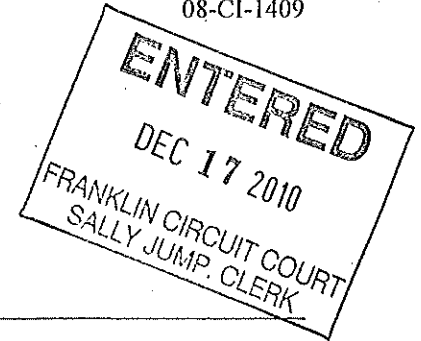


COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 08-CI-1409



COMMONWEALTH OF KENTUCKY
ex rel. J Michael Brown, Secretary,
Justice and Public Safety Cabinet

PLAINTIFF

vs.

141 INTERNET DOMAIN NAMES

DEFENDANTS

OPINION AND ORDER OF ABEYANCE

This matter is before the Court upon the Commonwealth's *Status Report and Motion for a Case Management Order* and Interactive Media Entertainment & Gaming Association, Inc.'s ("iMEGA") *Motion to Intervene*. Upon review of the parties' briefs and papers, hearing oral arguments on Monday, December 13, 2010, and being otherwise sufficiently advised, this Court now comes and holds both motions in abeyance.

ANALYSIS

The Commonwealth proposes this Court divide the 141 internet domain names into smaller, more manageable groups. *Commonwealth's Status Report and Motion for Case Management Order*. After doing so, the Court would give the owners of each domain name within a particular group, fair and reasonable opportunities (*a/k/a* 30 days) to appear, prove their/its ownership, and contest the seizure. *Id.* The first group would consist of *playersonly.com*, *sportsbook.com*, *sportsinteraction.com*, *mysportsbook.com*, and *linesmaker.com*. *Id.* iMEGA, a gaming association claiming associational standing, and others, oppose this motion arguing it is procedurally improper. *See generally* Oral

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Arguments, 08-CI-1409, Motion for Case Management Order & Motion to Intervene, Franklin Circuit Court, 48-2-10, Tape 39 beginning at 9:20 a.m.; *iMEGA Memorandum*; *iMEGA Motion to Intervene*. After re-reviewing the applicable case law, the Court agrees.

iMEGA has also filed a Motion to Intervene citing three reasons for its intervention: (1) to object to the Status Report and Motion for Case Management Order (2) to move the Court to address all of the jurisdictional and constitutional issues and (3) for the general purpose of representing its members' interests against all claims in this action. *iMEGA Motion to Intervene*. iMEGA further argues it has satisfied associational standing pursuant to *Commonwealth ex rel. Brown v. Interactive Media Entertainment & Gaming Ass'n, Inc.*, 306 S.W.3d 32 (Ky. 2010) ("*iMEGA I*"). *iMEGA Memorandum* pp. 1-6.

As to associational standing, iMEGA articulates three arguments. First, iMEGA argues that the affidavits of Joe Brennan, Jr., Natalie Sterling, and Matthew Bartlett, (attached to Memorandum as exhibits A, B, and C, respectively) provide verified assertions that an iMEGA member, Yatahay Limited, is the registrant of a Defendant domain name (*a/k/a* truepoker.com), is injured by this action, would have standing to sue in its own right, and thus, establish standing. *Id.* at 3-4. Second, iMEGA asserts the Commonwealth's own actions prove standing. Specifically, that the Commonwealth knew that Yatahay Limited owns truepoker.com and for that reason, sent a copy of this Court's October 16, 2008 Opinion and Order to Yatahay Limited c/o TPCR Development SRL. *Id.* at 4-5 *citing* Exhibit D, Federal Express Shipping Record. Lastly, iMEGA claims that Yatahay Limited has established ownership because the Network Solutions

