COMMONWEALTH OF KENTUCKY
SUPREME COURT
2009-SC-000043

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

V.

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

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

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

BRIEF FOR APPELLANT

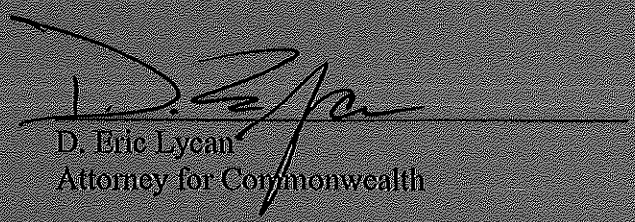
D. Eric Lycan
William H. May, III
William C. Hurt, Jr.
Aaron D. Reedy
HURT, CROSBIE & MAY, PLLC
127 W. Main Street
Lexington, Kentucky 40507
Telephone: (859) 254-0000
Fax: (859) 254-4763

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

COUNSEL FOR THE COMMONWEALTH

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief for Appellants was served by First Class U.S. Mail, postage prepaid, upon Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. John L. Tate, Hon. Ian T. Ramsey, Hon. Joel T. Beres, Stites & Harbison, PLLC, 400 West Market Street, Suite 1800, Louisville, KY 40202-3352, Hon. Bruce F. Clark, Stites & Harbison, PLLC, 421 West Main Street, Frankfort, KY 40601, and Hon. A. Jeff Ifrah, Hon. Jerry Stouck, Greenberg Traurig, LLP, Suite 1000, 2101 L. Street, N.W., Washington, D.C. 20037, *Counsel for Interactive Gaming Council and vicsbingo.com;* Hon. Thomas Wingate, Judge, Franklin Circuit Court, P.O. Box 40601-0678, Frankfort, KY 40601-0678, *Appellee;* Hon. William E. Johnson, Johnson, True & Guarnieri, LLP, 326 West Main Street, Frankfort, KY 40601, Hon. Patrick T. O'Brien, Greenberg Traurig, 401 East Las Olas Boulevard, Suite 2000, Fort Lauderdale, FL 33301, and Hon. Kevin D. Finger, Hon. Paul D. McGrady, Greenberg Traurig, LLP, 77 West Wacker Drive, Suite 2500, Chicago, IL 60601, *Counsel for Domain Defendants playersonly.com, sportsbook.com,sportsinteraction.com, mysportsbook.com ,and linesmaker.com;* Hon. Jon L. Fleischaker, Hon. R. Kenyon Meyer, Hon. James L. Adams, Dinsmore & Shohl, LLP, 1400 PNC Plaza, 500 West Jefferson Street, Louisville, KY 40202, Hon. Edward James Leyden, Hollrah Leyden, LLC, 1850 K Street, N.W., International Square, Suite 390, Washington, D.C. 20006, *Counsel For Interactive Media Entertainment & Gaming Association, Inc.*, and Phillip D. Scott, Greenebaum Doll & McDonald PLLC, 300 West Vine Street, Suite 1100, Lexington, Kentucky 40507, and Margaret E. Keane, Greenebaum Doll & McDonald PLLC, 3500 National City Tower, 101 South Fifth Street, Louisville, Kentucky 40202, *Counsel for Interactive Gaming Council,* this 2nd day of April, 2009.



D. Eric Lycan
Attorney for Commonwealth

INTRODUCTION

This is an appeal from a Writ prohibiting the Franklin Circuit Court from proceeding with the *in rem* civil forfeiture of 141 Internet Domain Names used as illegal "gambling devices" in violation of KRS Chapter 528. The Appellee associations and pseudonyms have no standing as "lawful claimants" to protest the forfeiture as surrogates for the anonymous offshore entities engaged in this unregulated gambling. Granting an extraordinary writ is inappropriate when it allows illegal gambling operators to purposefully target Kentucky residents from offshore, systematically violate Kentucky law and reap profits from illegal gambling in Kentucky - while contending that the courts of the Commonwealth are powerless to act.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes oral argument would be helpful to the Court's understanding that the *in rem* civil proceeding is one against the property itself, that the absent owners lack standing to defend that property through surrogates, and that the Domain Defendants are illegal gambling devices that are within the Court's in rem jurisdiction due to their minimum contacts with and purposeful availment of this forum.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

After an investigation into illegal gambling, the Commonwealth concluded, as have other state and federal authorities, that unregulated internet gambling is particularly harmful because, unlike legal and regulated gaming, it is extraordinarily easy, available and anonymous. Wagers are accepted in an unregulated underworld without effective age verification, identification, or financial accountability. Internet gamblers can gamble in relative isolation, from the privacy of their homes and offices, without any of the traditional social controls that help confine intemperance. Persons can instantly wager and lose retirement savings or college funds in secrecy.

The secrecy and anonymity of illegal internet gambling make this form of gambling extremely dangerous for youth. Minors can illegally gamble from a bedroom or even a mobile phone without the knowledge of parents. According to the 2003 Annenberg National Risk Survey of Youth (attached as Exhibit D) a total of 18.2% of age 14 - 17 youth gamble on the internet monthly, including almost nine percent (8.9%) of fourteen and fifteen year-olds. Furthermore, the Commonwealth is losing potentially millions of dollars in tax revenue as a result of illegal internet gambling operations that impact legitimate and regulated gambling operations, and diverts legitimate betting on horse racing in the Commonwealth. For these and other reasons, internet gambling is illegal under federal law and all 50 U.S. states - including Nevada and New Jersey, which depend on legal and regulated gaming for their economies.

