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JUL 25 2013  
FRANKLIN CIRCUIT COURT  
SALLY JUMP, CLERK

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,

v.

141 INTERNET DOMAIN NAMES,

DEFENDANTS.

\* \* \* \* \*

**RATIONAL ENTERTAINMENT ENTERPRISES LTD.'S AND  
RATIONAL INTELLECTUAL HOLDINGS LTD.'S  
MOTION TO DISMISS**

Rational Entertainment Enterprises Ltd. (“REEL”) and Rational Intellectual Holdings Ltd. (“RIHL”), by counsel, submit this memorandum in support of its motion to dismiss this action against PokerStars.com with prejudice. An Affidavit of Paul Telford (“Aff.”), supporting this Motion to Dismiss, is submitted herewith and is attached hereto as Exhibit A.

**I. BACKGROUND**

On August 26, 2008, the Cabinet initiated a civil *in rem* action in the Franklin Circuit Court in an attempt to forfeit to the Commonwealth 141 Internet domain names. The Cabinet alleged that these domain names are “gambling devices” subject to forfeiture pursuant to KRS 528.100 and KRS 500.090. Among those domain names was PokerStars.com, a domain name registered by REEL and RIHL. After filing the complaint, which sought declaratory and injunctive relief, the Cabinet quickly filed a Motion to Seal the Case File, as well as a Motion to Seize the domain names at issue. Without notice or service of process, the trial court held a hearing on September

18, 2008, issued a Seizure Order for the 141 domain names, including PokerStars.com, and then unsealed the case file five days later on September 23, 2008.

Trade association Interactive Gaming Council (“IGC”) learned of this court’s seizure from media reports. Among IGC’s members are entities that are the registrants of 61 of the seized domain names, including REEL. On September 26, 2008, IGC, representing its member domain name registrants, filed a Motion to Intervene as a matter of right under Kentucky Rule of Civil Procedure 24. To date, IGC’s associational standing still has not been decided, and IGC’s action currently is pending in the Kentucky Court of Appeals.

Despite the order of seizure, at no point during the past five years has Kentucky ever had the subject domain names within its custody and control. For two and a half years after this court issued the seizure order, REEL and RIHL remained the registrants of the PokerStars.com and PokerStars.net domain names and operated the associated website as normal.

On April 15, 2011, the federal government seized a number of domain names pursuant to a federal civil forfeiture proceeding in the United States District Court for the Southern District of New York (“SDNY”). The U.S. Department of Justice and the Federal Bureau of Investigation posted seizure notices on the associated websites and blocked access to the websites’ contents in the United States and elsewhere. Among those domain names seized (and the associated websites effectively shut down) were PokerStars.com, FullTilt.com, UltimateBet.com, and AbsolutePoker.com, all of which domain names the Cabinet purported to seize in in this action in 2008. Shortly thereafter, Pokerstars, on behalf of REEL and RIHL, entered into an agreement with the United States Attorney’s Office for the Southern District of New York, whereby REEL and RIHL were permitted to use the domain names, subject to certain limitations, oversight and control by the SDNY. (Aff. ¶ 5). This Agreement further freed up the domain names to resolve

to their associated websites in locations outside of the United States. The Commonwealth had no rights to or control over the domain names under this agreement, as the domain names had been seized by the SDNY.

On September 30, 2011, the Commonwealth filed a claim in SDNY as to domain names PokerStars.com, FullTilt.com, UltimateBet.com, and AbsolutePoker.com. On June 17, 2013, Kentucky entered into a \$6 million settlement with SDNY as to AbsolutePoker.com and UltimateBet.com, and agreed to dismiss with prejudice its claims to what were referred to as the FullTilt.com substitute assets. In a recent press release, the Commonwealth articulated its intent to pursue its forfeiture claims against PokerStars.com in Kentucky state court.

