appearance on behalf of the *res* is inimical to the very premise of an *in rem* forfeiture under both the Kentucky forfeiture statute and the various federal forfeiture statutes, and should be rejected by this Court as it has been by every court to consider it.

The absurdity of such an appearance has been forcefully rejected. In *US v. One Parcel of Real Property*, 831 F.2d 566 (5th Cir. 1987), an *in rem* civil forfeiture action, attorneys purporting to represent Defendant Property seized from an illegal drug smuggling operation appeared and filed various pleadings. The trial court wisely stated that the pleadings filed on behalf of the Defendant Property were not a claim or defense by any person, and denied the Defendant Property's motion to dismiss because it did not have standing. *Id.* at 567. Counsel appealed the decision, again purporting to represent the Defendant Property. The Fifth Circuit Court of Appeals stated unequivocally that only owners have standing to challenge a forfeiture action: "owners are persons, not pieces of real property and thus; the piece of property has no standing to contest its forfeiture." *Id.* (emphasis added). The Court awarded attorney fees and

double costs for the frivolous appeal and held the appearing attorneys personally liable for the sanctions.

The present situation is identical: counsel have appeared to challenge this forfeiture action on behalf of the Domain Defendants (both through pseudonyms and the associations), but do not claim to represent the owners of any. Owners are persons, not property, and the Domain Defendants have no standing to appear on their own behalf through counsel. *Id.; see also In re Forfeiture of Cessna 401 Aircraft, N8428F,* 431 So.2d 674 (Fla.App. 1983)(attorney who received assignment from fictitious name did not have standing to contest forfeiture). The attorneys purporting to represent the Domain Defendants lack standing to bring an original action in this Court. Accordingly, the Petitions should be dismissed.

2. The Trial Court Correctly Held That the Internet Gambling Associations Lack Standing.

The Internet gambling associations cannot appear in this action on behalf of seized property (or anonymous owners) by misapplication of associational standing, which has been allowed only in respect to injunctive or declaratory relief in limited circumstances. It bears repeating that the purported appearance by an association on behalf of seized property and/or its anonymous offshore owners is inimical to the very premise of *in rem* forfeiture. The Court does not need to reference KRS 500.090 or the criteria from *Hunt v. Washington State Apple Advertising Commission*[9] to imagine the absurdity of a fictitious "Narcotics Trafficking Association" appearing to contest a seizure of illegal drugs. After exhaustive research, it appears that no court has ever permitted associational standing in any *in rem* civil forfeiture action[10]. Likewise, the Petitioners appear unable to find a case in which a court has permitted associational standing in a civil forfeiture action. Certainly, they have not identified such a case.

[9] *Hunt,* 432 U.S. 333 (1977), discussed *infra.*

[10] The Petitioners have not identified a single case in which a trade association sought or was granted standing to assert the interests of its members in a civil forfeiture action. Likewise, the Commonwealth has located no such case.

Associational standing, moreover, is barred by the nature of an *in rem* proceeding and by the clear language of KRS 500.090. KRS 500.090(4) provides specifically that only the lawful claimant who establishes a legal interest in the property may contest a forfeiture action:

> 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). Notably, the statute does not provide for associational standing.

a. *A Claimant Must Show A Legal Ownership Interest In The Property*

It is not enough to have an interest in decriminalization of internet gambling, to engage in lobbying for its legalization, or even to be financially interested in the "industry". Instead, pursuant to the statute, the only persons who have standing to appear in a civil forfeiture action are those who claim to be a "lawful claimant." The statute specifically defines a "lawful claimant" as the owner or lienholder of record, and requires that the lawful claimant establish a legal interest in the property. KRS 500.090. In this case, none of Petitioners claim to be the owner of a Domain Defendant; therefore, none of the Petitioners have standing to appear in this matter.

The authority is uniform that to have standing, one must have an ownership interest in the property. "The claimant has the burden of establishing his or her standing in forfeiture proceedings. While any person with a recognizable legal or equitable interest in the seized property may have standing to challenge its forfeiture, a claimant must come forth with some evidence of his or her ownership interest to establish standing to contest a forfeiture." 36 Am. Jur. 2d *Forfeitures and Penalties*, § 38; *accord*, *U.S. v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 497 (6th Cir. 1998)(claimant must have a colorable ownership interest to claim money seized in a bingo operation); *U.S. v. One 1965 Cessna*, 715 F.Supp. 808, 810 (E.D.Ky. 1989) (unperfected security interest in airplane not sufficient ownership interest to confer standing).

The Ninth Circuit squarely confronted this issue and held unequivocally that a person must indentify a specific interest in property to appear to contest forfeiture, even if there existed a risk of self-incrimination. In *Baker v. U.S.*, 722 F.2d 517 (9th Cir. 1983), a couple appeared to contest forfeiture of property, but refused to identify an ownership interest because it allegedly might incriminate them in pending tax and welfare investigations. The Court dismissed the Fifth Amendment assertion[11] holding that "plaintiffs are not 'claimants' because they have alleged no specific property interest in the forfeited items....We require claimants to allege and prove a valid property interest in the forfeited items." *Id.* at 518-519.

Kentucky courts likewise will not allow a party to avoid forfeiture by employing a scheme to disguise the property's true owner. In *Commonwealth v. Coffey*, 247 S.W.3d 908 (Ky. 2008), the Commonwealth sought forfeiture of a vehicle used to conduct drug trafficking activity. The sister of the drug trafficker appeared to contest the forfeiture, claiming to be an "innocent owner." Though the vehicle was titled in the sisters' name, the Court found that she was simply a "straw man", as she did not use the vehicle and was unable to produce any indicia of ownership other than the title. The Court determined that the drug trafficker was the true owner, and thus the sister did not have standing to contest the forfeiture.

Consistent with KRS 500.090 and the body of law relating to *in rem* civil forfeitures, only an owner has standing to challenge such an action. Here none of the Petitioners claim to be owners, and thus none have standing to appear or otherwise challenge this action.

b. *Associations Cannot Defend Civil Or Criminal Actions In Lieu Of Their Purported Members*

Because the associations do not assert a valid property interest in the domain names, they have no standing to appear and contest forfeiture. Nonetheless, citing *Hunt v. Washington State*

[11] *Baker* is further discussed *infra* in relation to iMEGA's assertion of a Fifth Amendment privilege on behalf of absconding and anonymous owners.

Apple Advertising Commission, 432 U.S. 333 (1977), IGC and iMEGA argue for associational standing to represent the interests of anonymous members. *Hunt*, however, only permits associations to bring, not defend, claims on behalf of their members. In pertinent part, *Hunt* states that

> "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 individual members in the lawsuit."

Id. at 343. *Hunt* does not allow associations to defend claims on behalf of members. In regard to such claims as in the case *sub judice*, the third criteria of *Hunt* is clearly not met. KRS 500.090 expressly requires the participation of individual association members - the owner or lienholder of record - in the lawsuit. Accordingly, the Trial Court held that:

> The present civil forfeiture action involves a determination of the specific rights of persons with interest or claims over each of the Defendants 141 Domain Names. Neither IGC nor IMEGA has shown that the individual participation of their members, whose rights over any of the Defendants 141 Domain Names will be determined at the forfeiture proceeding, is not indispensable for the complete and proper resolution.

Opinion and Order, October 16, 2008, p. 37.

c. *The Absconding Owners Cannot Alleged Constitutional Violations To Create Associational Standing*

IMEGA argues that it should be granted associational standing because the Commonwealth's civil forfeiture proceeding infringes the anonymous domain owners' constitutional rights by forcing them to choose between (1) appearing to assert their ownership of the illegal gambling devices, or (2) remaining anonymous and offshore while the property is forfeited. The challenge *in rem* forfeiture on the basis of this dilemma has not only been

thoroughly deliberated and rejected, it has been codified in federal legislation and applied directly in the context of illegal internet gambling.[12]

In *U.S. v. $6,976,934.65 Plus Interest*, 520 F.Supp. 2d 188 (D.D.C. 2007), the U.S. sought forfeiture of nearly $7 million in funds related to illegal internet gambling. It traced illegal internet gambling funds to the Royal Bank of Scotland International ("RBSI") located on the island of Guernsey, one of the semi-autonomous Channel Islands off the British coast. The funds were deposited in an RBSI account held by a British Virgin Islands company named Soulbury Limited, the alter-ego of an Antigua-based internet gambling operation. The U.S. seized the funds from a New York interbank account owned by RBSI. Soulbury, a corporation owned by internet gambling fugitive William Scott, asserted its claim to the funds in the District Court, claiming that (1) the funds were improperly seized because they were located overseas, not in New York, and (2) venue was improper. The United States moved to strike Soulbury's pleadings on the ground that the fugitive status of it and its owners barred it from contesting the forfeiture. The D.C. Court found that because Soulbury was primarily owned by a fugitive it was disallowed standing to contest the forfeiture.

Courts have long exercised their discretion to disallow fugitives from availing themselves of the Court's protection while employing what has been called a "heads-I-win, tails-you-can't-find-me" strategy,[13] and both the Courts and the Congress apply it to bar claimants from contesting an in rem forfeiture while avoiding the jurisdiction of the court. Just as Scott was not permitted to hide behind his company, Soulbury, to contest the in rem forfeiture, the absent domain owners should not be permitted to hide behind an association. In light of this authority,

[12] The fugitive disentitlement doctrine was codified as to civil forfeitures in the federal Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub.L. No. 106-185, 114 Stat. 202. Though not applicable to this state law forfeiture proceeding, CAFRA demonstrates Congress' approval of the Courts' application of this doctrine to in rem forfeiture, even where the owner would face criminal prosecution, rather than mere civil liability.

[13] See, e.g., *Antonio-Martinez v. I.N.S.*, 317 F.3d 1089 (9th Cir. 2003)(applying doctrine in immigration context).

the Petitioners' pleas to represent the anonymous owners fail. Accordingly, the Court must dismiss the petitions for writ of prohibition.

II. THE ILLEGAL GAMBLING DOMAINS SHOULD NOT BE REWARDED WITH THE EXTRAORDINARY REMEDY OF A WRIT OF PROHIBITION

A writ is an extraordinary remedy which the Court of Appeals does not issue lightly. *Fischer v. State Board of Elections*, 847 S.W.2d 718 (Ky. 1993); *City of Lexington v. Cox*, 481 S.W.2d 645 (Ky. 1972); *Brougher v. Allen*, 462 S.W.2d 187 (Ky. 1970). The courts have always been cautious and conservative both in entertaining petitions for and in granting writs, which are extremely disfavored. *Appalachian Regional Healthcare, Inc. v. Coleman*, 239 S.W.3d 49 (Ky. 2007), *citing Buckley v. Wilson,* 177 S.W.3d 778, 780 (Ky. 2005). The Court in *Hoskins v. Maricle*, 150 S.W.3d. 1, 10 (Ky. 2004), set forth the stringent standard for a writ of prohibition:

> A Writ of Prohibition may be granted upon the 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 that there exists no adequate remedy by appeal or otherwise, and great injustice and irreparable injury will result if petition is not granted.

Id., at 10. Whether or not the court is within its jurisdiction, there must exist no adequate remedy by appeal, and it must be proven that great injustice and irreparable injury would result to the Petitioner if the writ is not entered. *Fischer*, 847 S.W.2d at 720; *Shumaker v. Paxton*, 613 S.W.2d 130 (Ky. 1981).

A. THE COURT SHOULD NOT EXERCISE ITS DISCRETION TO CONDONE AN ADMITTEDLY ILLEGAL SCHEME

Even could Petitioners satisfy the stringent standard, whether to issue a writ is always within the sound discretion of the Court. *Hoskins,* 150 S.W.3d. at 9. "In other words, a writ is never mandatory, even upon satisfaction of one of the tests laid out in *Hoskins.*" *Cox v. Braden,* --- S.W.3d ---, 2008 WL 4691782 (Ky. 2008). In regard to the internet gambling in which the Domain Defendants are used, neither in the Trial Court nor this Court has it been seriously

argued that the gambling activity is licensed, regulated or legal. In fact, the anonymous owners acknowledge through counsel the illegality of the enterprise, but maintain that Kentucky courts have no jurisdiction or power to stop it:

> A concept I think - I hope - this Court has got today is that what you are affecting is not something just here in Kentucky which we all agree is illegal, but something that is worldwide that is operating in jurisdictions...."

See video transcript of Franklin Circuit Court Hearing, October 7, 2008, 10:50:07 a.m. This Court should not exercise its discretion to condone this admittedly illegal gambling scheme.