THE ILLEGAL ONLINE GAMBLING RACKET

Since the inception of internet gambling around 1995, international gambling syndicates have capitalized on ever-expanding internet usage to solicit U.S. citizens. Online gambling operations offer a comprehensive array of gambling options on par with the largest Las Vegas casinos - such as sports betting, blackjack, slots, poker, roulette, keno, and baccarat. In 1996, there were only approximately 30 internet gambling sites that generated an estimated $30 million in annual revenue, according to various market analysts. The illegal internet gambling industry has since grown explosively, with more than 2,500 unregulated sites soliciting U.S. internet users.[1] These 2,500 sites consist of 1,083 online casinos, 592 sportsbooks, 532 poker rooms, 224 online bingos, 49 skill game sites, 30 betting exchanges, 25 lottery sites, and 17 backgammon sites (Casino City, 2006). They reaped an estimated 2006 profit over $10 billion (or much higher depending on the source), 80 percent coming from the U.S.

The explosion of "mobile" gambling applications - from a Blackberry or mobile phone - fuels the continued growth in online gambling. As touted by gambling software provider Microgaming: "Business analysts worldwide agree that Mobile Gaming is the fastest growing, most profitable phenomenon in the wireless market... After all, consumers almost always have their mobile devices with them, so it's an ideal opportunity to deliver casino games right into your players' hands and expand your player base." While the precise revenues can

[1] Attached as Exhibit E are charts illustrating the growth in illegal internet gambling.

only be estimated because of the lack of regulation, taxation, and industry transparency, an insight into the truly massive scale of the illegal internet gambling industry is available from the World Trade Organization ("WTO"), shown in Exhibit E. Millions per year of this Illegal internet gambling revenue is generated from internet gambling operations conducted in Kentucky.

The Department of Justice declared in relation to prosecuting online gambling operations that "Internet gambling is ... a colossal criminal enterprise masquerading as legitimate business." When the operators of these casinos and sports books have been found within the United States, they have been successfully prosecuted as criminal racketeering enterprises. The DOJ has also successfully pursued domestic companies that advertise or collude with internet casinos, disgorging funds and imposing fines on PayPal, The Discovery Channel, Yahoo, Microsoft and Google, among others. On December 16, 2008, just days after the Court of Appeals heard argument in this case, a foreign executive of an online gambling operation pled guilty and forfeited three hundred million dollars in New York federal court.

For more than ten years, law enforcement agencies including state attorneys general, U.S. attorneys and the Department of Justice have brought actions or prosecutions against internet gambling operators and U.S. companies that aid them. In 1998, Jay Cohen, an American citizen who set up an online sports betting operation in Antigua, was charged with violating the Wire Wager

Act. In 2000, after he returned to the United States to fight the charge, he was convicted in federal court and sentenced to 21 months in prison.

The State of New York prosecuted an internet gambling company based in Antigua, brushing aside arguments that it could not establish jurisdiction over the absent operation: "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."[2]

The deputy assistant attorney general for the criminal division of the U.S. Justice Department sent a letter in June 2003 to trade groups representing publishers and broadcasters.[3] The letter warned the trade groups that their members might be in violation of the law by aiding and abetting online casinos. Several big media operations -- including Infinity Broadcasting, Clear Channel Communications and the Discovery Networks – stopped running advertisements for offshore internet casinos in 2003 in light of the threat of prosecution.[4] In April

---

[2] *People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y.S. 1999).
[3] Exhibit "F".
[4] New York Times, Companies Aiding Internet Gambling Feel U.S. Pressure, 3/15/04 A1 Page 4.

2004, US marshals seized over $3 million of funds from Discovery Communications, the television and media company that owns the Travel Channel. The funds had been paid to Discovery for television advertisements to promote a popular gambling website. Discovery was told that it was party to illegal activity (effectively 'aiding and abetting' a crime) by broadcasting such advertisements.[5]

On January 21, 2006, The Sporting News entered into a $7.2 million settlement with the DOJ to resolve accusations that it promoted internet gambling by publishing advertisements for online casinos. As part of the settlement, The Sporting News agreed to complete a three-year public service campaign to educate people about illegal internet and telephone gambling.

Internet Gambling operator Betonsports PLC and related parties pleaded guilty in federal court in 2006 in the Eastern District of Missouri to illegal gambling-related charges, admitting that they were members of a criminal organization that operated web sites that offered unlawful computer and telephone sports betting in the United States.[6]

In June 2007, the U.S. Attorney for the Southern District of New York announced that the founders of internet payment processor NETeller PLC pleaded guilty to charges they conspired with others to promote illegal gambling

[5] New York Times, U.S. Steps Up Push Against Online Casinos by Seizing Cash, 5/31/2004.
[6] Order of Permanent Injunction, Exhibit G.

by providing payment services in the U.S. to offshore internet gambling businesses.[7]

In December of 2007, Microsoft, Google, and Yahoo agreed to pay a total of $31,500,000 to resolve claims that they promoted illegal gambling.[8] The settlements stem from an investigation into illegal online gambling by the U.S. Attorney, FBI and IRS of the three companies' advertisements for illegal online gambling. The settlements expressly exclude settlement of any State law claims.

Anurag Dikshit, a founder and former officer and director of an internet gambling business, pleaded guilty on December 16, 2008 in Manhattan federal court to charges that he used the wires to transmit in interstate and foreign commerce bets and wagering information. From 1997 through 2006, his Gibraltar corporation and affiliated entities offered casino and poker games to customers who wished to gamble online. A substantial majority of his online gambling customers, who accounted for approximately 85% of revenue, were located in the U.S. Dikshit was a principal shareholder and, at various times, served as an officer and director of the corporation. He faces a maximum sentence of 2 years in prison and a fine of $250,000. In addition, he agreed to forfeiture allegations that require him, a non-U.S. citizen, to forfeit $300,000,000.00 in proceeds of the illegal gambling enterprise.

[7] Press Release, July 18, 2007, Exhibit H.
[8] U.S. Attorney Press Release, 12/19/2007, Exhibit J.