publicly available WHOIS database of domain name registrant information lists “Yatahay Limited c/o TPCR Development SRL” as the registrant for truepoker.com. *Id.* at 5 citing Exhibit E. iMEGA then concludes, reasoning that it “has put forth evidence and met its burden to show that it meets the requirements of associational standing under the Kentucky Supreme Court’s earlier decision in *iMEGA I*.” *Id.* at 6. The Court agrees. Though another company may operate the truepoker.com website, iMEGA has proven that Yatahay Limited (*a/k/a* the registrant) owns truepoker.com. Indeed, it was the Kentucky Supreme Court which implied that one affidavit from one member of iMEGA verifying both membership and ownership of one of the 141 domain names could satisfy, if applicable, associational standing. *See iMEGA I*, 306 S.W.3d at 40. Later, the Kentucky Supreme Court again characterized this “preliminary factual dispute” as being “relatively simple.” *Interactive Media Entertainment and Gaming Ass’n, Inc. v. Wingate*, 320 S.W.3d 692, 695 (Ky. 2010) (“*iMEGA II*”). Even so, it is unclear whether associational standing applies in an in rem proceeding.

This case is on remand from *iMEGA II*: a case where the Kentucky Supreme Court granted a motion to transfer in order to clarify and to some extent correct *iMEGA I*. iMEGA’s discussion of associational standing, however, relies primarily (and arguably exclusively) on *iMEGA I*. *iMEGA Memorandum* pp. 1-6. This “tunnel-vision” reliance on *iMEGA I* is misplaced. Once again, iMEGA seeks to avoid important questions about the legitimacy of its standing. During oral arguments on these motions the Court expressed concern about the legality of extending associational representation to in rem proceedings. *See Oral Arguments, 08-CI-1409, Motion for Case Management Order &*

Motion to Intervene, Franklin Circuit Court, 48-2-10, Tape 39 beginning at 9:20 a.m. In *iMEGA II*, the Kentucky Supreme Court expressed this same concern.

The necessity for fact-finding [by the trial court] in this case is underscored by the fact that this case presents novel questions of law related to standing and jurisdiction that can only be addressed after the factual complexities of the case have been clarified, such as who is actually the owner of a given domain name and the applicability of associational representation in an in rem proceeding.

iMEGA II, 320 S.W.3d at 695-696 (emphasis added).

iMEGA may ultimately be entitled to associational standing. *See id.* at 694-696. However, *iMEGA* has not yet established that associational standing is proper in an in rem proceeding. In short, *iMEGA* has satisfied the requirements for associational standing under *iMEGA I*, but has not satisfied the requirements for associational standing under *iMEGA II*. Accordingly, *iMEGA*'s *Motion to Intervene* is, at the very least, premature.

To again quote the Kentucky Supreme Court,

[t]here is certainly nothing so extraordinary about this case that it requires ignoring the very real questions about Petitioners' standing to proceed any more so than all the other parties who have been required to show standing in every other court case.

Id. at 696 (emphasis added).

The issue of whether associational representation can extend to an in rem proceeding must be briefed and argued before this Court.

WHEREFORE, IT IS HEREBY ORDERED that the Commonwealth's *Motion for a Case Management Order* shall be **HELD IN ABEYANCE** and Interactive Media Entertainment & Gaming Association, Inc.'s *Motion to Intervene* shall also be **HELD IN**

ABEYANCE until such time as this Court rules on the legal standing question of whether associational representation is proper in an *in rem* proceeding.

IT IS FURTHER ORDERED that the Commonwealth, Interactive Media Entertainment & Gaming Association, Inc., and any other interested nonparties shall file a simultaneous brief/amicus brief within thirty (30) days of this Order. That brief/amicus brief shall be limited to the issue of whether associational standing is permitted under Kentucky law in the context of *in rem* seizure and forfeiture proceedings, and more specifically, under the facts of this case. The Commonwealth, iMEGA, and any other nonparty shall then have ten (10) days to file a response/amicus response.

Pursuant to the Local Rules of Practice for the 48th Circuit Judicial Circuit, Rule 4.02, supporting memorandum to motions shall not exceed twenty (20) pages in length (excluding exhibits and appendices) without leave of Court. After briefing is complete, the Commonwealth and iMEGA may set this matter for a hearing during one of the Court's regularly scheduled civil motion hours (Monday at 9:00 a.m. or Wednesday at 9:00 a.m.) or contact the Judge's Secretary to schedule a special time to be heard.

SO ORDERED, this 17 day of December, 2010.



THOMAS D. WINGATE
Judge, Franklin Circuit Court

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