Kentucky courts have refused to issue a writ for the benefit of an absconding property owner in similar circumstances. In *Blackerby v. Adams,* 232 S.W.2d 79 (Ky. 1950), an action by a judgment creditor to enforce an execution, a judgment debtor sold property which had been levied against, and then by agreed order deposited the proceeds with the court pending the determination of parties' rights. The debtor was, however, outside the state, and refused to appear for oral examination. The trial judge issued an order allowing the judgment creditor two weeks to complete the deposition from the date the debtor would appear, effectively holding the funds until such time as the debtor appeared. The debtor petitioned, through a surrogate, for a writ of prohibition on the ground that she was suffering loss in not being allowed use of the funds. The Court of Appeals refused to enter the writ on the grounds that debtor would not suffer a great and irreparable injury and a writ was not proper to appeal that interlocutory order. *Blackerby v. Adams,* 232 S.W.2d 79 (Ky. 1950). This Court should decline to allow the absconding owners the ability to defend through surrogates the devices they use to violate Kentucky law from offshore.

The Court has also not allowed writs to be used as an end-run around statutory procedures established for the condemnation of property. In *Linn v. Bryan,* the Court held that where the statute providing for condemnation of realty set forth the procedural steps necessary to

accomplish its purpose, the landowner could not supersede the judgment of condemnation by petitioning for a writ in the Court of Appeals. *Linn v. Bryan*, 226 S.W.2d 959 (Ky. 1950). This Court should likewise not employ a writ to allow the property or its owners to avoid the statutory procedures of the *in rem* forfeitures.

B. THE ANONYMOUS OWNERS OF THE DOMAIN DEFENDANTS HAVE AN ADEQUATE REMEDY ON APPEAL

1. A Writ Is Improper Because Both Petitioners And The Anonymous Owners Have A Remedy By Appeal

Pursuant to the Civil Rules, generally a party may only appeal final and appealable orders. *Lebus v. Lebus*, 382 S.W.2d 873, 874 (Ky. 1964). The Trial Court's orders are neither. Petitioners have not articulated any reason why the owners of Domain Defendants would not have an adequate remedy on appeal.[14] There is no certainty that the Domain Defendants will be forfeited, and there are a number of options by which the owners of Domain Defendants can avoid forfeiture. Even if the owners of Domain Defendants refuse to follow the Trial Court's outline to avoid forfeiture, forfeiture will not be immediate. There are a multitude of technical steps that the Trial Court and the Commonwealth will have to take before the Domain Defendants can be "blocked" or "shut down". At a minimum, the owners of Domain Defendants would have an opportunity to promptly appeal any adverse decision and post a supersedeas bond to stay disposition of Domain Defendants by the Commonwealth. Accordingly, the owners of the Domain Defendants have an adequate remedy on appeal and thus a writ or prohibition is not appropriate.

In addition to filing a Petition for Writ of Prohibition, iMEGA and IGC have separately appealed the Trial Court's order denying them intervention as a matter of right. *Hoskins* makes it clear that the internet gambling trade associations cannot both appeal the court's decision and

[14] In fact, the Group of 5 simply asserts that the Trial Court lacks jurisdiction. The Group of 5 does not contend that it will not have an adequate remedy on appeal or that the anonymous owners of Domain Defendants will be irreparably harmed if a writ of prohibition is not granted.

seek a writ. Under the Hoskins test, a writ of prohibition is not appropriate if there is a remedy through an application to an intermediate court. *Hoskins*, 150 S.W.3d. at 10. In this case both internet gambling trade associations claim to have a right to appeal the trial court's order refusing intervention as a matter of right. To the extent they have a right to appeal, a writ of prohibition is not appropriate and must be dismissed. Moreover, to the extent Petitioners wish to stay the trial court's decision, they must post a supersedeas bond.

In either case, the Trial Court properly refused to permit the internet trade associations to intervene in the underlying action as KRS 500.090 sets forth who has standing to appear in a civil forfeiture action. Whether by Petition for Writ or by appeal, Petitioners have no right to intervene; however, having chosen to appeal, they may not also petition this Court for the extraordinary remedy of a writ of prohibition.

2. Forfeiture Of The Domains Will Work No Great Injustice To Petitioners Or The Anonymous Owners

None of the Petitioners are owners of a Domain Defendant and will not suffer any injustice if this Court refuses to grant a writ of prohibition. Petitioners contend only that forfeiture of the *res* would cause great injustice and/or irreparable injury to their anonymous members.

The standard requires more than mere, or even great, injury.

> [In] addition to the element of great and irreparable injury there must be some aspect of *injustice.* There must be something in the nature of usurpation or abuse of power by the lower court, such as to demand that the Court ... step in to maintain a proper control over the lower court. The object of the supervisory power of the Court ... is to prevent miscarriage of justice.

Powell v. Graham, 185 S.W.3d 624, 629 (Ky. 2006).

The Trial Court's orders do nothing more than maintain the status quo pending a forfeiture hearing and a subsequent final determination. At this point, given the Trial Court's orders, there is no certainty that any Domain Defendant will in fact be forfeited. Furthermore,

under the statute, even the owners do not have the right to appear prior to forfeiture, but only after the culpability of the property has been determined.[15] The petitions are premature attempts to bypass the statutory, judicial and appellate process.

First, the Trial Court has ordered that if an owner or agent can demonstrate to the Trial Court's or the Commonwealth's satisfaction that a Domain Defendant will be blocked from gambling within Kentucky, then the Trial Court will relinquish its jurisdiction over the Domain Defendant and dismiss it from further forfeiture proceedings. Conversely, should they choose to ignore Kentucky law and continue operating an illegal gambling business within Kentucky, they have no one to blame but themselves.

Second, after the hearing, the Trial Court may determine that forfeiture of one or more Domain Defendants is improper. For example, counsel for one anonymous registrant has suggested that her client's Domain Defendant simply communicates protected speech. Although the Commonwealth has presented evidence that refutes the claim, the Trial Court has emphatically stated that it will dismiss that Domain Defendant—or any other—if it is shown that the Domain Defendant simply communicates protected speech.

Third, after the hearing, the Trial Court may simply determine that the Commonwealth has failed to prove that one or more Domain Defendants have been used in violation of KRS Chapter 528 and, therefore, should not be forfeited. Although the Court has noted that the Commonwealth's evidence is "overwhelming," KRS 500.090 provides the owner of any Domain Defendant the opportunity following forfeiture to introduce evidence, to rebut and refute the Commonwealth's evidence, and to assert any defense that it chooses to assert. If an owner succeeds, then the Trial Court will certainly dismiss that Domain Defendant.

---

[15] KRS 500.090(4): "The trial court shall remit the forfeiture when the lawful claimant" establishes its innocent ownership. (Emphasis added).

If an owner is dissatisfied with the forfeiture hearing or the Trial Court's decision regarding its assertion of its innocent ownership, it has the right to appeal to this Court. If the owner of a Domain Defendant prevails at the forfeiture hearing, then the opposing parties' objections will be moot. On the other hand, if the Commonwealth prevails, the trial court will enter a final and appealable forfeiture order. Any injustice can be remedied on appeal, making issuance of the extraordinary remedy of the writ of prohibition improper.

Petitioners contend that if the *res* used in violation of Kentucky anti-gambling laws are forfeited, the owners of Domain Defendants will lose goodwill and their illegal businesses will be crippled. This is the great injustice they claim will follow if the Court does not issue the writ.[16] They argue that the Commonwealth can do nothing to stop their anonymous members from perpetuating their massive criminal enterprises in Kentucky. Given the online gambling operators' blatant disregard for the laws of the Commonwealth, the true injustice in this case would be to continue to allow the owners of Domain Defendants to operate in the Commonwealth – not the predicted loss of huge profits the owners will lose if the Trial Court determines that forfeiture is appropriate.

C. THE TRIAL COURT CORRECTLY ASSERTED IN REM JURISDICTION OVER THE DOMAIN DEFENDANTS.

1. The Circuit Courts Have Jurisdiction Of In Rem Civil Forfeiture Actions.

The Petitioners cannot satisfy the first *Hoskins* test necessary for issuance of a writ of prohibition, because the trial court acted within its in rem jurisdiction in seizing the Domain Defendants. The Franklin Circuit Court is a court of general jurisdiction with a wide range of authority over various types of cases. *Hisle v. Lexington-Fayette Urban County Government*,

[16] IGC also argues that forfeiture would be unjust because then authorities in the remaining 49 states, in which unlicensed, unregulated gambling is illegal, may also want to take similar steps to stop illegal online gambling operations from occurring in their own states. Amazingly, IGC argues that it would be unjust for other states to enforce their laws to prevent crime from occurring in their respective states.

258 S.W.3d 422, 432 (Ky.Ct.App 2008). Kentucky Constitution § 112(5) states: "The Circuit Court shall have original jurisdiction over all justiciable causes not vested in some other court." This constitutional mandate imbues Kentucky's circuit courts with the general power to determine all matters of controversy arising under common law or equity, or by reason of statute or constitution, unless the constitution requires that the matter be resolved by another body of the government or another court. *Hisle*, 258 S.W.3d at 432. Even the General Assembly does not have the authority to limit or control the circuit court's subject matter jurisdiction. *Id.* at 434.

This forfeiture proceeding is a civil action *in rem. 14 Console Type Slot Machines v. Com.*, 273 S.W.2d 582 (Ky. 1954); *Sterling Novelty Co. v. Com.*, 271 S.W.2d 366 (Ky. 1954). Civil forfeiture actions uniformly originate in circuit court. *See 14 Console Type Slot Machines v. Com.*, 273 S.W.2d 582 (Ky. 1954)(appeal of a judgment from the Fayette Circuit Court forfeiting gambling devices); *Fall v. Com.*, 245 S.W.3d 812 (Ky.App. 2008)(appeal from an order of the Montgomery Circuit Court forfeiting funds connected to illegal cockfighting). The Petitioners do not identify or even suggest that the Constitution contains a requirement that civil forfeiture actions be resolved by another body of government or by another court. Accordingly, the circuit courts have original jurisdiction over this civil forfeiture action. See *Hisle*, 258 S.W.3d 422, 432.

2. The Domain Defendants' Use For Illegal Gambling Establishes Sufficient Minimum Contacts With Kentucky.

The Commonwealth presented overwhelming video and documentary evidence that the Domain Defendants are being used to conduct and promote illegal gambling within the Commonwealth of Kentucky. Petitioners argue that the Court was nonetheless without jurisdiction to seize the Domain Defendants because they were not physically in Kentucky at the time of seizure. Petitioners' argument fails because the Domain Defendants (and their owners and operators) have sufficient minimum contacts with Kentucky and, therefore, are subject to the

jurisdictions of Kentucky's courts. Due process does not require that property be physically located within the forum state.

The Intervenors erroneously cling to the notion that the location of the *res* determines the forum where an *in rem* action must be brought. The United States Supreme Court long ago rejected that notion. In *Heitner v. Shaffer*, 433 U.S. 186 (U.S. 1977), the U.S. Supreme Court held that the test for *in rem* jurisdiction is the same minimum contact standard announced in *International Shoe Co. v. Washington,* 326 U.S. 310 (U.S. 1945). Likewise, in *Citizens Bank and Trust Co. of Paducah v. Collins,* 762 S.W.2d 411, 412 (Ky. 1988), the Kentucky Supreme Court recognized *Heitner* and agreed that *International Shoe's* "minimum contacts" test is the proper standard for *in rem* jurisdiction.

Historically, state courts could only exercise jurisdiction over persons or things located within the state's boundaries. *Pennoyer v. Neff*, 95 U.S. 714 (1878). However, with the advent of the automobile and society's increased mobility, that standard became unworkable and unrealistic. Eventually, in 1945, in *International Shoe v. State of Washington*, the U.S. Supreme Court held that state courts may exercise jurisdiction over a person located outside the state's boundaries, so long as the person has sufficient contacts with the state "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe v. State of Washington*, 326 U.S. 310, 316 (1945).

For the next thirty years, it remained unclear whether *International Shoe's* minimum-contacts standard also applied to *in rem* jurisdiction. For example, in 1958, in *Hanson v. Denckla*, 357 U.S. 235 (1958), the Supreme Court held that a state could not exercise *in rem* jurisdiction over property located outside the state's boundaries. In *Hanson*, the Court neither considered nor applied *International Shoe's* minimum-contacts standard.

However, in 1977, in *Shaffer v. Heitner*, the U.S. Supreme Court expressly held that *International Shoe's* minimum-contacts standard applies equally to *in rem* jurisdiction. *Shaffer v. Heitner*, 433 U.S. 1865, 212 (1977)("[w]e therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." (emphasis added)). The Court explained as follows:

> The case for applying to jurisdiction *in rem* the same test of "fair play and substantial justice" as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that "(t)he phrase, 'judicial jurisdiction over a thing', is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." *Restatement (Second) of Conflict of Laws s 56*, Introductory Note (1971) (hereafter Restatement). This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*.

Id. at 207. Moreover, the Court expressly overruled all prior decisions that are inconsistent with the *International Shoe* minimum-contacts standard. *Id.* at note 39.

Notwithstanding the Court's clear holding, the Petitioners contend that *Pennoyer's* "presence" requirement survived *Shaffer*. They contend *Shaffer* merely added a second requirement. In other words, they contend that *Shaffer* established a two-part test: (1) the property must be located within the state (*Pennoyer*); and, (2) there must exist sufficient minimum contacts with the state (*International Shoe*). Because the Interveners contend that the Domain Defendants are not present in Kentucky, they contend that the Court cannot have *in rem* jurisdiction.