Despite these efforts by other state and federal authorities, illegal gambling operations remain offshore, anonymous and difficult to reach while conducting a multi-billion dollar illegal gambling enterprise in Kentucky. Only by seizing and subsequently forfeiting the domain names can the Commonwealth require that the illegal casinos respect its laws and use readily available technology to block their domains from being accessed from Kentucky.

KENTUCKY LAW PROHIBITING UNREGULATED GAMBLING

Kentucky law has long reflected its strong public policy prohibiting unregulated gambling operations. KRS Chapter 528 makes it illegal to conduct, promote, advertise, own, profit from, or conspire to profit from an illegal gambling operation. Under KRS 528.020, a person is guilty of a Class D felony when he knowingly advances or profits from unlawful gambling activity by engaging in a bookmaking operation or setting up and operating a gambling device. Under KRS 528.030, a person is guilty of a Class A misdemeanor when he knowingly advances or profits from unlawful gambling activity. A person "advances gambling activity" when, acting other than as a player, he engages in conduct that materially aids any form of 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
- 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 gambling activity. *Id.*

Because the owners of the illegal gambling domain names are often disguised or registered by proxy, and because they have located in friendly foreign jurisdictions to avoid service and enforcement of judgments, it is difficult to recover against the owners *in personam*. The gambling devices, however, specifically the domain names used to conduct illegal internet gambling in Kentucky, are forfeit to the Commonwealth under KRS 528.100.

Perhaps most significantly, KRS § 528.100 mandates forfeiture of any gambling devices used or intended to be used for illegal gambling. Each domain seized in the underlying action is such a device. Following forfeiture, the case would then proceed under KRS 500.090. That statute requires:

> (4) The trial court shall remit the forfeiture of property when the lawful claimant:
>
> (a) Asserts his or her claim before disposition of the property pursuant to this section;
>
> (b) Establishes his or her legal interest in the property; and
>
> (c) Establishes that the unlawful use of the property was without his or her knowledge and consent. This subsection shall not apply to a lienholder of record when the trial court elects to dispose of the property pursuant to subsection (1)(b) of this section.
>
> (5) For purposes of this section, "lawful claimant" means owner or lienholder of record.

Accordingly, if the Domain Name owners believe they are not involved in criminal activity they will have their chance to establish that fact prior to the domain name being forfeited and/or disposed and operations being shut down. Subsequent to the forfeiture hearing, the Commonwealth can then require that the casinos not operate in Kentucky, or failing that, shut down the operation.

THE COMMONWEALTH SEEKS CIVIL FORFEITURE OF THE DOMAINS

Pursuant to KRS 528.100 and well-developed civil forfeiture law, the action *in rem* lies against the offending property itself, not against the individual owner or possessor. On August 26, 2008, the Commonwealth filed its *in rem* civil forfeiture Complaint[9] against 141 named internet Domain Defendants to stop unregulated, unlicensed illegal internet gambling that is occurring within the Commonwealth in blatant violation of Kentucky law. Due to the intangible nature of the property and the contractual rules regarding domain disputes, instead of a physical seizure the Commonwealth moved for an Order of Seizure against the property. On September 18, 2008 the Court conducted a probable cause hearing on the Motion for Seizure. The Commonwealth presented "overwhelming" evidence that the Domain Defendants were gambling devices used in connection with illegal gambling activity in Kentucky.[10] This evidence included testimony of Dr. Derek J. Paulson, Professor of Criminology and

[9] The Commonwealth's Second Amended Complaint is attached as Exhibit K.

[10] The evidence included computer screenshots of the gambling activity, correspondence from the operators, account statements of bank transactions, the reports of the Commonwealth's investigators, and video evidence of the illegal activity at each domain. Examples are attached as Exhibit L.

cybercrime instructor at Eastern Kentucky University, that the Domain Defendants are "devices" and are used in violation of KRS Chapter 528.

The Trial Court found that probable cause existed that the Domain Defendants were being used within Kentucky in violation of KRS Chapter 528. It 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 copy of the September 18, 2008 order is attached as Exhibit B. A forfeiture hearing was scheduled for September 25, 2008 to allow anyone claiming an ownership interest in the seized domains to appear and assert qualifications for return of the property pursuant to KRS 500.090.

The Commonwealth transmitted the Court's order to the registrars of each of the Domain Defendants, notifying each of the seizure and the forfeiture hearing. At the forfeiture hearing on September 26, 2008, no one claiming to be a lawful claimant appeared to assert an interest. Instead, ICG and iMEGA, two internet gambling lobbying associations, appeared to defend by proxy purported members' interests in the illegal gambling devices.[11] IGC and iMEGA have refused to identify a single owner that they seek to represent. iMEGA has even failed to identify any Domain Defendants its unidentified members claim to

[11] IGC's Petition for Writ included a co-Petitioner, "vicsbingo.com". This pseudonym did not appear in the court below, but was included following the court's rejection of the associational standing argument.

own. Appellant has no way to verify whether the associates have the authority to represent an actual entity claiming an ownership interest in a domain.

Separate counsel appeared purporting to represent the five Domain Defendants playersonly.com, sportsbook.com, sportinteraction.com, mysportsbook.com and linesmaker.com ("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 refused to identify the owner(s) of the 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.

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. The Trial Court ordered on October 2, 2008 that no party take any action regarding transfer, ownership or registration of the Domain Names unless and until further ordered by the Court, and allowed the groups to brief certain issues while it considered the motions for permissive intervention. After receiving and carefully reviewing the briefs, the Trial Court conducted a second hearing, and subsequently entered a lengthy, reasoned Opinion and Order dated October 16, 2008, attached as Exhibit C.