In the five years since Kentucky purported to seize the PokerStars.com domain, neither REEL nor RIHL has ever been given notice by the Cabinet nor provided the opportunity to be heard in this matter, despite being the registrant of the domain name. REEL and RIHL now enter a special appearance in this matter to contest the validity of the Cabinet's purported seizure based on lack of jurisdiction, without submitting itself to the court's jurisdiction *in personam*. See First Nat. Bank of Cincinnati v. Hartman, 747 S.W.2d 614, 615-16 (Ky. Ct. App. 1988) (“[W]hen the intention is to defend on the basis of lack of jurisdiction, one does not thereby lose that very defense...Neither does seeking affirmative relief waive the defense by constituting an appearance.”) REEL and RIHL hereby submits their Motion to Dismiss the Commonwealth's seizure of PokerStars.com

## II. LEGAL STANDARD

A motion to dismiss should be granted where “it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Pari-Mutuel Clerks’ Union v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). When considering the motion, the allegations contained in the pleading are to be treated as true and must be construed in a light most favorable to the pleading party. *See Gall v. Scroggy*, 725 S.W.2d 867 (Ky.App.1987). The test is whether the pleading sets forth any set of facts which—if proven—would entitle the party to relief. If so, the pleading is sufficient to state a claim. *See* CR 8.01. Since the trial court is not required to make factual findings, the determination is purely a matter of law. *James v. Wilson*, 95 S.W.3d 875 (Ky.App.2002).

This motion is timely filed because REEL and RIHL, the registrants of PokerStars.com, have not been served by the Cabinet with notice or provided the opportunity to be heard regarding the seizure. *See* KRS 425.012. While a motion to dismiss would normally be brought no later than 20 days after service, *see* C.R. 12.01 and C.R. 12.02, this period never began to run – and in fact to date has not begun to run – due to the Cabinet’s failure to serve REEL and RIHL. Therefore, by voluntarily entering this limited appearance to contest the validity of the seizure, REEL and RIHL are timely submitting this motion to dismiss.

## III. THE COMPLAINT SHOULD BE DISMISSED FOR LACK OF JURISDICTION

The Cabinet’s complaint against PokerStars.com must be dismissed because this court lacks *in rem* jurisdiction over the domain name. The Cabinet never established actual or constructive control over the *res*, as demonstrated by SDNY’s exercise of exclusive *in rem* jurisdiction over the domain in the 2011 federal seizure. Further, the domain name was purportedly seized pursuant to KRS 528.100, which requires notice to the owners – notice that

neither REEL nor RIHL ever has been given by the Cabinet. Finally, since the time of the initial seizure was ordered in 2008, the Kentucky Court of Appeals has held that this court does not have subject matter jurisdiction over the domain names because internet domain names are not “gambling devices” subject to forfeiture under KRS 528.100. For these reasons, this court lacks jurisdiction to hear this complaint and the action against PokerStars.com must be dismissed.

A. THIS COURT LACKS *IN REM* JURISDICTION OVER POKERSTARS.COM BECAUSE THE COURT NEVER ESTABLISHED ACTUAL OR CONSTRUCTIVE CONTROL OVER THE *RES*

*In rem* jurisdiction derives entirely from the court's control over the defendant res.

*Pennington v. Fourth Nat'l Bank*, 243 U.S. 269, 272 (1917); *United States v. One Lear Jet Aircraft*, 836 F.2d 1571, 1573 (11th Cir.) (en banc), *cert. denied*, 487 U.S. 1204 (1988). “One of the essentials of jurisdiction *in rem* is that the thing shall be ‘actually or constructively within the reach of the Court.” *United States v. Mack*, 295 U.S. 480, 484 (1935).