As correctly found by Judge Wingate, the Commonwealth presented overwhelming evidence that the anonymous owners and operators have operated massive illegal gambling enterprises within Kentucky and have thereby established sufficient minimum contacts with the state. Moreover, by their use of the devices to operate these enterprises, the Domain Defendants

have sufficient minimum contacts with Commonwealth to subject themselves to *in rem* jurisdiction.

Judge Wingate noted that prior to *International Shoe*, in *Hess v. Pawloski*, 274 U.S. 352 (1927), the U.S. Supreme Court had already softened *Pennoyer's* "presence" requirement by approving the fiction that, by using a state's highways, out-of-state motorists appoint a designated state official as an agent to establish "presence" for purposes of *Pennoyer*.

Then, in *International Shoe*, "a unanimous United States Supreme Court declared that the demand for "presence" as a prerequisite for state court authority may be met by "minimum contacts" with the state, such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' Id. at 316." Opinion and Order, October 16, 2008, p. 17.

Finally, Judge Wingate recognized that in *Shaffer*, the U.S. Supreme Court applied *International Shoe's* minimum-contacts standard to *in rem* jurisdiction: "in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interest of the persons in a thing.' *Id.*, at 207." Opinion and Order, October 16, 2008, p. 17-8

Judge Wingate noted that: "as the law stands on state court jurisdiction, the requirement of "presence" is seen through the lens of "minimum contacts," for both *in rem* and *in personam* actions." Opinion and Order, October 16, 2008, p. 18.

Judge Wingate considered the evidence and found that the Commonwealth has established a *prima facie* case supporting the Court jurisdiction.

> For now, however, and considering the foregoing discussion and based on the other evidence offered by the Commonwealth during the seizure hearing on September 18, 2008, the Court finds that the Commonwealth has established a prima facie case that the presence of the operators of the casino websites and the Internet domain names which identify these gambling operators with is continuous and systematic, constituting reasonable bases for the exercise of this Court's jurisdiction. As evidence in the record stands, the Defendants 141 Domain Names transport the virtual premises of an Internet gambling casino

> inside the houses of Kentucky residents, and are not providing information or advertising only. The Defendants 141 Domain Names perform a critical role in creating and maintaining connection by way of the various interfaces to transact a game or play. Accordingly, but subject to further review during the forfeiture hearing, the Court finds reasonable bases to conclude that the Internet gambling operators and their property, the Internet domain names, are present in Kentucky. Therefore, the Court has reasonable bases to assert its jurisdiction over them. As best stated in *Gorman v Ameritrade Holding Corp.*, 293 F.3d 506, 510 (C.A.D.C. 2002), "[c]yberspace is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar."

Opinion and Order, October 16, 2008, p. 22-3.

In *Cummings v. Pitman*, the Kentucky Supreme Court adopted the Sixth Circuit's three-part test to determine whether minimum contacts exist under *International Shoe*:

> The first prong of the test asks whether the defendant purposefully availed himself of the privilege of acting within the forum state or causing a consequence in the forum state. The second prong considers whether the cause of action arises from the defendant's activities in the forum. The final prong requires the defendant to have a substantial enough connection to the forum state to make exercise of jurisdiction over the defendant reasonable.

Cummings v. Pitman, 239 S.W.3d 77, 85 (Ky. 2007), *citing Southern Machine Co. v. Mohasco*, 401 F.2d. 374, 381 (6th Cir. 1968)(citations omitted).

a. *The Domain Defendants Purposefully Created A Substantial Connection With Kentucky*

The "purposeful availment" requirement of *Cummings* is satisfied when the defendant's contacts with the forum state "proximately result from the actions of the defendant *himself* that create a 'substantial connection' with the forum State," and when the defendant's conduct and connection with the forum are such that he "should reasonably anticipate being haled into court there." *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1263 (6th Cir. 1996)(quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 474-75 (1985). Physical presence in the forum state is not necessary. *CompuServe*, 89 F.3d at 1264. If the plaintiff can demonstrate purposeful availment, the absence of physical contacts with the forum state will not defeat jurisdiction over a non-

resident defendant. *Bridgeport*, 327 F.3d at 483, *citing Burger King*, 471 U.S. at 476; *see also CompuServe*, 89 F.3d at 1264.

Moreover, states maintain a "manifest interest" in providing residents with a convenient forum for redressing injuries inflicted by out-of-state actors. *Verizon Online Services, Inc. v. Ralsky*, 203 F.Supp.2d 601, 607 (E.D.Va. 2002), *citing Burger King*, 471 U.S. at 473. A state's interest in exercising personal jurisdiction over a tortfeasor takes on a stronger role than other contexts such as a contract dispute. *Id.* Generally speaking, a "state has power to exercise judicial jurisdiction over an individual who has done, or has caused to be done, an act in the state with respect to any claim in tort arising from the act." *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §36.1 (1988).

The fact that this relationship has continued over an extended period of time and has involved substantial amounts of money will, in itself, satisfy the minimum contacts test established by *International Shoe Co.,* unless there is a showing of other factors which would affect the balancing of equities and make the exercise of jurisdiction over the non-resident fundamentally unfair. *First National Bank of Louisville v. Shore Tire Co. Inc.*, 651 S.W.2d 472, 474 (Ky.App. 1982).

Operation of an Internet website constitutes the purposeful availment of the privilege of acting in a forum state under the first *Mohasco* factor "if the website is interactive to a degree that reveals specifically intended interaction with residents of the state." *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 483 (6th Cir. 2003). If a defendant enters into contracts with residents of a foreign jurisdiction ... over the Internet, personal jurisdiction is proper. *Euromarket Designs, Inc. v. Crate & Barrel Ltd*, 96 F.Supp.2d 825, 837 (N.D.Ill. 2000)(citing *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D.Pa. 1997). A clear commercial link between a defendant and residents of a forum state warrants a finding of

personal jurisdiction. *Lexmark Intern., Inc. v. Laserland, Inc.*, 304 F.Supp.2d 913, 918 (E.D.Ky. 2004).

Moreover, in the case of internet businesses, courts have also recognized that a corporation has a choice whether to do business in a particular state. *Lexmark International, Inc.*, 304 F.Supp.2d, at 918; see also *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1126-1127 (W.D.Pa. 1997). The owners and operators of a website can sever their connection with a particular state if it determines that the jurisdictional risks are too great. *Id.* Conversely, by choosing to do business in the forum state, a defendant purposefully avails itself of the privilege of doing business in that forum state. *Id.*

The Commonwealth presented overwhelming evidence, and Judge Wingate found, that the owners and operators used the Domain Defendants to establish clear commercial links with residents of the Commonwealth, to enter into contracts with residents of the Commonwealth, to actively solicit Kentucky customers and conduct commerce within the Commonwealth, to receive payment from within the Commonwealth and to deliver software, services, opportunities, wagering information, and sums from winning wagers to residents of the Commonwealth. Here, the owners and operators could have severed their connection with Kentucky, and thereby avoided Kentucky's jurisdiction, by simply using available technology to block Kentucky. Instead, they chose to target Kentucky, because it was profitable. By choosing to operate their illegal gambling enterprise in Kentucky, they purposely availed themselves and their Domain Defendants of the privilege of doing business in Kentucky.

b. *The Forfeiture Action Arises Directly From Domain Defendants' Use In Illegal Gambling Activity*

The second *Cummings* requirement is that "the cause of action must arise from the defendant's activities" in Kentucky. Put another way, the cause of action must "have a substantial connection with the defendant's in-state activities." *Southern Machine*, 401 F.2d. at

384. The Commonwealth presented overwhelming evidence that the owners and operators used the Domain Defendants to conduct their illegal gambling enterprise in Kentucky. These contacts with Kentucky are not only substantially connected to this cause of action, they are the precise basis for this cause of action.

c. *In Rem Jurisdiction Is Proper Over Domains Used To Illegally Gamble In Kentucky*

The final *Southern Machine* requirement is that "the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable." *Id.* Where the first two elements are met, "an inference arises that the third, fairness, is also present; only the unusual case will not meet this third criterion." *First National Bank v. J.W. Brewer Tire Co.,* 680 F.2d. 1123, 1126 (6th Cir. 1982).

Again, the owners and operators could have blocked Kentucky, but instead chose to use the Domain Defendants to blatantly violate Kentucky's clear anti-gambling prohibitions. They did so for purely commercial reasons—it is enormously profitable. The owners and operators purposefully chose to use the Domain Defendants to conduct a massive, illegal business in Kentucky. Moreover, the Commonwealth presented overwhelming evidence that the owners and operators have earned millions of dollars in profits from their illegal business in Kentucky. Accordingly, it is fair and reasonable that the owners, the operators and their Domain Defendants be subject to the jurisdiction of Kentucky's courts.

d. *Illegal Gambling Enterprises Cannot Use The Internet To Avoid Kentucky's Proper Exercise Of Jurisdiction Over Illegal Gambling Within Its Borders*

"'Cyberspace' ...is not some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar." *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510 (D.C.Cir. 2002). Notwithstanding that the illegal operators conducted their operations from

offshore in an attempt to avoid the reach of U.S. laws, Kentucky can exercise jurisdiction over the Domain Defendants, and over their owners and operators. By choosing to use the Domain Defendants to operate their illegal gambling enterprises in Kentucky, the absent owners and operators established sufficient minimum contacts with Kentucky to subject themselves to personal jurisdiction and their Domain Defendants to *in rem* jurisdiction.

Although there is no dispute that the Domain Defendants were used to purposefully target Kentucky, the Petitioners argue that Kentucky has no jurisdiction. On the contrary, they argue that only courts where the Domain Defendants are registered or where their owners and operators are located have jurisdiction. With all due respect to the Petitioners, it is absurd to suggest that the Commonwealth of Kentucky, a sovereign government, must resort to foreign courts to enforce its laws and public policy.

It is perhaps even more absurd to suggest that criminal enterprises should be permitted to choose the jurisdiction and the courts that judge their conduct. If this were the law, child pornographers would locate in a jurisdiction that tolerates child pornography; drug cartels would locate in a jurisdiction that tolerates drug trafficking; and, unlicensed, illegal gambling enterprises would locate in a jurisdiction that permits unlicensed, illegal gambling. According to the Petitioners, these outfits would be free to export their criminal conduct around the world and the targeted jurisdictions would be impotent to stop them. According to the Petitioners, the targeted jurisdictions would have no option but to appeal to the courts of the jurisdiction that tolerates the criminal conduct. Such a system would be Nirvana for criminal enterprises. Fortunately, it is clearly not the law.

New York's courts have already recognized and rejected this absurd argument in another case involving illegal internet gambling. *People ex rel. Vacco v. World Interactive Gaming Corp.,* 714 N.Y.S. 2d 844, 850 (N.Y.Sup., Jul 22, 1999). In *World Interactive Gaming*, the

defendant argued that Internet gambling was legal in Antigua, the country where the defendant was located, and, therefore, New York had no jurisdiction. The New York court rejected the argument:

> Wide range implications would arise if this Court adopted respondents' argument that activities or transactions which may be targeted at New York residents are beyond the state's jurisdiction. Not only would such an approach severely undermine this state's deep-rooted policy against unauthorized gambling, it also would immunize from liability anyone who engages in any activity over the Internet which is otherwise illegal in this state. A computer server cannot be permitted to function as a shield against liability, particularly in this case where respondents actively targeted New York as the location where they conducted many of their allegedly illegal activities.

Id., at 850.

Likewise, courts have held that the illegal internet gambling transaction occurs in the state where the bet is made.

> When bets are placed from New York, the gambling activity is illegal under New York law, regardless of whether the activity is legal in the location to which the bets were transmitted. *See, e.g., People ex rel. Vacco v. World Interactive Gaming Corp.,* 185 Misc.2d 852, 859-60, 714 N.Y.S.2d 844 (N.Y.Sup.1999) ("[U]nder New York Penal Law, if the person engaged in gambling is located in New York, then New York is the location where the gambling occurred (*see* Penal Law § 225.00(2)) [FN14] .... It is irrelevant that Internet gambling is legal in Antigua. The act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling activity within New York State.").

U.S. v. Gotti, 459 F.3d 296, 340 (2nd Cir. 2006)(quoting *People ex rel. Vacco v. World Interactive Gaming Corp.,* 714 N.Y.S.2d 844, 850 (N.Y.Sup., Jul 22, 1999).

In another internet gambling case, a Court in Texas found that the betting occurred in Texas, and also that the site operator had purposefully availed itself of doing business in Texas sufficient not only to establish jurisdiction, but also to avoid a clause that provided for California arbitration. In *Thompson v. Handa-Lopez, Inc.*, 998 F.Supp. 738 (W.D.Tex. 1998), the Plaintiff brought an action alleging breach of contract, fraud, and other claims against an internet casino domiciled in California, where its server also was located. In this scheme, gamblers purchased

tokens with a credit card, and used them to play blackjack, poker, slots, roulette, etc., at which he could win "Funbucks". A winner was to be entitled to receive $1.00 for each 100 Funbucks. Plaintiff won 19,372,840 Funbucks from Texas, and was refused when he attempted to redeem them for $193,728.40. The Court upheld Texas jurisdiction, finding that:

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

Id. at 744.

