

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. _____

INTERACTIVE MEDIA
ENTERTAINMENT AND GAMING
ASSOCIATION, INC.

PETITIONER

v. PETITION FOR ORIGINAL PROCEEDING PURSUANT TO CR 76.36

HONORABLE THOMAS D. WINGATE,
JUDGE, FRANKLIN CIRCUIT COURT

RESPONDENT

AND

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

REAL PARTY IN INTEREST

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

INTRODUCTION

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

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

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

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

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

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

(*Id.*)

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

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

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

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

I. THE PARTIES.

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

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

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

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

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

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

II. THE UNDERLYING ACTION.

The underlying action is *Commonwealth of Kentucky ex rel. J. Michael Brown, Secretary, Justice and Public Safety Cabinet v. 141 Internet Domain Names*, Case No. 08-CI-1409, Franklin Circuit Court.

III. FACTS THAT ENTITLE PETITIONER TO RELIEF.

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

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

The same day, September 18, 2008, the Commonwealth filed its Second Amended Complaint,⁵ its Motion for Seizure of Domain Names⁶ and supporting memorandum.⁷ The trial court issued its Seizure Order the same day. The trial court found that probable cause existed to believe that the domain names “were and are being used in connection with illegal gambling activity” in Kentucky but did not specify by statute or otherwise the alleged illegal activity occurring in Kentucky. (*See* Seizure Order, Exhibit D, at 1).

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

³ Motion To Seal Case File is attached as Exhibit E.

⁴ The claim that registrants will take actions to remove domain names beyond Kentucky was and is baseless given the fact that the names have never been in Kentucky.

⁵ Attached as Exhibit F.

⁶ Attached as Exhibit G.

⁷ Attached as Exhibit H.

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

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

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

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

⁸ Attached as Exhibit I.

⁹ Attached as Exhibit J.

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

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

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

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

¹⁰ Attached as Exhibit K.

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

(Id.)

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

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

RELIEF SOUGHT

I. REQUEST FOR RELIEF.

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

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

II. THE RELIEF IS APPROPRIATE.

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

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

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

The Supreme Court has held that a

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

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

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

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

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

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

MEMORANDUM OF AUTHORITIES IN SUPPORT OF PETITION

I. iMEGA PROPERLY ASSERTS ASSOCIATIONAL STANDING.

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

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

An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit.

Hunt, 432 U.S. at 334.

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

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

