

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. _____

INTERACTIVE MEDIA
ENTERTAINMENT AND GAMING
ASSOCIATION, INC.

PETITIONER

v.

MOTION FOR INTERMEDIATE RELIEF

HONORABLE THOMAS D. WINGATE,
JUDGE, FRANKLIN CIRCUIT COURT

RESPONDENT

and

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

REAL PARTIES IN INTEREST

* * * * *

Petitioner Interactive Media Entertainment and Gaming Association, Inc. ("iMEGA"), by counsel, on March 23, 2010, filed a petition for original proceeding pursuant to CR 76.36 as styled above.¹ Because iMEGA challenges the jurisdiction of the circuit court, iMEGA hereby moves for intermediate relief pursuant to CR 76.34(4) and CR 81 in the form of an order that would stay all proceedings in the underlying *in rem* action, *Commonwealth of Kentucky ex rel. J. Michael Brown, Secretary, Justice and Public Safety Cabinet v. 141 Internet Domain Names*, Case No. 08-CI-1409, in Franklin Circuit Court (the "trial court"). iMEGA moves for this intermediate relief on the grounds that the orders have inflicted or will inflict irreparable harm

¹ The Petition for Original Proceeding Pursuant to CR 76.36 is attached hereto as Exhibit A. Because the amount of pages included as exhibits to that petition are voluminous, and are already on file with this Court, Petitioner has attached to this motion only those documents referenced herein.

and will continue to inflict immediate and irreparable harm before a hearing may be had or a writ issued on the petition filed by iMEGA on March 23, 2010. In support of its motion, Petitioner states as follows.

1. The Commonwealth filed the case below on August 26, 2008. The trial court sealed the record on that date,² and the record, including orders and the record of *ex parte* proceedings, remained sealed until unsealed by the trial court on September 23, 2008.³

2. iMEGA's members include owners and registrants of some of the Internet domain names named in the action below. On March 23, 2010, iMEGA and Yatahay Ltd. filed affidavits with this Court proving that Yatahay Ltd. is an owner of one of the Internet domain names named in the action below and is a member of iMEGA. Each of those affidavits satisfies the proof required by the Supreme Court's opinion of March 18, 2010, for this Court to recognize iMEGA as having standing in this action. On September 25, 2008, iMEGA filed a notice and motion asserting associational standing in the action.⁴ Since that date iMEGA has made numerous appearances in various courts and submitted pleadings, briefs, and attended oral arguments on behalf of its members.

3. Pursuant to the Order of Seizure of Domain Names ("the Seizure Order") entered under seal on September 18, 2008,⁵ by the trial court, the Commonwealth has seized domain names registered to members of iMEGA, including Yatahay Ltd. Such members who are domain name owners and registrants received no notice in advance of that order and had no

² The Order Sealing Case Record is attached hereto as Exhibit B.

³ The Order of September 23, 2008 ordering that the action no longer be kept under seal is attached hereto as Exhibit C.

⁴ Notice of Appearance and Motion for Stay is attached hereto as Exhibit D.

⁵ The Order of Seizure of Domain Names is attached hereto as Exhibit E.

opportunity to respond prior to its issuance or prior to seizure. This violated due process rights of iMEGA members.

4. By its Opinion and Order entered October 16, 2008,⁶ the trial court held that iMEGA lacks associational standing in the circuit court action. *See* Opinion and Order, Exhibit E at 34-37. Additionally, the trial court stated that it would treat iMEGA's assertion of associational standing as a motion to intervene, and then denied iMEGA intervenor status. *Id.* at 35, 37.

5. The Opinion and Order of October 16 also denied iMEGA's motion to dismiss the circuit court action and set a forfeiture hearing for November 17, 2008. By order entered October 23, 2008, the trial court rescheduled the forfeiture hearing for December 3, 2008.⁷ (This forfeiture hearing was stayed by the Court of Appeals, as noted in paragraphs 8 and 9 below.)

6. In the underlying action, the Commonwealth has alleged that the criminal offense of promoting gambling has occurred through the possession or use of the defendant domain names. iMEGA vigorously denies this allegation. However, by denying iMEGA standing or intervenor status, the trial court's Opinion and Order entered October 16, 2008, has put iMEGA members, who are owners and registrants, in a position in which they must either come forward, thus surrendering their Fifth Amendment constitutional guarantees against self-incrimination, or not come forward, thus surrendering their right to defend their interests in the domain names seized in violation of their due process rights. In denying associational standing and intervenor status for iMEGA, the trial court has rendered representation for iMEGA members who are facing forfeiture effectively impossible.

⁶ The Opinion and Order entered October 16, 2008 is attached hereto as Exhibit F.

⁷ Order of October 23, 2008 is attached hereto as Exhibit G.

7. iMEGA filed a petition for original action pursuant to CR 76.36 on October 22, 2008, seeking dismissal of the action in the circuit court on grounds including that the trial court is proceeding without jurisdiction and is violating rights of the members of iMEGA that are guaranteed under the First, Fifth and Fourteenth amendments to the United States Constitution, which violations constitute ongoing and irreparable harm. *See* Exhibit A.