In the case at bar, the owners and operators chose to use their Domain Defendants to operate illegal gambling enterprises within Kentucky. They purposefully chose to do business in Kentucky. Accordingly, they established sufficient minimum contacts with Kentucky and thereby subjected themselves and their Domain Defendants to the jurisdiction of Kentucky's courts.

3. The Domain Defendants are "located" in Kentucky for Purposes of Civil Forfeiture.

The Petitioners erroneously contend that the Domain Defendants are "located" outside Kentucky and therefore, under *Pennoyer*, are outside the jurisdiction of Kentucky's courts. However, even if *Pennoyer's* presence requirement had survived *Shaffer*, the result would be the same because the domains are intangible property that may have more than one situs, one of which in this instance, is in Kentucky.

As is fully explained herein, the Domain Defendants are a form of intangible property. *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003). It is well established that intangible property has no physical existence and, therefore, no actual *situs*. *Higgins v. Commonwealth*,

103 S.W. 306, 308 (Ky.App. 1907); *Severnoe Securities Corporation v. London & Lancashire Insurance Co.*, 174 N.E. 299, 300 (N.Y. 1931). Accordingly, when justice or convenience requires that intangible property be deemed to have a *situs*, the law relies on a variety of legal fictions. *Id.*

Chief Justice Benjamin Cardozo wrote perhaps the most widely quoted discussion about the fictional *situs* of intangible property. *Severnoe Securities Corporation v. London & Lancashire Insurance Co.*, 174 N.E. 299, 300 (N.Y. 1931). In particular, Justice Cardozo explained that the fictional location of the *situs* varies depending upon the legal purpose. To illustrate, he noted that in different cases, the fictional *situs* of intangible property is different. *Id.* Justice Cardozo noted that at its root, the selection of a fictional *situs* depends upon a "common sense appraisal of the requirements of justice and convenience in particular conditions." *Id.*

> The *situs* of intangibles is in truth a legal fiction, but there are times when justice or convenience requires that a legal *situs* be ascribed to them. The locality selected is for some purposes, the domicile of the creditor; for others, the domicile or place of business of the debtor, the place, that is to say, where the obligation was created or was meant to be discharged; for others, any place where the debtor can be found [citations omitted"]. At the root of the selection is generally a common sense appraisal of the requirements of justice and convenience in particular conditions [citations omitted].

Id. at 300.

Numerous courts have likewise pointed out that the fictional *situs* of an intangible depends entirely upon the purpose. See e.g., *Callejo v Bancomer, S.A.*, 764 F.2d 1101, 1122 (5th Cir. 1985) (recognizing that "situs of intangible property is about as intangible a concept as is known to the law...."). "Various courts have also found that intangible property may have more than one *situs*. In addition, the same intangible property may be deemed to have a *situs* for a particular purpose, yet have another *situs* for a different purpose." *Acme Contracting, Ltd. v. Toltest, Inc.*, slip copy, 2008 WL 453475 (E.D.Mich. 2008).

Likewise, in *Higgins v. Commonwealth, supra,* the Kentucky Court of Appeals recognized that intangible property's fictional *situs* depends upon the legal purpose:

> There is, of course, a marked distinction between what is known as corporeal personal property, such as live stock, lumber, or other material, and intangible personal property, like notes, bonds, and other securities. And it is generally recognized that tangible personal property has an actual *situs* at the place where it is located without respect to the domicile of the owner, whereas the *situs* of intangible personal property for purposes of taxation depends altogether on legislative enactment, or judicial construction. It does not always follow the beneficial owner; but may be taxed at the place where the person resides who has the control and management of the securities, who lends out the money, collects the interest, and exercises other acts of ownership and control over it, and where it may be said to be permanently located, as much so as if the actual owner resided where it was. For many purposes the domicile of the owner is deemed the *situs* of his personal property, but this is only a fiction from motives of convenience, and is not of universal application, but yields to the actual *situs* of the property when justice requires that it should, controlling feature in matters of taxation.

Higgins, 103 S.W. at 308-309.

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

In pertinent part, the ACPA provides a cause of action against a party who registers, traffics or uses a domain name that infringes on a protected trademark. 15 U.S.C. § 1125(d)(1). Under certain circumstances, the ACPA permits a trademark owner to bring the action *in rem.* 15 U.S.C. § 1125(d)(2). The ACPA contains a venue provision that permits the action to be brought in the district where the domain name's registrar or registry is located. *Id.* As Judge Wingate held, the ACPA has no application to this case. Opinion and Order, October 16, 2008, p. 19. This is a civil forfeiture action involving illegal gambling devices; it is not a cyber squatting

dispute in which Congress made the choice of which legal fiction situs to employ. Because this is not a cyber squatting case, the ACPA simply does not apply. *Id.*

Additionally, as Judge Wingate points out, the ACPA expressly provides that its *in rem* jurisdiction is not exclusive: "[t]he in rem jurisdiction established under paragraph (2) shall be *in addition to any other jurisdiction that otherwise exists, whether in rem or in personam.*" 15 U.S.C. § 1125(d)(4) (emphasis added). In other words, an ACPA claim may be brought in the district provided in 15 U.S.C. § 1125(d)(2) or in any other district where jurisdiction otherwise exists.

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

Higgins and *Severnoe Securities* hold that when a court needs to attribute a fictional situs to intangible property, the fiction must be based upon a "common sense appraisal of the requirements of justice and convenience in particular conditions." *Severnoe Securities Corporation*, 174 N.E. at 300. This is not a cyber squatting case, or a tax case. This is a civil forfeiture action involving illegal gambling devices that have been purposefully used to operate massive illegal gambling enterprises within Kentucky. Here, a sovereign government seeks to exercise its legitimate police powers to prevent illegal gambling activities within the

Commonwealth. The Commonwealth's public policy is strong and clearly articulated. KRS Chapter 372; KRS Chapter 528. Accordingly, to the extent that it is necessary to assign a fictional *situs* to the Domain Defendants[17], the Court must assign one that is consistent with the Commonwealth's public policy and legitimate governmental interests. *Id.* Considering the state's strong public policy and legitimate governmental interests in preventing illegal gambling activities, it is vital that the Commonwealth's courts be available to enforce its anti-gambling laws. A legal fiction that would artificially deprive Kentucky's courts of the power to enforce its public policy and laws would undermine the Commonwealth's legitimate governmental interests and violate its public policy.

Moreover, such a legal fiction would be inconsistent with federal law and the laws of its sister states. In *State v. Western Union Financial Services, Inc.*, __ P.3d __, 2008 WL 2583853 (Ariz. App. 2008), a recent civil forfeiture case, the Arizona Court of Appeals held that Arizona courts have *in rem* jurisdiction over intangible property that is related to illegal activities that occurred in the state. The State of Arizona is engaged in an ongoing effort to stop human smuggling and narcotics trafficking activities across Arizona's shared border with the state of Sonora, Mexico. As part of that effort, the State of Arizona brought a civil forfeiture action against wire-transfer funds that were traceable to these human-smuggling and narcotics trafficking activities. *Id.*, at 1.

In order to thwart Arizona's law enforcement efforts, smuggling groups had begun using a "triangulation" method that kept all money outside of Arizona's borders. For example, an undocumented immigrant ("UDI") would pay an initial fee to a northern Sonora-based smuggling group to smuggle that person into Arizona. A member of that group, commonly called a "coyote," guides the UDI into southern Arizona, where another coyote then drives the

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

UDI to a "stash house". The coyote then contacts the UDI's "sponsor," to pay the remaining smuggling fee by wire-transferring money from outside Arizona to the coyote's associate in Sonora. Once told the money is in hand, the coyote releases the UDI. The wire transfers, or electronic credits (the "EC"), were unwittingly transacted by Western Union. The seizure sought to intercept those wire transfers. *Id.*, at 10.

The trial court granted Western Union's motion to quash the seizure warrant, finding "that the wire-transfers sent from outside Arizona did not 'flow through, touch or have any connection with' Arizona and were 'carried out in and constitute[d] interstate and foreign commerce.'" The trial court also found that "the State had failed to 'establish *in personam* jurisdiction over the Customers in the Money Transfers[,] ... *in rem* jurisdiction over the Money Transfers [, and] ... jurisdiction over the transactions constituting the Money Transfers." *Id.*, at 3.

Citing *Shaffer*, the Arizona Court of Appeals reversed. The Court of Appeals noted that "[t]he touchstone of jurisdictional analysis must be whether the relationship among the owners or beneficial interest holders in the *res*, the forum, and the litigation would make the exercise of jurisdiction fair and just. *Id.*, at 10. "Examining the relationship between the owners of the EC's, Arizona, and the attempt to forfeit the funds as proceeds of racketing, we conclude that minimum contacts exist so that 'traditional notions of fair play and substantial justice' would not be offended by the assertion of jurisdiction. *Id.*, at 10 (citing *Shaffer*, 433 U.S. at 203-04; *International Shoe*, 326 U.S. at 316).

The Court held that the *res* constitutes proceeds of criminal activity, and that by purposefully committing the illegal acts in Arizona, the owners of the res should expect to adjudicate their rights in Arizona:

> ... the res constitutes proceeds from human smuggling and narcotics trafficking activities that predominately occurred in Arizona. Returning to the triangulation

> example, the UDI are brought into Arizona, held hostage in Arizona, an agreement for release is negotiated from Arizona with the sponsor, and the coyote performs the agreement in Arizona by releasing the UDI upon notification of payment by the sponsor. The owners or beneficial interest holders in the ECs, who are parties to this illegal enterprise, purposefully facilitated illegal acts in Arizona and should expect therefore to adjudicate their rights to the *res* in Arizona.

Id., at 11 (citing Rush, 444 U.S. at 328-29; and *United States v. Approximately $1.67 Million (US) in Cash*, 513 F.3d 991, 996 (9th Cir. 2008).

Significantly, Congress and the federal courts agree that civil forfeiture actions should be brought in the district "in which any of the acts or omissions giving rise to the forfeiture occurred." 28 U.S.C. § 1355(b); *United States v. Approximately $1.67 Million (US) in Cash*, 513 F.3d 991, 996 (9th Cir. 2008). This is true regardless of whether the property is "located" outside the district, or even outside the United States. *Id.*; *United States v. Certain Funds Located at the Hong Kong & Shanghai Banking Corp.*, 96 F.3d 20, 22 (2d Cir. 1996); *United States v. All Funds in Account in Banco Espanol de Credito, Spain,* 295 F.3d 23, 27 (D.C.Cir. 2002); *Contents of Account Number 03001288 v. U.S.*, 344 F.3d 399 (3rd Cir. 2003).

Here, as in *State v. Western Union Financial Services, Inc.*, the Domain Defendants were purposefully used to operate massive illegal gambling enterprises within the Commonwealth. The Commonwealth presented overwhelming evidence, and Judge Wingate found, that the owners and operators used the Domain Defendants to establish clear commercial links with residents of the Commonwealth, to enter into contracts with residents of the Commonwealth, to actively solicit Kentucky customers and conduct commerce within the Commonwealth, to receive payment from within the Commonwealth and to deliver software, services, opportunities, wagering information, and sums from winning wagers to residents of the Commonwealth. By choosing to operate their illegal gambling enterprise in Kentucky, they purposely availed themselves and their Domain Defendants of the privilege of doing business in Kentucky. The owners of the Domain Defendants purposefully facilitated illegal acts in Kentucky and should

therefore expect to adjudicate their rights to the Domain Defendants in Kentucky. *Western Union,* at p. 11.

4. Forfeiture Of Extra-Territorial Property Is Common And Consistent With Due Process.

Despite the Petitioners' arguments on behalf of the illegal gambling operation owners, extra-territorial *in rem* civil forfeiture actions are anything but novel under state and federal law. There are a number of federal statutes concerning civil forfeiture; in fact, the body of law regarding *in rem* forfeitures is so developed that there are even special Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. *See, e.g.,* FRCP Supp. AMC Rule G. With the enactment of the Civil Asset Forfeiture Reform Act (CAFRA), furthermore, Congress expressly declared that courts have jurisdiction to seize property used in criminal activity within their districts, even if the property is outside the district or the United States. 28 U.S.C. § 1355(b); *U.S. v. All Funds in Account in Banco Espanol de Credito, Spain,* 295 F.3d 23, 27 (D.C.Cir. 2002). Extra-national seizures of property have been made in a number of cases, and upheld by numerous appellate courts. Courts have asserted jurisdiction over property located in a number of locations overseas, including Hong Kong, the Isle of Man, the United Kingdom and Luxembourg[18]. Due Process clearly permits civil forfeiture of property located in foreign jurisdiction.