The Trial Court concluded, among other things, that 1) the Court has reasonable basis to assert civil *in rem* jurisdiction over the Domain Defendants and their owners/operators; 2) Domain Defendants are property and "gambling

devices" subject to seizure and forfeiture; 3) the seizure was consistent with Due Process; 4) IGC and iMEGA lacked associational standing to intervene; and 5) the lawyers for the Group of 5 must disclose the identities of the persons who engaged them and their interests in the *res*. 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).

The Trial Court denied all Motions to Dismiss and the Motion of IGC to intervene, but amended the prior Seizure Order to limit the forfeiture proceedings to those domains that had not "on or before 30 days from entry of [the] Opinion and Order, install[ed] 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...." In other words, if the owners of the domains could establish to the Commonwealth or Court's satisfaction that such geographical blocks are operational such Domain Defendants would be dismissed from the action.

The Seizure Order of September 18, 2008 remained in effect as amended by this order. The Court set a final hearing on forfeiture for November 17, 2008. IGC and the Group of 5 immediately filed a Motion to Stay that Order and to

hold the forfeiture hearing in abeyance. The forfeiture hearing was postponed by the trial court, but the action was not stayed. Appellees then filed original actions petitioning for Writs of Prohibition in the Court of Appeals, which by a November 14, 2008 Order suspended the forfeiture hearing.

The Court of Appeals, after consolidating the three actions, reviewed the three Petitions, three briefs by *Amicus Curiae,* and the Commonwealth's Response. Oral argument was held on December 12, 2008. On January 20, 2009, a divided panel issued its Order Granting Petition for Writ of Prohibition. The Majority declined to substantively address the issue of standing, allowing the associations and pseudonyms standing to appear without reference to any status as "lawful claimants" under KRS 500.090, or any other authority. It did not find *in rem* jurisdiction lacking, but decided the matter on the basis that a domain name is not a "gambling device" within the broad definition of KRS 528.010(4).[12] The dissent agreed with the trial Judge that the domain name, when used for illegal gambling, is an enabling component of a unified system that meets the broad definition of an internet gambling device. The Majority made its conclusion without considering any proof or testimony, including that of Dr. Derek J. Paulson that a domain name is a device within the statutory definition. The Commonwealth immediately appealed the Order to this Court, effectively

[12] Judge Taylor, in a separate concurrence that the other two judges declined to join, also opined that KRS 528.000 requires a conviction of an individual prior to forfeiture of the device.

staying the Order of the Court of Appeals and leaving Judge Wingate's Order of Seizure in effect.

ARGUMENT

I. ONLY A PROPERTY OWNER MAY CONTEST THE FORFEITURE

Appellees do not have standing to appear in the Circuit Court, to prosecute the original action in the Court of Appeals, or defend this appeal. Only a party with proper standing may petition for a writ of prohibition. *Schroering v. McKinney,* 906 S.W.2d 349 (Ky. 1995). 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). Appellees do not have a direct interest in the subject matter of the litigation, much less a legal interest in the property required by KRS 500.090. The burden is on the claimant to establish standing, and Appellees 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 Appellees claim to be owners of a single Domain Defendant. As such, the Trial Court correctly held that the internet gambling associations lacked standing to litigate on behalf of the Domain Defendants.

A. PROPERTY CANNOT CONTEST ITS OWN FORFEITURE.

It is self-evident by the very nature of a civil forfeiture, as distinct from an action against a person, that seized property cannot contest its own forfeiture. Nonetheless, without identifying the owners, counsel seek 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...." Exhibit C, 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. The absurdity of such an appearance has been forcefully rejected by every court to consider it, and should be rejected by this Court. 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 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.*. 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, but do not claim to represent the owners. 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 seek the Writ of Prohibition. Accordingly, the Writ should be dissolved.

B. THE GAMBLING ASSOCIATIONS LACK STANDING.

The internet gambling associations cannot appear in this action on behalf of seized property (or anonymous owners) by misapplication of the associational standing doctrine, 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. No court has apparently ever permitted associational standing in any *in rem* civil forfeiture action. The Court does not need to reference KRS 500.090 or the *Hunt*[13] criteria to

[13] *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977), discussed *infra.*

imagine the absurdity of a fictitious "Narcotics Trafficking Association" appearing to contest a seizure of illegal drugs.

Associational standing is barred 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. 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". The statute specifically defines a "lawful claimant" as the owner or lienholder of record. Notably, the statute does not provide for associational standing. No Appellee claims to be the owner of a Domain Defendant; therefore, no Appellee has standing to appear in this matter.

The authority is uniform that to have standing, one must prove an ownership interest in the property. "The claimant has the burden of establishing his or her standing in forfeiture proceedings...[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; *U.S. v. $515,060.42, supra,* (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. *Baker v. U.S.*, 722 F.2d 517 (9th Cir. 1983).

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.

IMEGA nonetheless 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 to *in rem* forfeiture on the basis of this dilemma was thoroughly deliberated and rejected. In *U.S. v. $6,976,934.65 Plus Interest*, 520 F.Supp. 2d 188 (D.D.C. 2007)(fugitive status of corporation owned by a fugitive disallowed standing to contest forfeiture of nearly $7 million in funds related to illegal internet gambling).

None of the Appellees claim to be owners, and thus none have standing to appear or otherwise challenge this action. In light of this authority, the Appellees' pleas to represent the anonymous owners of the domains must fail.

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

A writ is an extraordinary remedy which should not issue lightly. *Fischer v. State Board of Elections*, 847 S.W.2d 718 (Ky. 1993). 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). "A writ of prohibition *may* be granted upon a showing that (1) the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court; or (2) that the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted." *Hoskins v. Maricle*, 150 S.W.3d. 1, 10 (Ky. 2004).