First, with respect to a domain name, the situs of the res is the location of the registrar or the registry for the domain name. *See Office Depot Inc. v. Zuccarini*, 596 F.3d 696, 703 (9<sup>th</sup> Cir. 2010) (“domain names are located where the registry is located for the purpose of asserting *quasi in rem* jurisdiction. Although the question is not directly before us, we add that we see no reason why for that purpose domain names are not also located where the relevant registrar is located.”). The registry for Pokerstars.com is the .com registry – VeriSign, Inc. – which is located in Virginia. *See Volkswagen, AG v. Volkswagentalk.com*, 584 F. Supp. 2d 879, 882-83 (E.D. Va. 2008). The registrar for Pokerstars.com is Nom IQ Ltd., d/b/a Com Laude. *See* <http://www.networksolutions.com/whois/results.jsp?domain=pokerstars.com>. This entity, in turn, is located in the United Kingdom. *See* <http://www.comlaude.com/contact>. Simply put, the res that the Cabinet seeks to “seize” – the domain name – is located, for jurisdictional purposes,

in Virginia and in the United Kingdom. It is not, under any circumstances, located in the Commonwealth of Kentucky. Therefore, this Court has no basis for asserting in rem jurisdiction over the res.

Second, despite purporting to seize the PokerStars.com domain name nearly five years ago, this Court never established *in rem* jurisdiction over PokerStars.com because it never exercised dominion or control over the domain name to constitute actual possession. The Commonwealth clearly did not exercise control over PokerStars.com during the two-and-a-half year period between the Kentucky seizure and the federal seizure because during that time REEL, the true registrant, continued to allow downloads from its website without interruption by the Kentucky Courts.

In fact, the Commonwealth has conceded in court filings that it never enjoyed possession of the domain names, *see* Memorandum in Support of Commonwealth's Motion to Stay In Rem Claims as to Domain Defendants, 1:11-cv-02564-KMW, Dkt. 221 (S.D.N.Y., July 16, 2012) (copy attached as Exhibit B) (arguing that actual possession of the *res* is not important to a determination of which court has jurisdiction over the domain names), and that it never perfected seizure as to PokerStars.com. Moreover, during the pendency of the SDNY action, the Commonwealth sought to have this Court forfeit all domain names in issue other than those seized in the SDNY action – thereby effectively conceding, as it must, that this Court lacked jurisdiction over the domain names already seized by the federal court in New York. *See* this Court's March 18, 2012 Order of Forfeiture, n.1 (stating that the order does not apply to PokerStars).

B. SDNY'S EXERCISE OF *IN REM* JURISDICTION OVER THE DOMAIN NAMES WAS  
EXCLUSIVE.

It is well-established that only one jurisdiction can have *in rem* jurisdiction over a *res* at any given time. “[I]f the two suits are in rem or quasi in rem, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other.” *Penn Gen. Cas. Co. v. Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195 (1935) (internal citations omitted).

The Southern District of New York asserted *in rem* jurisdiction over the PokerStars.com domain name, among others, when it seized control of the domain names on April 15, 2011. “Actual control” was apparent from the federal seizure notices posted to the websites in lieu of the regular content, which was blocked to U.S. visitors. SDNY was able to exercise *in rem* jurisdiction because Kentucky never obtained possession and control of the domain in its purported 2008 seizure. Indeed, the Commonwealth conceded SDNY’s exclusive *in rem* jurisdiction by filing a claim in SDNY as to the seized domain names. Although the Commonwealth originally contested SDNY’s exercise of *in rem* jurisdiction, it ultimately settled its claims as to the Absolute, Ultimate, and Full Tilt domain names for \$6 million, thereby conceding that SDNY’s exercise of jurisdiction was proper. *See* Stipulation and Order of Settlement as to the Commonwealth, 1:11-cv-02564-KMW, Dkt. 305 (S.D.N.Y., June 17, 2013). Because PokerStars.com was seized together with these domain names in the same federal action, the Commonwealth’s admission that SDNY’s seizure was proper as to Absolute and Full Tilt necessarily conceded that SDNY properly exercised exclusive *in rem* jurisdiction over all of the domain names, including PokerStars.com.