In *United States v. Certain Funds Located at the Hong Kong & Shanghai Banking Corp.,* 96 F.3d 20, 22 (2d Cir. 1996), the U.S. sought forfeiture of assets, valued at between 1.5 and 3 million dollars, located in Hong Kong, alleging that the defendant assets constituted proceeds of a conspiracy to import heroin into the United States and to launder the proceeds of that smuggling. At the request of the United States, the Hong Kong Government seized the property.

[18] *See e.g., U.S. v. Certain Funds in Hong Kong contained in Account No(s). 3201514. et al.,* Case No. 91-598 Civ-J-10 (M.D. Fla.). A copy is attached as Exhibit G.

The Second Circuit held that the Court had *in rem* jurisdiction to entertain forfeiture actions for property located overseas without the necessity of constructive or actual control, *i.e.,* the Court had jurisdiction regardless of the Hong Kong government's cooperation. The court noted that the government's cooperation went only to the effectiveness of the Court's orders, not its jurisdiction to issue the Order.

The D.C. Circuit held that constructive control is not required in *United States v. All Funds in Account in Banco Espanol de Credito, supra,* concluding that "Congress intended the District Court for the District of Columbia, among others, to have jurisdiction to order the forfeiture of property located in foreign countries." *Banco Espanol* involved bank accounts located in Spain that contained the proceeds of a cocaine smuggling operation. *Id.* at 24-25. The Court held that "Where an act or omission giving rise to the forfeiture occurs in a district, the corresponding district possesses jurisdiction over the forfeiture action regardless of its control over the *res*." *Id.* at 27. The D.C. Circuit reasoned that regardless of whether Spain cooperated, the court had jurisdiction. The court noted that Spain's cooperation was important only to the extent of the order's effectiveness. *Id.*.

In *Contents of Account Number 03001288 v. U.S.,* 344 F.3d 399 (3rd Cir. 2003), the United States brought a civil action *in rem* for forfeiture of funds located in claimant's bank accounts in the United Arab Emirates (UAE) on ground that funds were alleged proceeds of claimant's illegal narcotics sales. The Third Circuit held that the district court had subject matter jurisdiction over the UAE bank accounts regardless of the constructive control given by the UAE's cooperation: "the UAE's compliance and cooperation with this forfeiture determined only the effectiveness of the district court's order, not its jurisdiction to issue that order." The Court had jurisdiction, even in the absence of any such cooperation.

Earlier this year, in *U.S. v. Approximately $1.67 Million (US) in Cash,* 513 F.3d 991 (9th Cir. 2008), the United States brought a civil forfeiture action seeking $1.67 million in funds deposited in offshore bank accounts in the Cayman Islands. The district court held that it had *in rem* jurisdiction because it exercised constructive control over the funds once the Cayman Islands court had frozen the funds, thereby acting as its agent of the United States district court. The Ninth Circuit, following the precedent of other circuits, went further and held that the lower court had jurisdiction without need to resort to the theory of constructive possession. *Id.* at 998. It concluded that "[t]he District of Northern California properly exercised jurisdiction over the money in question due to several acts occurring in that district from which the forfeiture action arose." *Id.*

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

a. *Though Unnecessary For The Exercise Of Jurisdiction, ICANN Policies Ensure The Effectiveness Of The Forfeiture Of Domain Defendants*

As explained above, in the case of civil forfeiture of property, Due Process does not require that the property be located within the forum state. Due Process also does not require that the property be within the court's constructive possession; nonetheless, in this case, because

of the contractual agreements between the Domain Defendants' owners and registrars, the Domain Defendants are in the Court's constructive possession.

As a condition of registering the Domain Defendants with the Internet Corporation for Assigned Names and Numbers (ICANN) through its Registrars, the domain name owners agreed to be bound by the *ICANN Uniform Domain Name Dispute Resolution Policy* (the "UDRP"). A copy of the UDRP is attached as Exhibit H. In the UDRP, incorporated into each Registration Agreement, the owners of the Domain Defendants represented and warranted that the Domain Defendants shall not be used for an illegal purpose. UDRP ¶2. By using the Domain Defendants to operate an illegal gambling enterprise in Kentucky, those agreements, representations and warranties have been violated.

The UDRP sets forth the agreed dispute resolution terms and conditions relating to internet domain names. In pertinent part, the domain name owners and registrars agreed that:

a. The Registrar shall not be made a party to any action. UDRP ¶ 6.

b. A dispute between the owner and any third party concerning improper use of the domain name may be resolved "*through any court ... that may be available.*" UDRP ¶5.

c. The Registrar will voluntarily comply with the Court's orders, and, in particular, will transfer the Domain Defendants to the Court's registry. Specifically, "We will cancel, transfer or otherwise make changes to domain registrations ... [upon] our receipt of an order from a court or arbitral tribunal, in each case of competent jurisdiction, requiring such action; ..." UDRP ¶3(c).

As provided by the UDRP, no registrar has been made a party to this action; however, pursuant to the UDRP, the registrars for the vast majority of Domain Defendants have complied with the Court's orders by transferring the Domain Defendants to the Court's account or by administratively locking them pending further orders of the Court. The Domain Defendants thus transferred or locked are in the Court's possession.

The Petitioners have argued that the Court's order is not binding on the registrars or the property because UDRP ¶3 states that the registrar will transfer on receipt of an order from a court "... of competent jurisdiction." The Petitioners argue that a "court of competent jurisdiction" is one that has jurisdiction over the registrar. This argument makes no sense. The UDRP mandates that the registrar will not be made a party to any dispute between the registrant and a third party, and that the registrar "will not participate in any way in any dispute between you and any party other than us regarding the registration and use of your domain name. You shall not name us as a party or otherwise include us in any such proceeding." UDRP ¶6 (emphasis added). It is therefore absurd to suggest that the dispute must be brought in a court that has jurisdiction over the registrar. Put another way, it is absurd to suggest that jurisdiction must be based on the location of a non-party.

The UDRP clearly contemplates that a "court of competent jurisdiction" is one that has jurisdiction over the dispute. As previously discussed, Kentucky circuit courts clearly have jurisdiction over illegal gambling occurring within the Commonwealth. Moreover, the owners and operators chose to use the Domain Defendants to operate a series of illegal gambling enterprises within Kentucky. In so doing, they established sufficient minimum contacts with Kentucky so that they (the owners and operators) and their Domain Defendants are subject to the jurisdiction of Kentucky's courts.

Most registrars recognize that the Franklin Circuit Court is a "court of competent jurisdiction" over this dispute. Accordingly, pursuant to the UDRP ¶3, they have complied with the Seizure Order either transferring the Domain Defendants to the Court or the Commonwealth, or by administratively locking the Domain Defendants to prevent their transfer pending further orders from the Court. *Id.* Additionally, registrars have complied with the Seizure Order simply because ICANN and its registrars have a strong policy that domain names shall not be used for

an illegal purpose. UDRP ¶2. The Commonwealth presented overwhelming evidence that each of the Domain Defendants has been used in violation Kentucky's anti-gambling laws. Accordingly, each registrant has violated its representations and warranties, and has thereby materially breached its registration agreement. As a result, the registrars are justified in terminating the Domain Defendants' registrations.

Moreover, the registrars do not wish to be knowingly complicit in an illegal gambling enterprise. By using the domain names in violation of Kentucky's anti-gambling laws, the owners of the Domain Defendants have exposed their registrars to a potential legal dilemma. Presumably, prior to receiving the Court's Order of Seizure, the registrars had no reason to know that the Domain Defendants were being used to violate Kentucky's anti-gambling statutes. However, after receiving the Court's order, the registrars are on absolute notice. Continuing to enable the Domain Defendants would be no different than contracting to provide a boat to a drug smuggler with knowledge that the smuggler is using the boat to smuggle cocaine—just as the boat enables the smuggler to transport the cocaine into the United States, the Domain Defendants enable the owners and operators to transport their illegal gambling operations into Kentucky. After having received notice, the registrars face the choice of ceasing to service a Domain Defendant, or being knowingly complicit in the continued violation of Kentucky's anti-gambling laws.

For all of these reasons, the registrars for the vast majority of Domain Defendants have willingly complied with the Court's Seizure Order.

5. KRS 528.100 Is A Civil Forfeiture Statute Which Does Not Require A Criminal Conviction.

The Franklin Circuit Court correctly held that the General Assembly intended KRS 528.100 to be a civil forfeiture statute directed against "[a]ny gambling device or gambling record possessed or used in violation of [KRS Chapter 528]". The Court states that "KRS

528.100 contemplates a separate and independent civil proceeding, having for its purpose the condemnation of the property that is used in violation of KRS Chapter 528, independent of the innocence or guilt of its owner." *Opinion & Order*, p. 12. The Court points out that "[i]t would be absurd for our General Assembly to emphasize the pernicious nature of gambling within the state and to its determination to punish all forms of gambling, yet restrict the remedial measures made available to its law enforcement agents." *Id.*

Kentucky's highest court has held that a forfeiture proceeding under KRS 436.280, the predecessor of KRS 528.100, is a civil action *in rem*. *14 Console Type Slot Machines v. Com.*, 273 S.W.2d 582 (Ky. 1954). Likewise, in *Hickerson v. Com.*, 140 S.W.2d 841 (Ky. 1940), the Court of Appeals held that an action to recover forfeited craps tables "is in the nature of a civil action." *Id.* at 842. Finally, in *Sterling Novelty Co. v. Com.*, 271 S.W.2d 366 (Ky. 1954), the Court of Appeals held that a forfeiture proceeding under KRS 436.280 "should have been tried as a civil action because essentially it is an action in rem against the machines." *Id.* at 368.

The former KRS 428.260 affirmatively provided that a conviction was necessary to forfeit property; however, KRS 528.100 dispenses with the requirement, thus a conviction is no longer necessary. See *Osborne v. Com.*, 839 S.W.2d 281 (Ky. 1992)(criminal conviction of person whose property is sought to be forfeited unnecessary). The forfeiture statutes do not require a criminal conviction of the person whose property is sought to be forfeited. It is sufficient to show a nexus between the property sought to be forfeited and its use to facilitate a violation. *Smith v. Com.*, 205 S.W.3d 217 (Ky.App. 2006)(interpreting KRS 218A.410).

The Franklin Circuit Court further points out that federal jurisprudence supports the conclusion that KRS 528.100 is a civil forfeiture statute. The U.S. Supreme Court has held that civil forfeiture is a proceeding *in rem* against property used in committing an offense. *U.S. v. Ursery*, 518 U.S. 267, 293 (1996). In *Ursery*, the United States Supreme Court recognized that

"[s]ince the earliest years of this Nation, Congress has authorized the Government to seek parallel *in rem* civil forfeiture actions and criminal prosecutions based upon the same underlying events." *Id.*, 274. It clearly distinguished civil forfeiture from criminal prosecution:

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

Id., 284. The Court emphasized that a civil forfeiture action is an action against the property, not the owner or any particular person: "indeed, the property may be subject to forfeiture even if no party files a claim to it and the Government never shows any connection between the property and a particular person." *Id.*, 291-292.

The Petitioners suggest that because KRS 528.100 is located in Chapter 528 of the Kentucky Revised Code, it is therefore a criminal forfeiture statute. As previously discussed, Kentucky's highest court has held on three separate occasions that KRS 436.280, the predecessor of KRS 528.100, is a civil forfeiture statute. In *Ursery*, the government brought a civil forfeiture action under 18 U.S.C. § 981 against property used to manufacture marijuana. Similar to KRS 528.100, 18 U.S.C. § 981 is located in U.S.C. Title 18, Crimes and Criminal Procedure. Notwithstanding its location in the U.S. Code, the U.S. Supreme Court correctly held that the fact that 18 U.S.C. § 981 is triggered by violations of the criminal code is irrelevant – it is a civil forfeiture statute that authorizes civil action *in rem* against offending property.

In *Ursery*, the U.S. government brought the civil forfeiture action against the defendant property before it brought criminal charges against any person. Just before settlement of the civil forfeiture action was consummated, the government indicted Mr. Ursery. *Id.*, 271. The *Ursery* Court repeated its holding that a criminal conviction is not a requirement for a civil forfeiture action:

> Civil *in rem* forfeiture has long been understood as independent of criminal

> punishments.... "[T]he practice has been, and so this Court understand[s] the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam.*"

Id., 295. In holding that a civil forfeiture action and a subsequent criminal prosecution did not violate the Double Jeopardy Clause of the Fifth Amendment, the Court held that the *in rem* civil forfeiture is neither punishment nor criminal. *Id.*, 292.

In *Smith v. Com*, 205 S.W.3d 217 (Ky.App. 2006), the Kentucky Court of Appeals considered *Ursery* in determining whether a civil forfeiture under KRS 218A.410 violated the Double Jeopardy Clause of the Fifth Amendment. The Court first determined there was little doubt that the General Assembly intended KRS 218A.410 to be a civil *in rem* proceeding. Citing *Ursery*, the Court noted that "[f]orfeitures pursuant to the statute are specifically structured to be impersonal by targeting the property itself." *Id.*, 221. The Court next considered whether there existed the "clearest proof" necessary to establish that statute was so punitive as to render it criminal, despite the General Assembly's contrary intent. Again referring to *Ursery*'s analysis, the Court stated:

> ...KRS 218A.405 *et seq.* "while perhaps having certain punitive aspects, serve[s] important nonpunitive goals." ..."To the extent that [the statute] applies to 'proceeds' of illegal drug activity, it serves the additional nonpunitive goal of ensuring that persons do not profit from their illegal acts."