The issuance of a writ requires more than even great injury. "[T]here must be some aspect of *injustice*... in the nature of usurpation or abuse of power by the lower court...." *Powell v. Graham*, 185 S.W.3d 624, 629 (Ky. 2006). *In rem* forfeiture of property could conceivably cause injustice or irreparable injury only to the actual owners. None of the Appellees are owners of a Domain Defendant and will suffer no injustice if the writ of prohibition is dissolved. The great

injustice Appellees portend is that the owners of Domain Defendants will lose goodwill and their illegal businesses will be crippled.[14] The true injustice in this case would be to continue to allow the owners of Domain Defendants to operate blatant violation of the laws of the Commonwealth – not the predicted profits the owners could lose.

Whether a "great injustice" would result from an adverse forfeiture ruling, 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. There is no certainty that the Domain Defendants will be forfeited, and no such final action has yet occurred from which the right to appeal arises. KRS 500.090 provides the owner of any Domain Defendant the opportunity to introduce evidence, to rebut and refute the Commonwealth's evidence, and to assert any defense that it chooses to assert. The Trial Court may determine that forfeiture of one or more Domain Defendants is improper, and dismiss that Domain Defendant. If, however, following the hearing through which the facts of the case (including the nature of a domain as a device) are fully developed, the Trial Court makes a decision adverse to an owner, the owner would have an opportunity to promptly appeal that decision and post a supersedeas bond to stay disposition of the domain.

[14] IGC also argues that forfeiture would be unjust because the remaining 49 states may take similar steps to stop illegal online gambling in their states. Amazingly, IGC argues that it would be unjust for other states to enforce their laws to prevent crime in their states.

The Trial Court has, furthermore, ordered that if an owner or agent can demonstrate to its satisfaction that a Domain Defendant will be blocked from gambling within Kentucky, the Trial Court will relinquish its jurisdiction and dismiss the Domain Defendant from further forfeiture proceedings. Should any domain owner choose to ignore Kentucky law and continue operating an illegal gambling business within Kentucky, it is clear that it has no regard for Kentucky's law or sovereignty, and the Courts should employ all available remedies to stop it. Such an owner would still have recourse to appeal, but its illegal activity should not be rewarded by the extraordinary and discretionary remedy of a writ of prohibition.

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,* 266 S.W.3d 792 (Ky. 2008). It has not been seriously argued that the gambling activity conducted through the Domain Defendants 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. *Blackerby v. Adams,* 232 S.W.2d 79 (Ky. 1950)(surrogate for out-of-state debtor denied writ where court held sums pending appearance by debtor); *see also Linn v. Bryan,* 226 S.W.2d 959 (Ky. 1950)(writs not to be used as end-run around statutory procedures for condemnation of property). 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.

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

The Appellees 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. This forfeiture proceeding is a civil action *in rem*. *See* Section II.B., *infra* at p. 47. The Domain Defendants are gambling devices subject to forfeiture under KRS 528.010 and 528.100, and are within the in rem jurisdiction of Kentucky courts.

1. Domain Defendants Are "Gambling Devices" Under KRS §528.010.

The Franklin Circuit Judge correctly found that these domain names are both property and "devices" within the purview of KRS 528.010, which was

purposefully fashioned to broadly deter illegal gambling activity. The KRS 528.010(4)(b) definition of "gambling device" specifically includes "*...other device, including but not limited to*" any machine or mechanical device.[15] 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 that: "[A]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature." KRS 446.080(1). The true intention or will of the legislature is the law, not the literal language of the statute. *Hardwick v. Boyd County Fiscal Court*, 219 S.W.3d 198 (Ky. 2007). Courts must consider the intended purpose of the statute, the reason and spirit of the statute, and the mischief intended to be remedied. *Com. v. Kash*, 967 S.W.2d 37 (Ky. 1997); *Mitchell v. Kentucky Farm Bureau Mut. Ins. Co.*, 927 S.W.2d 343 (Ky. 1996). Numerous decisions have recognized that when it enacted the gambling laws, the intent of the legislature was to prevent illegal gambling in whatever form. *Gilley v. Com.* 229 S.W.2d 60 (Ky.1950); *Meader v. Com.* 363 S.W.2d 219 (Ky.1963).

---

[15] (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).

In *Gilley*, 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 (emphasis added).

In *Meader*, the Court again recognized that the gambling laws were enacted to stop all forms of illegal gambling, in holding 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 (E.D.Ky. 1951) (gaming laws were enacted to deter and, "so far as possible," to prevent illegal gambling, and must be liberally construed to accomplish that purpose.)

The Domain Names are clearly instruments "whereby money or things of value are won or lost." *Gilley, supra.* The Trial Court correctly relied upon *Gilley* and concluded the defendant Domain Names, the "virtual keys for entering and creating virtual casinos from the desktop of a resident in Kentucky", are gambling devices. Exhibit C, p. 23.

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 M. 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 N, 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.[16] 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 orders. Plaintiff could not sell, liquidate, or transfer these domain names. It subsequently ordered the domains permanently

[16] *1st Technology, LLC v. Rational Enterprises LTDA, et al.*, Case 2:06-cv-01110-RLH-GWF (D.Nev. 2008) ("Bodog Suit"), attached as Exhibit I.

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.[17]

The argument that these gambling domain names are not devices because all internet domain names are not designed for gambling activities is specious, and similar arguments have failed. A craps table is not immune from seizure as a gambling device merely because it is a "table." Likewise, all pinball machines are gambling device, but ones used for gambling illegal clearly are:

> It is suggested by appellants that commonplace objects such as numbers on automobile license plates, white horses grazing in pastures, and numbers on railroad cars may be used for gambling purposes, but that they are not for this reason subject to confiscation by the state. The point is that license plates and railroad cars ordinarily are not kept and maintained for gambling purposes, whereas these machines, admittedly, were installed and maintained for that purpose.