8. On October 28, 2008, iMEGA filed a motion for intermediate relief with this Court to stay the order of seizure of domain names issued September 18, 2008, and the opinion and order of October 16, 2008, and to suspend the December 3, 2008 forfeiture hearing.

9. This Court granted the motion for intermediate relief on November 14, 2008.

10. On January 20, 2009, the Court of Appeals granted iMEGA's writ of prohibition, stating that the Franklin Circuit Court was acting outside its jurisdiction..⁸

11. The Commonwealth filed a notice of appeal on January 21, 2009.⁹

12. After being fully briefed and argued, the Kentucky Supreme Court reversed the Court of Appeals in an opinion rendered March 18, 2010, stating that iMEGA did not prove associational standing because it was not clear that it represented an owner of one of the domain names named in the action below.¹⁰

13. In its March 18, 2010, opinion, the Supreme Court stated that "[n]umerous, compelling arguments endorsing the grant of the writ of prohibition have been presented throughout the Court of Appeals' opinion, Judge Taylor's separate concurrence, the Appellees' briefs, the amici briefs, and oral argument before this Court." *Commonwealth v. Interactive Media Entertainment and Gaming Association*, No. 2009-SC-000043-MR, slip op. at 3 (Ky. 2010).

⁸ The Court of Appeals' opinion is attached hereto as Exhibit H.

⁹ The Commonwealth's Notice of Appeal is attached hereto as Exhibit I.

¹⁰ The Kentucky Supreme Court opinion is attached hereto as Exhibit J.

14. Also in its March 18, 2020, opinion, the Supreme Court stated that [i]f a party that can properly establish standing comes forward, the writ petition giving rise to these proceedings could be re-filed with the Court of Appeals. The Court of Appeals could then properly proceed to the merits of the issues raised, or upon a proper motion, this Court could accept transfer of the case, as the merits of the argument have already been briefed and argued before this Court.

Id. at 13.

15. On March 23, 2010, iMEGA, following the suggestion of the Supreme Court, filed a writ of prohibition with affidavits from iMEGA and Yatahay Ltd. proving that Yatahay Ltd. is a member of iMEGA and is an owner of one of the Internet domain names named in the action below.

16. The Commonwealth has made a motion to amend its complaint and expects to prosecute this action in the circuit court, despite the fact that the circuit court does not have jurisdiction for reasons set forth in the petition.

17. As set out fully in the petition for writ, the violations in sum are as follows:

- The trial court lacks jurisdiction over the domain names because the domain names are not located in Kentucky. Petition for Original Proceeding, at 34-39.
- The trial court lacks jurisdiction over the domain names because the domain names do not qualify as "gambling devices" under KRS 528.010(4). *Id.* at 12-20.
- The trial court lacks jurisdiction to adjudicate a civil forfeiture action under KRS 528.100 because the statute requires a conviction before forfeiture. *Id.* at 20-31.
- The trial court lacks jurisdiction because the alleged illegal conduct occurred outside Kentucky, and no element of the alleged offenses occurred inside Kentucky. *Id.* at 31-33.
- The trial court's seizure violated the dormant commerce clause by impeding interstate and foreign commerce. *Id.* at 42-46.

- The trial court violated the First Amendment by closing proceedings and the record of the case, and therefore its orders based upon such record are unconstitutional and invalid. *Id.* at 39-42.

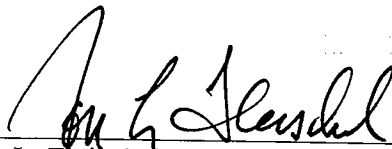
- The trial court has acted in violation of the First Amendment and has created ongoing and continuous violations of the First Amendment by placing unconstitutional prior restraints upon protected commercial speech. *Id.* at 46-48.

18. Intermediate relief is crucial in this case. Members of iMEGA, for reasons stated in this motion and in the petition of March 23, 2010, have suffered immediate and irreparable harm and will continue to suffer immediate and irreparable harm before a hearing may be had on iMEGA's petition.

19. Furthermore, judicial economy dictates that the proceedings in the circuit court be stayed until the writ of March 23, 2010, is finally disposed of by this Court or the Kentucky Supreme Court.

20. Accordingly, Petitioners respectfully request that this Court issue an intermediate order staying all orders entered in, and the proceedings in, *Commonwealth of Kentucky ex rel. J. Michael Brown, Secretary, Justice and Public Safety Cabinet v. 141 Internet Domain Names*, Case No. 08-CI-1409, which is in Franklin Circuit Court.

Respectfully submitted,



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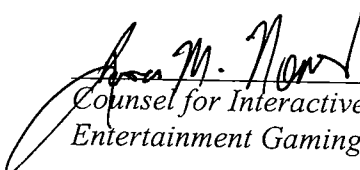
Counsel for Interactive Media

Entertainment & Gaming Association, Inc.

CERTIFICATE OF SERVICE

It is hereby certified that a true copy to the foregoing Petition for Original Proceeding Pursuant to CR 76.36 was served via U.S. Mail, postage prepaid, this 31st day of March, 2010, upon the following:

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



*Counsel for Interactive Media &
Entertainment Gaming Association, Inc.*