Id., 222.

In this case, the General Assembly directed KRS 528.100 against "[a]ny gambling device or gambling record possessed or used in violation of [KRS Chapter 528]". The General Assembly no doubt knew that Kentucky's highest court had recognized, on three separate occasions, that KRS 528.100's predecessor was a civil forfeiture statute that authorized a civil action *in rem*. Had the General Assembly wished to change the nature of the proceeding, it would have clearly expressed its contrary intent when it enacted KRS 528.100. The General Assembly could not have more clearly announced its intent to impersonally target the offending

property, not a person. There can be no doubt that KRS 528.100 "was intended by the legislature to be a civil, *in rem* proceeding." *See Smith*, 205 S.W.3d at 222.

As Kentucky courts have recognized for nearly seventy years, KRS 528.100 and its predecessor are civil forfeiture statutes, and the forfeiture action is a civil, *in rem* proceeding.

6. The Trial Court Agreed With All Reported Judicial Authority In Holding That Domain Names Are Property.

Every reported judicial opinion addressing the question has suggested or concluded that domain names are intangible property. In what appears to be the earliest case to address this issue, a registrar filed an interpleader action seeking a determination of a dispute over rights to a domain name. *Network Solutions, Inc. v. Clue Computing, Inc.*, 946 D.Supp. 858 (D.CO. 1996). The registrar sought to deposit the disputed domain name into the court and have the court determine the rightful owner. To interplead under 28 U.S.C. § 1335, the registrar had to establish that the domain name was "money or property" having a value of more than $500. *Id.* at 860. All parties agreed that the domain name was indeed "property" worth more than $500. *Id.* at 860. Although the court declined to exercise interpleader jurisdiction for other reasons, the court also agreed that the domain name was intangible property. *Id.* at 861.

Later, in 2000, the same registrar objected to a garnishment proceeding involving a domain name. *Network Solutions, Inc. v. Umbro International, Inc.*, 529 S.E.2d 80 (Va. 2000). The trial court had concluded that a domain name was a form of intellectual property. The registrar again acknowledged that a domain name is a form of intangible property. *Id.* The *Umbro* court, however, found that the domain name's status as property was immaterial for purposes of Virginia's garnishment statute. *Id.* Virginia's garnishment statute allows "a judgment creditor to institute a garnishment proceeding 'if there is a liability' on a third person to the judgment debtor." *Id.* at 85. Accordingly, the question before the court was not whether a

domain name is "property"; the question was whether a domain name is a "liability."[19] *Id.* Because its status as "property" was unnecessary for purposes of the Virginia garnishment statute, the *Umbro* court declined to consider whether a domain name is "property". *Id.* at 86.

Clue and *Umbro* show the early consensus among registrars, parties and courts, that a domain name is intangible property. Congress and Federal agencies confirmed this consensus by recognizing domains as property subject to forfeiture. The Anti-Cybersquatting Protection Act, 15 U.S.C. § 1125(d)(2), for example, treats domain names as property and expressly authorizes *in rem* actions against them. The IRS also considers domain names to be "property" subject to levy, seizure and sale. *See* IRS Notice of Public Auction Sale and appraisal for public auction of www.DoctorTalk.com, attached as Exhibit I. The Department of Justice also considers domain names to be property and has forfeited domain names used in commission of crimes. *See* DOJ press releases attached as Exhibit J, regarding forfeitures of www.software-inc.com (used in sale of counterfeit copyrighted computer software), www.isonews.com (used in sale of illegal modification chips that allowed play of pirated videogames) and a number of domain names used by an adult entertainment company in the commission of obscenity crimes.

Domains specifically used for illegal internet gambling have been auctioned as property. In August 2007, a plaintiff obtained a writ of execution in Washington State on a $46 million default judgment ordering that nearly 3,000 domain names registered to Bodog, a prominent offshore illegal internet gambling operation, were executable property and would be transferred to Plaintiff's domain account.[20] Bodog then registered a second set of domain names and directed their customers to those sites. The Washington court ordered the domain names transferred to Plaintiff's account and locked by the registrars eNom and Dotster until further

[19] Finding that a domain name is not a "liability", the court held that it was not subject to garnishments. *Id.* at 86. The court noted that certain types of intangible, intellectual property have been found to not be subject to levy and sale by creditors, citing patents, copyrights and trademarks as examples. *Id.* note 13.

[20] *1st Technology, LLC v. Rational Enterprises LTDA, et al.,* Case 2:06-cv-01110-RLH-GWF (D.Nev. 2008) ("Bodog Suit"). A copy is attached as Exhibit K.

orders. Plaintiff could not sell, liquidate, or transfer these domain names. It subsequently ordered the domains permanently transferred to Plaintiff's account. The court also ordered any new domain names to which Defendants attempted to direct customers would be similarly transferred, nullifying the attempts to hide the assets through a maze of entities.

Finally, in *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003), the question of whether a domain name is "property" was squarely addressed and adjudicated. The *Kremen* court pointed out that "property" is a broad concept that includes "every intangible benefit and prerogative susceptible of possession or disposition." *Id.* at 1030. The court applied a three-part test to determine whether a domain name is property: "First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity." *Id.* (citation omitted). The court found that domain names satisfy each criterion:

> Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. Someone who registers a domain name decides where on the Internet those who invoke that particular name—whether by typing it into their web browsers, by following a hyperlink, or by other means—are sent. Ownership is exclusive in that the registrant alone makes that decision. Moreover, like other forms of property, domain names are valued, bought and sold, often for millions of dollars....

Id. at 1030 (citation omitted). The Court held squarely that not only are domain names property, "*they are now even subject to in rem jurisdiction.*" *Id.* Accordingly, the Domain Defendants are subject to *in rem* jurisdiction and civil forfeiture.

a. Umbro's Concern about Contract Rights Does not Apply to this Forfeiture Proceeding.

The *Umbro* court pointed out that a service agreement exists between the registrar and the domain-name's registrant. The court expressed concern that a garnishment proceeding under the Virginia statute could have the effect of compelling a registrar to perform its contract duties for a third party with whom the registrar had not agreed to contract. Contrary to Network Solutions

argument, for at least four reasons, this concern does not exist in the Commonwealth's forfeiture action.

First, the *Umbro* court pointed out that the judgment creditor could obtain the same practical result by simply following ICANN's UDRP, rather than Virginia's garnishment statute. ICANN's UDRP is part of the contract between the registrar and the registrant, and reflects ICANN's policy and procedures for handing disputes concerning the use of domain names. The Commonwealth's forfeiture action and the Court's Order of Seizure are consistent with ICANN's UDRP procedures and, therefore, the registrars' registration agreements.

Second, the Commonwealth has established accounts with several registrars. The registrars were not ordered to open an account with the Commonwealth. On the contrary, the registrars voluntarily opened accounts for the Commonwealth and agreed to serve as registrar for any domain name that the Commonwealth might transfer into that account. In fact, every registrar that the Commonwealth has approached has voluntarily established an account for the Commonwealth. All forfeited domain names would be transferred to these accounts. No registrar will be compelled to do business with the Commonwealth. The Domain Defendants will be transferred only to those registrars who have voluntarily chosen to open accounts for the Commonwealth.

Third, ICANN and all of its registrars have a strong policy that domain names shall not be used for an illegal purpose. In registering a domain name, every registrant represents and warrants: (i) that the domain name is not being obtained for an illegal purpose; and, (ii) that the domain name will not knowingly be used in violation of any applicable law. Each of the Domain Defendants has been used in blatant violation Kentucky's anti-gambling laws. Accordingly, each registrant has violated its representations and warranties, and has thereby materially

breached its registration agreement. As a result, the registrars are justified in terminating the Domain Defendants' registrations.

Fourth, by using the domain names in violation of Kentucky's anti-gambling laws, the owners of the Domain Defendants have exposed their registrars to serious legal peril. Presumably, prior to receiving the Court's Order of Seizure, the registrars could possibly have been unaware that the Domain Defendants were being used to violate Kentucky's anti-gambling statutes. However, after receiving the Court's order, the registrars are on absolute notice.

Legitimate, law-abiding registrars will gladly comply with the Court's orders because: (1) ICANN's UDRP requires compliance; (2) the Domain Defendants will be transferred only to those registrars who voluntarily choose to open accounts for the Commonwealth; (3) the Domain Defendants have materially breached their registration agreements; and, (4) legitimate, law-abiding registrars have no desire to knowingly assist a criminal enterprise, or to expose themselves to legal liability.

7. The Trial Court Correctly Determined That Domain Defendants Are A "Gambling Device" Under Krs §528.010.

The Franklin Circuit Judge correctly found that not only are these domain names property, they are clearly devices within the purview of KRS 528.010, which was purposefully fashioned to broadly deter illegal gambling activity. Petitioners purposefully ignore that the KRS 528.010 definition specifically includes *"...other device, including but not limited to...."* and Kentucky law mandates a broad interpretation to accomplish the statutes' goals. KRS §446.080(1) requires the Court to liberally construe § 528.010 to promote its objective and carry out the intent of the legislature, and the courts have declared this as the Legislatures' intent. *Gilley v. Com.* 229 S.W.2d 60 (Ky.1950); *Meader v. Com.* 363 S.W.2d 219 (Ky.1963). Pursuant to KRS 528.010(4), "Gambling device" means:

> (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; (emphasis added).

The statute broadly captures all "other device[s], and expressly states that the forfeit devices are "not limited to" wheels, tables or similar devices. Without question, this broad definition intends to capture any device used in illegal gambling.

In addition to the expressly broad language of this statute, the legislature has mandated all statutes should be interpreted broadly to carry out the intent of the legislature: "[A]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." KRS 446.080(1) The true intention or will of the legislature is the law and not the literal language of the statute. *Hardwick v. Boyd County Fiscal Court*, 219 S.W.3d 198 (Ky. 2007). In construing any statute the courts must consider the intended purpose of the statute, the reason and spirit of the statute and the mischief intended to be remedied. *Com. v. Kash*, 967 S.W.2d 37 (Ky. 1997). In fact, it is the principal rule of statutory construction that the scope and applicability of a statute may be determined by ascertaining the intent and purpose of the legislature as well as by considering the evil which the law was intended to remedy. *Mitchell v. Kentucky Farm Bureau Mut. Ins. Co.,* 927 S.W.2d 343 (Ky. 1996)

Numerous decisions have recognized it was the intent of the legislature to prevent illegal gambling in whatever form when it enacted the gaming laws at issue. In *Gilley v. Com.*, 229 S.W.2d 60 (Ky. 1950), the Commonwealth moved for an order of forfeiture under the predecessor statute to KRS §528.100. The Court had to determine whether "number slips" fell within the term "contrivance used for gambling". *Id.* In concluding "number slips" were in fact a contrivance the Court stated:

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

Id. at 63.

In *Meader v. Com.*, 363 S.W.2d 219 (Ky. 1963) the Court again recognized that the gaming laws were enacted to stop all forms of illegal gambling:

> Recognizing in this instance that the intent of the legislature was to prohibit organized gambling, we are of the opinion that the operator of a dice game called beat-the-dealer is in fact operating a contrivance....

Meader, 363 S.W.2d at 221. *See also Scott v. Curd,* 101 F.Supp. 396 (D.C.Ky. 1951) (gaming laws were enacted to deter and, "so far as possible," to prevent illegal gambling, and must be liberally construed to accomplish its purpose.)

The Domain Names are clearly used as a means to achieve, perform, and further internet gambling. The Trial Court correctly relied upon *Gilley* and concluded the defendant Domain Names are the "virtual keys for entering and creating virtual casinos from the desktop of a resident in Kentucky." Opinion & Order October 16, 2008 p. 23.

When a domain name is deliberately converted to an unlawful use as a gambling device, "adapted, devised, or designed" for the purposes of furthering gambling, all property rights are forfeited and they become subject to seizure and forfeiture.

In a similar instance, the Supreme Court of Arkansas determined that "teletype machines" were gambling devices subject to forfeiture despite the fact the machines were not present where the gambling actually occurred:

> It must be conceded that the teletype machines were not gambling devices, per se. It does not follow, however, that they would not become gambling devices, under our statutes, when used for gambling purposes....
>
> [A]ppellee had deliberately converted these teletype machines to an unlawful use and purpose, thereby converting them into gambling devices "adapted,

> devised or designed" for the purpose .... and therefore all property rights in these machines were forfeited

Albright v. Muncrief, 176 S.W.2d 426 (Ark. 1943).