Three One-Ball Pinball Machines v. Com., 249 S.W.2d 144 (Ky. 1952); see also *Van Pelt v. State*, 246 S.W.2d 87, 89-90 (Tenn. 1952) (rejecting the notion that a device had to be a tangible mechanical object, finding the "slips" in the defendant's possession were gambling devices because they were "the means by which the policy game was played"); 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).

[17] Orders Granting Motion For Writ of Execution Re Domain Names, Exhibit I.

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....

Albright v. Muncrief, 176 S.W.2d 426 (Ark. 1943). When a domain name is deliberately converted to an unlawful use as a gambling device, *i.e.* "adapted, devised, or designed" for the purposes of furthering gambling, all property rights are forfeited and they become subject to seizure and forfeiture.

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 those being used to gamble in Kentucky - goldencasino.com, pokerstars.com, betus.com, ultimatebet.com, sportsbook.com, etc. - clearly were. The Domain Defendants, 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.

Contrary to the Appellees claims, it is not meaningful that the internet and domain names did not exist when the term "gambling device" was enacted. 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. 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:

> 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).

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 was found to be a gambling device within the meaning of 18 U.S.C. § 1953 because Congress employed broad language to "permit law enforcement to keep pace with the latest developments"....

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 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.

2. Internet Gambling Occurs Within Kentucky.

Notwithstanding that the illegal operators conducted their operations from offshore in an attempt to avoid the reach of U.S. laws, Kentucky has 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.

Appellees argue that only courts where the Domain Defendants are registered or where their owners and operators are located have jurisdiction. It is absurd to suggest that the Commonwealth of Kentucky, a sovereign government, must resort to foreign courts to enforce its laws and public policy. "'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). 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 Appellees, the targeted jurisdictions would be impotent save for the option 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.

The illegal internet gambling transaction occurs in the state where the bet is made. *U.S. v. Gotti*, 459 F.3d 296, 340 (2nd Cir. 2006)(if the person engaged in gambling is located in New York, then New York is the location where the gambling occurred....); *Thompson v. Handa-Lopez, Inc.*, 998 F.Supp. 738, 744 (W.D.Tex. 1998)("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."). Courts reject the absurd argument that because internet gambling was legal in defendant's country, New York had no jurisdiction:

> 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.

World Interactive Gaming Corp., supra, 714 N.Y.S. 2d at 850.

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. They have profited illegally from Kentucky residents. 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 Domains are "located" in Kentucky for Purposes of Forfeiture.

Just as the gambling - and hence the illegal activity - occurs in Kentucky, the Domain Defendants are "located" in Kentucky and within the jurisdiction of Kentucky's courts. Domain names 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*, 174 N.E. at 300. He explained that the fictional location of the *situs* varies depending upon the legal purpose. Justice Cardozo noted that the selection of a fictional *situs* depends upon a "common sense appraisal of the requirements of justice and convenience in particular conditions." *Id.* Numerous courts have agreed. *Higgins*, 103 S.W. at 308-309; *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:* 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).

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[18], the Court must assign one that is consistent with the Commonwealth's public policy and legitimate governmental interests. *Higgins*, 103 S.W. at 308-309; *Severnoe Securities Corporation*, 174 N.E. at 300. 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. In the case of an *in rem* civil forfeiture of a device used to conduct illegal gambling in Kentucky, that one *situs* is in Kentucky.

Kentucky *situs* of a domain used to violate Kentucky law is consistent with the forfeiture jurisprudence under federal law and that of sister states. In a recent civil forfeiture case, *State v. Western Union Financial Services, Inc.*, 199 P.3d 592 (Ariz. App. 2008), the Arizona Court of Appeals held that Arizona courts

[18] The U.S. Supreme Court in *Shaffer, infra*, explained that the proper inquiry is whether sufficient contacts exist between the *res*, the forum and the cause of action. Accordingly, there may be no need to establish a *situs*; nonetheless, Kentucky is an appropriate *situs* for this intangible property.

have *in rem* jurisdiction over intangible electronic property representing funds not within Arizona but related to illegal activities that occurred in the state. As part of an ongoing effort to stop human smuggling and narcotics trafficking activities across Arizona's shared border with Mexico, the State brought a civil forfeiture action against wire-transfer funds that were traceable to these human-smuggling and narcotics trafficking activities. The *in rem* civil forfeiture was the only workable remedy because, 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 Mexican 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 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 Mexico. Once told the money is in hand, the coyote releases the UDI. The seizure sought to intercept the wire transfers, or electronic credits (the "EC"), unwittingly transacted by Western Union.

The trial court quashed 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.'" *Id.*, at 599. Citing *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Arizona Court of Appeals reversed. It 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 605. "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 606.

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.... 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., citing United States v. Approximately $1.67 Million (US) in Cash, 513 F.3d 991, 996 (9th Cir. 2008).

Here, as in *Western Union*, 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. Extra-Territorial Forfeiture Is Consistent With Due Process.

Extra-territorial *in rem* civil forfeiture actions are anything but novel under state and federal law. Due Process has long permitted civil forfeiture of property located in foreign jurisdiction. 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[19]. 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." *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*

[19] 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.).

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).

In *Hong Kong Banking,* 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. 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 *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, supra,* 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.

Last year, in *U.S. v. Approximately $1.67 Million,* 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.*

Congress subsequently followed the Courts with the 1992 enactment of the Anti-Money Laundering Act ("AMLA")[20]. 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); *Banco Espanol de Credito,* at 27. Extra-national seizures of property have been made in a number of cases, and upheld by numerous appellate courts. The AMLA codified the assertion of jurisdiction and venue in any district "in which any of the acts or omissions giving rise to the forfeiture occurred." 28 U.S.C. § 1355(b).