The argument that these domain names are not devices because all internet domain names are not designed for gambling activities is specious. A craps table is not immune from seizure as a gambling device merely because it is a "table." All internet domains names are not designed or intended for use in internet gambling, just as not every table is not designed for poker or craps, but these – goldencasino.com, pokerstars.com, betus.com, ultimatebet.com, sportsbook.com, etc. - clearly were. In *Van Pelt v. State,* 246 S.W.2d 87, 89-90 (Tenn. 1952) the Court adopted a broad definition of "gambling device," and stated that: "In determining whether or not something is a gambling device a Court is required to "look behind the name, the style and the what not of the thing and ascertain its true character." *Van Pelt,* 246 S.W.2d at 90. The *Van Pelt* Court, like the Court in *Gilley,* rejected the notion that a device had to be a tangible mechanical object and found the "slips" in the defendant's possession were gambling devices because they were "the means by which the policy game was played." *Id; See also U.S. v. Thompson,* 409 F.Supp. 1044 (D.Mont. 1976) (football parlay card is a gambling device because the game cards were indispensable and game could not be played without them).

The General Assembly used expansive language when it included "or other device" in the definition of §528.010, recognizing the need to combat the ingenuity and technological advances of those engaged in unlicensed, unregulated illegal gambling activity.

Contrary to the Petitioners claims, it is not meaningful that the internet and domain names did not exist when the term "gambling device" was enacted. Kentucky courts have interpreted the law to accomplish the legislature's objectives even in the face of rapidly evolving technology that did not exist when the law was originally contemplated. In *Central Kentucky Cellular Telephone Co. v. Revenue Cabinet,* 897 S.W.2d 601 (Ky.App. 1995), the Court held that

a cellular telephone company was a "telephone company" even though cellular technology did not exist when statute was enacted. It reasoned that the use of new technology did not change the fundamental nature of the service that the cellular telephone company provided. *Id.* at 603. Likewise, in *U.S. v. Mendelsohn* 896 F.2d 1183, 1187 (9th Cir. 1990), "a computer disk encoded with a software program is a device within the meaning of 18 United States Code § 1953." The Court noted the term "device" was not defined by statute or case law and turned to the legislative history stating:

> Congress employed broad language to "permit law enforcement to keep pace with the latest developments".... The district court did not err, therefore, in instructing that a computer disk with a program was a "device," even though bets would not necessarily be recorded on it.

Id.

The *Albright* Court noted the use of the teletype machines "was the most modern operation of the various gambling houses". Obvious parallels can be drawn between the use of a teletype machine through a telegraph in the 1940's and domains used on the internet in the 21st century.

> The means to the end may have changed, but the end remains the same, that is, cellular phone companies are designed and operated to provide telephone service. (Emphasis added).

The Domain Defendants at issue are used for the sole purpose of providing their owners with a medium to offer gambling. It is not significant that this particular device did not exist when the law was created.

Petitioners inappropriately rely on *Bratcher v. Ashley*, 243 S.W.2d 1011 (Ky. 1951), which actually confirms the Court's obligation to construe a forfeiture statute consistently with the legislature's intent. In *Bratcher*, the defendant's vehicle was forfeited for unlawful use in connection with an intoxicating liquor operation. There was no dispute as to whether the vehicle was subject to forfeiture; rather, a dispute arose regarding the disposition of the forfeited vehicle

that had been purchased on contract and assigned to a creditor. KRS 242.330 provided that upon a forfeiture sale the sheriff shall first pay any "valid recorded liens" on the property sold. The Commonwealth maintained the creditor improperly perfected its lien, precluding it from receiving proceeds from the sale. The Court did not apply a literal interpretation of the statute, or strictly construe the term "valid recorded lien"; instead, the Court read the statute consistent with the legislative intent to conclude the forfeiture statute was designed to prevent unlawful use of property, not to punish an innocent creditor. *Bratcher* confirms *Gilley* and *Meader*. The Court must broadly construe the term "device" to effectuate the legislative intent of preventing organized gambling by depriving the guilty party of the additional opportunity to misuse the Domain Names within the Commonwealth.

Finally, Petitioners offer a specious argument that they should not have to "guess" as to whether particular items are gambling devices and illegal. Illegal internet gambling operators have made this argument in the past, and it has been squarely rejected. The Second Circuit Court of Appeals held that knowledge of the illegality of internet gambling in the jurisdiction is irrelevant: "it mattered only that [defendant] Cohen knowingly committed the deeds forbidden by §1084, not that he intended to violate the statute. ... This belief regarding the legality of betting in New York are immaterial." *U.S. v. Cohen*, 260 F.3d 68 (2d Cir. 2001). Petitioners here, however, acknowledge that they know their activities within the Commonwealth are illegal. *See* video transcript of Franklin Circuit Court Hearing, October 7, 2008, 10:50:07 a.m. Once they know that their enterprise illegal, it should be apparent that the things they use to operate their enterprise are contraband. In Kentucky, and throughout the United States, the law has consistently been interpreted to subject devices utilized to conduct the gambling activity to forfeiture regardless of whether the "device" was a slot machine, piece of paper, card, or slip.

The Court has jurisdiction over the Domain Defendants by reason of their minimum contacts with Kentucky. The domains purposefully availed themselves of this jurisdiction through their commercial transactions and their systematic violation Kentucky law. This forfeiture action arises directly from that activity. The fact that the operators and /or registrars are located offshore is immaterial, as the location of the property is immaterial to the court's jurisdiction. The domain names clearly fall within the broad definition of "gambling device" under KRS 528.100. The Franklin Circuit Court has jurisdiction over the Domain Defendants, and thus Petitioners fail in their burden to satisfy the first *Hoskins* test.

III. FORFEITURE WOULD NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF PETITIONERS' ANONYMOUS MEMBERS.

A. CIVIL IN REM FORFEITURE ACTIONS DO NOT VIOLATE THE DUE PROCESS RIGHTS OF THE ANONYMOUS DOMAIN DEFENDANT OWNERS

Petitioners contend that the probable cause seizure hearing violated their anonymous members' due process rights. They further contend that the anonymous owners should have been served with a summons and complaint, prior to seizure. For multiple reasons, the Petitioners arguments are without merit.

First, the civil character of the *in rem* action should not be confused with the procedures for initiating a civil action against a person. In the words of the Court below:

> From a practical point of view, there is no summons to serve on a person when there is no person named in the complaint. The seizure of the property, discussed earlier, is the mechanism by which the Court acquires control over the property and is, for practical purposes, the mechanism which triggers the notification process to any person who claim an interest in the seized property.

Opinion and Order, p. 29.

The Court correctly held that in civil forfeitures, it is the property that is the subject of the seizure, and it is given notice by the fact of its seizure. *Republic National Bank of Miami v. U.S.*, 506 U.S. 80 (1972).

Personal property may be seized without process preparatory to forfeiture. *Smith v. Commonwealth*, 205 S.W.3d 217 (Ky.App. 2006)(interpreting forfeiture provisions of KRS 218A.415). Kentucky construes gambling forfeiture statutes "as not even requiring the owner or custodian of the machines to be party to the action....Consequently, an action may be maintained by the Commonwealth to condemn the machines, even where the owner is unknown." *Sterling Novelty Co. v. Commonwealth*, 271 S.W.2d 366 (Ky. 1954), *citing Three One-Ball Pinball Machines v. Commonwealth*, 249 S.W.2d 144 (Ky. 1952). Not only are the owners not entitled to notice prior to the seizure, therefore, if not for the post-forfeiture notice requirements of KRS 500.090, they would be entitled only to the constructive notice of the seizure. The owners of the property are given notice, constructively by the event of the seizure, and actual notice only as provided by statute - *after* seizure and forfeiture has occurred.

The Commonwealth cannot – and should not – serve summons on forfeitable property, nor should it give notice prior to seizure to the possessors of the contraband. One can imagine the limits to effective seizure if the Commonwealth announced its intention to seize a kilogram of cocaine – it is doubtful that either the cocaine or the dealer would keep the appointment. The Franklin Circuit Court recognized this reality:

> [P]re-seizure notice and hearing might frustrate the interests served by the statutes, since the property seized - domain names- like a yacht in the case of *Calero-Toledo*, 416 U.S. 663 at 679, will often be a type of property that could be removed from the reach of the Commonwealth, if advance warning of confiscation is given.

Opinion and Order, p. 30.[21]

Rather than the typical seizure without notice or hearing, in this instance the Commonwealth went the extra step and obtained a court order prior to the seizure – easily the equivalent of a warrant or summons, though neither is required. *Smith*, 205 S.W.3d 217; 1982

[21] The Domain Defendants immediately demonstrated the reality of the circuit court's concern when some took action to pressure their foreign registrar to re-transfer the domain names to the account of its anonymous owner. See Commonwealth's Motion to Terminate Permissive Intervention, attached as Exhibit L.

Ky.Op.Atty.Gen. 2-453. The trial court found this to be determinative: "[T]he seizure was only effected after determination by this Court that probable cause existed based upon the evidence presented by the Commonwealth that the domain names were being used in connection with illegal gambling activity available and accessible in Kentucky." Opinion and Order, p. 30. Because under ICANN rules, on receipt of a Court Order the Registrar is contractually bound to transfer the domain name, the Order was then served on the Registrars to complete the seizure. Upon receipt of the Order, the Registrars for the vast majority of Domain Defendants complied with the Court's order by transferring the names to the Court or the Commonwealth, or by administratively locking the Domain Defendants to prevent their transfer pending further orders of the Court.

While a forfeiture action is generally initiated by a seizure of contraband, in this instance the seizure was within the civil action because of the nature of internet domain names and the administrative procedures established for the resolution of internet domain disputes.

It is critical to understand that the Domain Defendants continue to operate as they did prior to the seizure. They were not *forfeited* as a result of the probable cause hearing, but were only *seized.* The anonymous owners' complaint is not that they have been deprived of due process, but that they wish to abscond from due process. Due process but awaits their assertion of rights in the property as provided by KRS 500.090.

B. KENTUCKY'S ACTIONS DO NOT VIOLATE THE DORMANT COMMERCE CLAUSE

Regulation of gambling is and has historically been a matter of primarily state regulation. *See, e.g.*, Interstate Horseracing Act, § 3001 ("the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders."). The states' police power to regulate gambling as it determines is in the best interest of its citizens is virtually unlimited. *Farr v. O'Keefe,* 27 F.Supp. 216 (S.D.Miss. 1939), *citing Ah Sin v.*

Wittman, 198 U.S. 500 (1905). Petitioners agree, having sued to block enforcement of the Unlawful Internet Gambling Enforcement Act of 2006 on the Tenth Amendment basis that "Gambling is a right specifically reserved to the states."[22] They nonetheless argue the exact opposite here - that the Seizure Order violates the dormant Commerce Clause of the U.S. Constitution. In light of Congress' express abdication of regulation of gambling, however, this argument fails.

Petitioners, have not and cannot claim the "interstate commerce" they seek to engage in is legal anywhere else within the United States. The Department of Justice declared in relation to prosecuting online gambling operations that "Internet gambling is ... a colossal criminal enterprise masquerading as legitimate business."[23] Petitioners' arguments that internet gambling is beyond state regulation by application of the Commerce Clause is as indefensible as would be if the Columbian cocaine cartels tried to defend their drug smuggling as an unconstitutional attack on the trucking industry. Kentucky's gambling laws have no effect on legitimate interstate commerce, and thus do not violate the Commerce Clause.

A state's interest in preventing illegal activities is a per se legitimate interest. *Chance Management, Inc. v. State of San Diego*, 97 F.3d 1107, 1115 (8th Cir. 1996). Courts have uniformly held that states have a legitimate governmental interest in the regulation of gambling. *Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003); *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 399 F.3d 1276, 1278 (11th Cir. 2005)("The regulation of gambling lies at the 'heart of the state's police power.'"); *U.S. v. Washington*, 879 F.2d 1400, 1401 (6th Cir.

---

[22] *iMEGA v. Alberto Gonzales, Attorney General of the United States*, Case No. 07-2625 (D.N.J), Plaintiff's Response to Defendant's Motion To Dismiss Complaint And Reply To Defendants' Response to Motion For Issuance Of Temporary Restraining Order. ¶103. A copy is attached as Exhibit M.

[23] Press Release, US Attorney, S.D.N.Y., U.S. Charges Two Founders of Payment Services Company With Laundering Billions of Dollars of Internet Gambling Proceeds, Exhibit N, p. 3.

1989)("The enactment of gambling laws is clearly a proper exercise of the state's police power in an effort to promote the public welfare.").

Likewise, states are free to permit certain forms of gambling and to prohibit others. *Helton*, 330 F.3d at 246. "But there is no mandate that a state must address its problems wholesale. Indeed, states are free to regulate by degree, one step at a time, 'addressing ... the phase of the problem which seems most acute to the legislative mind'" *Id.* (citing *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955)). Likewise, "Michigan's decision to permit a state lottery but prohibit private lotteries is neither an unreasonable nor arbitrary exercise of that police power." *U.S. v. Washington*, 879 F.2d at 1401.