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.

[20] *US v. $1,670,000, Hong Kong Banking* and *Banco Espanol De Credito* each recognized that even prior to the AMLA, *in rem* jurisdiction over property located outside the U.S. was based on minimum contacts with the district.

5. The Domains' Illegal Gambling Establishes Minimum Contacts.

In *Shaffer v. Heitner*, 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 *Schaffer* and agreed that the "minimum contacts" test is the proper standard for *in rem* jurisdiction.

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. Domain Defendants (and their owners and operators), therefore, have sufficient minimum contacts to be subject to the jurisdictions of Kentucky's courts.

Appellees 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. 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). In 1945, 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. *International Shoe, supra.* In 1977, the U.S. Supreme Court expressly applied that minimum-contacts standard to *in rem* jurisdiction: "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in

International Shoe and its progeny." *Shaffer*, 433 U.S. at 212. 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." ...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. The Court expressly overruled all prior decisions inconsistent with the minimum-contacts standard. *Id.* at note 39.

To determine whether the domain defendants have sufficient minimum contacts to be subject to *in rem* jurisdiction, the Courts must apply the Sixth Circuit's three-part test adopted by the Kentucky Supreme Court in *Cummings v. Pitman*, 239 S.W.3d 77 (Ky. 2007):

> 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.

Id. at 85, *citing Southern Machine Co. v. Mohasco*, 401 F.2d. 374, 381 (6th Cir. 1968). Viewing each of these factors below, it is clear that the domain defendants have sufficient contacts to be subject to *in rem* jurisdiction.

a. *Defendants Purposefully Created A Substantial Kentucky Connection*

"[P]urposeful availment" occurs 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). If the plaintiff can demonstrate purposeful availment, the absence of physical presence or contacts with the forum state will not defeat jurisdiction over a non-resident defendant. *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 483 (6th Cir. 2003); see also *CompuServe*, 89 F.3d at 1264. 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, unless other factors 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 purposeful availment "if the website is interactive to a degree that reveals specifically intended interaction with residents of the state." *Bridgeport*, 327 F.3d at 483. 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). By choosing to do business in the forum state,

a defendant purposefully avails itself of the privilege of doing business in that forum state. *Lexmark Intern., Inc. v. Laserland, Inc.*, 304 F.Supp.2d 913, 918 (E.D.Ky. 2004); *Zippo,* 952 F.Supp. at 1126-1127. Courts recognized that an internet business has a choice whether to do business in a particular state. *Id.* 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.*

Appellant is aware that following Judge Wingate's Opinion and Order, a quite significant number of Domain Defendants have attempted to block access from Kentucky, demonstrating both that (1) those domains previously purposefully availed themselves of this forum and (2) that those domains that continue to accept wagers from Kentucky are consciously and defiantly conducting commerce here.[21]

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

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

[21] Though Judge Wingate's discretion to relinquish jurisdiction is disputed, no domain has attempted to satisfy the Court that their blocking is sufficient. In the absence of injunctive measures these domains may freely resume gambling in Kentucky if the Writ is not dissolved.

internet contacts are the precise basis for this cause of action because the contacts themselves are the issue.

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

The final *Cummings* 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 purposely chose to use the Domain Defendants to blatantly violate Kentucky's clear anti-gambling prohibitions. They did so for a purely commercial reason—it is enormously profitable. The Commonwealth presented 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.

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." Exhibit C, p. 18. He considered the evidence and found that the Commonwealth has established a *prima facie* case

supporting the Court's jurisdiction. *Id.* at 22-23. 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 and established sufficient contacts to establish *in rem* jurisdiction.

6. ICANN Policies Ensure The Effectiveness Of The Forfeiture

For civil forfeiture of property, Due Process does not require that the property be located within the forum state, or even within the court's constructive possession. In this case, however, the Domain Defendants are not only within the Court's jurisdiction, they are also in the Court's constructive possession because of the contractual agreements between the Domain Defendants' owners and registrars.

As a condition of registering the Domain Defendants through the Registrars, the domain owners agreed to be bound by the *ICANN Uniform Domain Name Dispute Resolution Policy* ("UDRP", attached as Exhibit O). In the UDRP, incorporated into each Registration Agreement, the owners represented and warranted that the Domain Defendants would not be used for an illegal purpose. UDRP ¶2. By using the Domain Defendants to operate an illegal gambling enterprise in Kentucky, they violated that agreement and warranty, leading to this dispute over the right to ownership of the domains.

The UDRP sets forth the agreed dispute resolution terms and conditions relating to ownership of internet domain names. The domain name owners and registrars agreed, *inter alia*, that:

a. 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.

b. 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).

The Appellees 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 Appellees argue that a "court of competent jurisdiction" is one that has jurisdiction over the *registrar*. It makes no sense, however, to base jurisdiction on the one party who

contractually cannot be brought into the action. 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. 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.*

Kentucky courts clearly have jurisdiction over illegal gambling occurring within the Commonwealth. The owners and operators chose to use the Domain Defendants to operate a series of illegal gambling enterprises within Kentucky, and in so doing established sufficient minimum contacts to subject themselves and Domain Defendants to Kentucky jurisdiction. Because Kentucky clearly has jurisdiction over the dispute, its courts are of "competent jurisdiction" for purposes of the UDRP.

ICANN and its Registrars have a strong policy that domain names shall not be used for an illegal purpose. UDRP ¶2. The Court found overwhelming evidence that each of the Domain Defendants has been used in violation Kentucky's anti-gambling laws. Accordingly, each registrant breached its registration agreement, justifying the registrars, should they wish, in terminating the Domain registrations. Instead, most registrars recognized that the Franklin Circuit Court is a "court of competent jurisdiction" and pursuant to UDRP ¶3

complied with the Seizure Order by either transferring or administratively locking the Domain Defendants pending further orders from the Court.[22]

B. FORFEITURE DOES NOT REQUIRE A CRIMINAL CONVICTION.

The Franklin Circuit Court correctly held that "KRS 528.100 contemplates a separate and independent civil proceeding, having for its purpose the condemnation of the property that is used in violation of KRS Chapter 528, independent of the innocence or guilt of its owner." *Opinion & Order*, p. 12. 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.*

By its very nature, civil forfeiture is a proceeding *in rem* against property used in an offense, as there often is no person present or identifiable to criminally prosecute. In *U.S. v. Ursery*, 518 U.S. 267, 295 (1996)(Kennedy, J., concurring), the Court recognized that:

> 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.*"

---

22 Moreover, the registrars do not wish to be knowingly complicit in an illegal gambling enterprise. Prior to receiving the Court's Order of Seizure, the registrars may not have known that the Domain Defendants were being used to violate Kentucky's anti-gambling statutes. Continuing to enable the Domain Defendants after receiving the Court's order, however, 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.

Id., 295. The forfeiture statutes do not require a criminal conviction of the person whose property is sought to be forfeited. See *Osborne v. Com.*, 839 S.W.2d 281 (Ky. 1992). *Ursery* emphasized that civil forfeiture is an action against the property, not the owner or any 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.* at 291-292.

In *Smith v. Com*, 205 S.W.3d 217 (Ky.App. 2006), the Court cited *Ursery* in noting that "[f]orfeitures pursuant to the statute are specifically structured to be impersonal by targeting the property itself." *Id.*, 221. It is sufficient to show a nexus between the property sought to be forfeited and its use to facilitate a violation. *Id.* (interpreting KRS 218A.410). The former KRS 428.260, to cite another example, affirmatively provided that property was forfeit upon a conviction; however, in the absence of a conviction forfeiture required only a finding that the property was used or intended to be used for gambling. Kentucky's highest court repeatedly held that forfeiture proceedings under that statute were civil actions *in rem*. *14 Console Type Slot Machines v. Com.*, 273 S.W.2d 582 (Ky. 1954); *Hickerson v. Com.*, 140 S.W.2d 841 (Ky. 1940)(action to recover forfeited craps tables); *Sterling Novelty Co. v. Com.*, 271 S.W.2d 366 (Ky. 1954)(forfeiture proceeding should be tried as civil action).

Like KRS 218A.410 and the federal statute considered in *Ursery*, KRS 528.100 references the property, not the person. The property is the subject of the sentence, each of which provides for forfeiture without reference to a person,

much less a conviction of that person. The General Assembly could not have more clearly announced its intent to impersonally target the offending property, not a person. It no doubt knew that Kentucky's highest court had recognized, on three separate occasions, that KRS 528.100's predecessor authorized a civil action *in rem*. Had the General Assembly wished to change the nature of the proceeding, it could have clearly expressed its contrary intent when it enacted KRS 528.100. KRS 500.090 (the statute under which KRS 528.100 forfeited property is disposed) likewise does not contemplate the involvement of a person until post-forfeiture - only then does the innocent owner have the right to assert an interest. The intent of the General Assembly in these enactments is clear that forfeiture is an *in rem* action not predicated on a conviction *in personam*.

The Appellees wrongly argue that because KRS 528.100 is located within the penal code, it is therefore a criminal forfeiture statute. The fallacy of this argument was exposed in *Ursery*, as that civil forfeiture statute (18 U.S.C. § 981) is located in U.S.C. Title 18, Crimes and Criminal Procedure. Notwithstanding its location, the Court correctly held that the fact that the forfeiture 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*. Kentucky's highest court has held on three separate occasions that the gambling device forfeiture statute is a civil forfeiture statute, even though it did reference a conviction in some instances, and was located in the "Crimes and Punishments" Title 40 of the statutes. 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.

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.

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

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

COUNSEL FOR THE COMMONWEALTH

EXHIBIT
INDEX OF EXHIBITS

Exhibit A: Court of Appeals Order dated January 20, 2009

Exhibit B: Franklin Circuit Court Order dated September 18, 2008

Exhibit C: Franklin Circuit Court Opinion and Order dated October 16, 2008

Exhibit D: 2003 Annenberg National Risk Survey of Youth
Chart 1: Chart of youth gamblers

Exhibit E: Illustrative charts:

- Chart 2: Indicates the market shares of the various illegal internet gambling products
- Chart 3: Three separate charts illustrating the growth in the number of illegal internet gambling sites
- Chart 4: Chart of scale of the illegal internet gambling industry is available from the World Trade Organization

Exhibit F: Department of Justice letter dated June, 2003 to trade groups representing publishers and broadcasters

Exhibit G: Order of Permanent Injunction

Exhibit H: *New York Times* Press Release dated July 18, 2007

Exhibit I: *1st Technology, LLC v. Rational Enterprises LTDA, et al.,* Case 2:06-cv-01110-RLH-GWF (D.Nev. 2008) ("Bodog Suit")

Exhibit J: U.S. Attorney Press Release, dated December 19, 2007

Exhibit K: Commonwealth's Second Amended Complaint filed August 26, 2008

Exhibit L: Illustrative examples of Commonwealth's evidence including 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.

Exhibit M: IRS Notice of Public Auction Sale and appraisal

Exhibit N: DOJ press releases

Exhibit O: *ICANN Uniform Domain Name Dispute Resolution Policy* (the "UDRP")

EXHIBITS

Pursuant to the Order of the Kentucky Supreme Court entered March 18, 2009 denying Appellant's Motion To File Brief Exceeding Page Limitations, the Appendix Of Exhibits is not attached hereto, in order that the Clerk shall add the previously tendered appendix hereto in accordance with said Order.