Moreover, courts have held that there is no constitutional right to a license to operate a gambling business. *Medina v. Rudman*, 545 F.2d 244, 251 (1st Cir. 1976). Likewise, states are free to choose how and to whom they grant license. *Id.*

> We think the state, under its police powers, is entitled, if it elects, to issue racetrack licenses, and to regulate participation thereunder, on a discretionary basis as it has chosen to do here. Given the social evils associated with gambling and the state's revenue interests, the state's choice of means in the selection of licensees is entitled to prevail over the private interests of potential investors.

Id.

In *State v. Western Union Financial Service, Inc., supra,* Arizona sought to stop human smuggling across Arizona's shared border with Sonora, Mexico by seizing wire-transfer funds traceable to those endeavors. Western Union challenged the *in rem* forfeiture of electronic credits (ECs) in Western Union's computer system, representing wire transfers of $500 or more from 28 states other than Arizona to recipients in Sonora, Mexico. Western Union challenged the seizure on the same grounds as the Domain Name defendants in this case, raising issues of jurisdiction, whether the EC's are property, the situs of the EC's, and the dormant Commerce Clause.

The *Western Union* Court recognized that a statue is only invalidated by the dormant Commerce Clause if the conduct the state seeks to regulate occurs wholly outside the State, and concluded its resolution of the in rem jurisdictional issue was also dispositive of whether the warrants sought to regulate conduct wholly outside of the state. *Western Union,* at 24. In other words, because the Court had *in rem* jurisdiction over the property the seizure was appropriate under the Commerce Clause, even though the EC's were being sent from states other than Arizona to Sonama, Mexico. The Court noted that a Court should be hesitant to interfere under the guise of the Commerce Clause when a local government engages in a traditional government function. *Id. citing Dept. of Revenue of Ky. v. Davis,* 128 S.Ct. 1801 (2008). Accordingly, the Court was not persuaded this seizure violated the dormant Commerce Clause or the "dormant foreign Commerce Clause."

C. THE FIRST AMENDMENT RIGHTS OF THE ANONYMOUS OWNERS HAVE NOT BEEN VIOLATED.

Ignoring the fact that their internet gambling operations are illegal, the absent and anonymous owners of the Domain Defendants argue through their surrogates that their gambling operations are merely advertising activities entitled to protection under the First Amendment. Even if Petitioners had standing to raise this claim, it must fail.

The traditional definition of commercial speech is "speech which does no more than propose a commercial transaction." *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 340 (1986), and is "related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York,* 447 U.S. 557, 561 (1980). Petitioners correctly cite *Central Hudson* for the proposition that "if a communication is neither misleading nor related to unlawful activity" restrictions by the state are subjected to intermediate scrutiny. *Central Hudson,* 447 U.S. at 564.

In a recent child pornography case, the U.S. Supreme Court held that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment Protection. *U.S. v. Williams*, __U.S. __, 128 S.Ct. 1830, 1841 (2008). However, any First Amendment protection is lost when the commercial activity it seeks to advertise for is illegal and the restriction on advertising is incidental to a valid limitation on economic activity. *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376, (1973). as demonstrated, all of the domain names have been used for illegal gambling purposes within the Commonwealth. These sites are not used to "advertise", rather, they are used to gamble illegally. Petitioners readily acknowledge that their online gambling businesses are illegal. *See* video transcript of Franklin Circuit Court Hearing, October 7, 2008, 10:50:07 a.m. Accordingly, advertisements to engage in this illegal conduct are categorically excluded from First Amendment Protection. *Id.*

In the specific context of illegal internet gambling, an online advertiser for illegal internet gambling sites filed suit against the U.S. Department of Justice challenging DOJ's assertion of aiding and abetting liability against broadcasters who accepted advertisement for internet gambling operations. The suit was in response to a June 11, 2003 letter from the Deputy Assistant Attorney General for the Criminal Division of the DOJ to the National Association of Broadcasters advising them of their members' potential liability, stating that:

> Broadcasters and other medial outlets should know of the illegality of offshore sportsbook and Internet gambling operations since, presumably, they would not run advertisements for illegal narcotics sales, prostitution, child pornography or other prohibited activities.

Casino City, Inc. v. United States Department of Justice, 04-557-B-M3, p. 3 (M.D.La. February 15, 2005), *appeal dismissed,* 05-30403 (5th Cir. 2005). A copy is attached as Exhibit O.

The Court ruled that Casino City had no standing to assert the claim, but that the First Amendment claim would fail nonetheless:

> It is well-established that the First Amendment does not protect the right to advertise illegal activity.... Furthermore, the speech in which plaintiff wishes to engage is misleading because it falsely portrays the image that Internet gambling is legal.

Casino City, supra, p. 14. Accordingly, any analogy to the use of billboards related to *legal* gambling in other states is unavailing. A Kentucky resident is obviously free to travel across state lines to gamble at a legal establishment regulated by a particular state. However, just as the owners of casinos located in other states cannot set up a table on a street corner in Kentucky and run a blackjack game without a license, the owners of the Domain Names cannot take the game off of the street corner and move it into the Kentucky resident's home through the use of the internet. Because these domain names are clearly used to promote and effectuate illegal activity, there can be no First Amendment violation.

D. THE FIFTH AMENDMENT RIGHTS OF THE ANONYMOUS OWNERS HAVE NOT BEEN VIOLATED.

Petitioner iMEGA contends that its anonymous members' Fifth Amendment privileges against self incrimination are being or will be irreparably harmed by the Trial Court's order refusing to allow iMEGA to intervene on their behalf. The Fifth Amendment has no application to the present case and thus the rights of iMEGA's anonymous members will not be irreparably harmed by denial of a writ of prohibition.

The Fifth Amendment privilege against self incrimination is personal. *Com. v. Southern Express Co.*, 169 S.W. 517, 518 (Ky. 1914). Because the privilege is personal, a trade association or other proxy cannot assert it on behalf of its members, much less anonymous and absconding members. *Southern Express* further holds that in order to assert the privilege against self-crimination the individual claiming it "must appear in person in the court... rendering himself amenable to the authority of the court...so that the court may determine for itself whether [the documents/testimony] are of a criminating nature." *Id; see also U.S. v. Certain Real*

Property, 968 F.2d 990, 994 (6th Cir.1993)(forfeiture action will not be barred because of possibility claimant will expose himself to incriminating admissions or be disadvantaged by remaining silent... blanket assertion of the privilege is no defense to a forfeiture proceeding); *Baker v. U.S.*, 722 F.2d at 518-19 (claimant had no standing where he refused to claim any particular interest in the property but asserted that Fifth Amendment allowed him to make claim for the property without explaining the nature of his interest).

Additionally, although iMEGA has not identified its members, presumably most, if not all, of the Domain Defendants are owned by corporate entities. "Not only are corporations excluded from the assertion of the constitutional privilege against self-crimination, but such privilege may not be claimed for the corporation by its officers and agents." *Id.*

The attempt at associational standing is designed precisely to avoid the requirement of these authorities that the owners appear and risk incriminating themselves, and cannot be countenanced; however, the Fifth Amendment assertion would fail even if the owners appeared personally to assert it. and the Fifth Amendment is not a valid basis to avoid forfeiture of the Domain Defendants.

E. THE TRIAL COURT CORRECTLY HELD THAT THE SECRETARY HAS STANDING TO BRING THE UNDERLYING ACTION

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

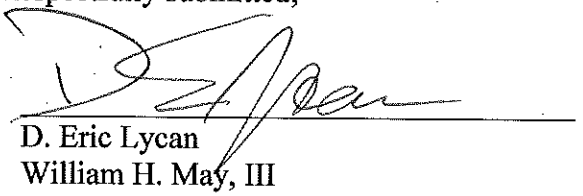
KRS 12.210 and 12.220 empower the executive branch to hire attorneys and bring claims. *Johnson v. Commonwealth ex rel. Meredith*, 165 S.W.2d 820 (Ky. 1942). KRS 12.210 allows that "the Governor, *or any department with the approval of the Governor,* may employ... attorneys for legal services...." KRS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

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

CONCLUSION

The attempt of the owners of the illegal gambling Domain Defendants to appear and assert their interests through associations or as "dot-com" pseudonyms is antithetical to the concept of *in rem* forfeiture, and cannot be countenanced by allowing these surrogates standing. It is clear that the Domain Defendants, by their use for illegal gambling in Kentucky, have the minimum contacts to satisfy any due process concerns over Kentucky's exercise of *in rem* jurisdiction. The rights of the anonymous owners, much less the disinterested surrogates, will not be harmed by requiring them to assert their claims post-forfeiture as required by KRS 500.090. The standards of *Hoskins,* are not met by these Petitions, and the Court should not exercise its discretion to condone the illegal scheme through issuance of a Writ of Prohibition.

Respectfully submitted,



D. Eric Lycan
William H. May, III
William C. Hurt, Jr.
Aaron D. Reedy
HURT, CROSBIE & MAY, PLLC
127 W. Main Street
Lexington, Kentucky 40507
Telephone: (859) 254-0000
Fax: (859) 254-4763

Robert M. Foote
FOOTE, MEYERS, MIELKE &
FLOWERS, LLC
28 North First Street, Suite 2
Geneva, IL 60134

COUNSEL FOR THE COMMONWEALTH

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Motion was served, this the 21st day of November, 2008 by U.S. Mail to the following:

Hon. Jon L. Fleischaker
Hon. R. Kenyon Meyer
Hon. James L. Adams
Dinsmore & Shohl, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
Telephone: (502) 540-2300
Facsimile: (502) 585-2207

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 Registrant For Goldenpalace.com And Goldencasino.com

Hon. Edward James Leyden
Hollrah Leyden, LLC
1850 K Street, N.W.
International Square, Suite 390
Washington, D.C. 20006
Counsel For Interactive Media Entertainment & Gaming Association, Inc.

Lawrence G. Walters
Westton, Garrou, Walters & Mooney
781 Douglas Avenue
Altamonte Springs, FL 32714
Counsel For Registrant for Goldenpalace.Com

John L. Tate
Hon. Ian T. Ramsey
Hon. Joel T. Beres
Stites & Harbison, PLLC
400 West Market Street
Suite 1800
Louisville, KY 40202-3352
Telephone: (502) 587-3400
Fax: (502) 587-6391

Hon. William E. Johnson
Johnson, True & Guarnieri, LLP
326 West Main Street
Frankfort, KY 40601
Telephone: (502) 875-6000
Facsimile: (502) 857-6008

Hon. Bruce F. Clark
Stites & Harbison, PLLC
421 West Main Street
Frankfort, KY 40601
Telephone: (502) 223-3477

Hon. Patrick T. O'Brien
Greenberg Traurig
401 East Las Olas Boulevard
Suite 2000
Fort Lauderdale, FL 33301
Telephone: (954) 768-8221
Fax: (954) 765-1477

Hon. A. Jeff Ifrah
Hon. Jerry Stouck
Greenberg Traurig, LLP
Suite 1000
2101 L. Street, N.W.
Washington, D.C. 20037
Telephone: (202) 331-3100
Counsel For Interactive Gaming Council And Vicsbingo.com

Kevin D. Finger
Paul D. McGrady
Greenberg Traurig, LLP
77 West Wacker Drive, Suite 2500
Chicago, IL 60601
Counsel For Group Of 5 Domain Name Defendants

Attorney General Jack Conway
Hon. Tad Thomas
Hon. Lisa Long
Kentucky Attorney General
State Capitol
700 Capital Avenue, Suite 118
Frankfort, KY 40601

Hon. Thomas Wingate, Judge
Franklin Circuit Court
P.O. Box 40601-0678
Frankfort, KY 40601-0678
Respondent

Phillips S. Corwin
Ryan D. Israel
BUTERA & ANDREWS
1301 Pennsylvania Ave., N.W., Suite 500
Washington, DC 20004
Counsel For Amicus Curiae Internet Commerce Association

Merrill S. Schell, Esq.
David A. Calhoun, Esq.
WYATT, TARRANT & COMBS, LLP
500 West Jefferson Street, Suite 2800
Louisville, KY 40202-2898
Counsel For Amicus Curiae Internet Commerce Association

Matthew Zimmerman, Esq.
454 Shotwell Street
San Francisco, CA 94110
Counsel for Electronic Frontier Foundation

Timothy B. Hyland
Of Counsel
STEIN, SPERLING BENNETT,
DE JONG, DRISCOLL & GREENFEIG, P.C.
25 West Middle Lane
Rockville, MD 20850

Michael R. Mazzoli
COX & MAZZOLI
600 West Main Street, Suite 300
Louisville, Kentucky 40202
Counsel For Network Solutions, Inc.

John L. Krieger
Anthony Cabot
LEWIS AND ROCA LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169
Counsel For The Poker Players Alliance

David A Friedman, Esq.
William E. Sharp, Esq.
315 Guthrie Street, Suite 300
Louisville, KY 40202
Attorneys for ACLU of Kentucky

John B. Morris, Jr., Esq.
1634 I Street NW, Suite 1100
Washington, DC 20006
Counsel for Center for Democracy and Technology

COUNSEL FOR THE COMMONWEALTH