C. UNDER KENTUCKY PROCEDURAL LAW, THE DOMAIN NAME HAS NOT BEEN AND  
COULD NOT BE PROPERLY ATTACHED.

The Cabinet argues for seizure of the domain names pursuant to KRS 528.100, and this Court's *ex parte* Seizure Order referenced and relied upon that statute. KRS 528.100 does not, however, authorize any judicial process to seize property. In order to effect a proper seizure of property pursuant to judicial process in a civil action, the Commonwealth must seek a writ of possession pursuant to KRS 425.011 *et seq.* In order to obtain a writ under those provisions, the Commonwealth would have to provide the owner of the property with notice, an opportunity for a hearing, and personal service, *see* KRS 425.012, and then would have to prove, at the hearing, that “the plaintiff is entitled to possession of the property claimed.” KRS 425.011. The Commonwealth never provided REEL nor RIHL with notice, service, or an opportunity for a hearing. Therefore, it could not properly “seize” the domain names under these provisions, and it has not done so.

D. THE DOMAIN NAME IS NOT A GAMBLING DEVICE UNDER KENTUCKY LAW.

The Franklin Circuit Court exercised its September 2008 seizure authority under a Kentucky statute banning illegal gambling devices. KRS 528.100 provides that “[a]ny gambling device or gambling record possessed or used in violation of this chapter is forfeited to the state.” Secretary Brown wrongly suggests that the 141 Domain Names sued in this civil *in rem* lawsuit are gambling devices used in violation of KRS 528.020 and KRS 528.030. However, the Kentucky Court of Appeals has held that this court does not have subject matter jurisdiction over the domain names because the internet domain names are not “gambling devices” within the statutory definition of KRS 528.010(4). Interactive Media Entm’t & Gaming Ass’n, Inc. v. Wingate, 2008-CA-002000-OA, 2009 WL 142995 (Ky. Ct. App. Jan. 20, 2009) (“We are thus convinced 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.”); rev’d on other grounds sub

nom. Com. ex rel. Brown v. Interactive Media Entm't & Gaming Ass'n, Inc., 306 S.W.3d 32 (Ky. 2010). In its March 18, 2010 Opinion in Commonwealth of Kentucky ex rel. J. Michael Brown, Secretary, Justice and Public Safety Cabinet v. Interactive Media Entm't & Gaming Ass'n, 306 S.W.3d 32, 35 (Ky. 2010), the Kentucky Supreme Court did not disturb the Court of Appeals' dispositive ruling that the domain names are not "gambling devices" within the statutory definition. Further, when the Supreme Court remanded the case to the trial court, it did so only with instructions to conduct fact-finding as to the trade associations' standing to appear on behalf of the domain names. Since PokerStars.com is not a "gambling device," the Commonwealth does not have statutory authority to seize it in anticipation of forfeiture.<sup>1</sup>

#### **IV. FORFEITURE OF THE POKERSTARS.COM DOMAIN NAME WOULD ALSO VIOLATE NUMEROUS FEDERAL AND STATE CONSTITUTIONAL PROVISIONS**

Dismissal is also required because forfeiture of the PokerStars.com domain name would not only trample trademark rights registered in the U.S. and abroad, but also violate U.S. and Kentucky constitutional provisions (1) prohibiting abridgement of free speech, *see Reno v. ACLU*, 521 U.S. 844 (1977) (First Amendment applies to internet communications); *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (invalidating statute regulating internet conduct occurring outside state); (2) prohibiting undue interference with commerce, both interstate and with foreign countries, *see, e.g., C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1992) (re interstate commerce); *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7-8 (1986) (re foreign commerce); (3) protecting state sovereignty by prohibiting extraterritorial laws, *see, e.g., BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996) (state cannot

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<sup>1</sup> More pointedly, PokerStars.com never has offered "gambling," and any suggestion otherwise is entirely inaccurate. PokerStars.com has never offered anything other than peer-to-peer poker to persons who access its website. Peer-to-peer poker is a game of skill, and is not "gambling" in any event. *See United States v. Dichristina*, 886 F. Supp. 2d 164, 234 (E.D.N.Y. 2012) (holding that poker is predominantly a game of skill, not a game of chance, and therefore is not gambling under the Illegal Gambling Business Act).

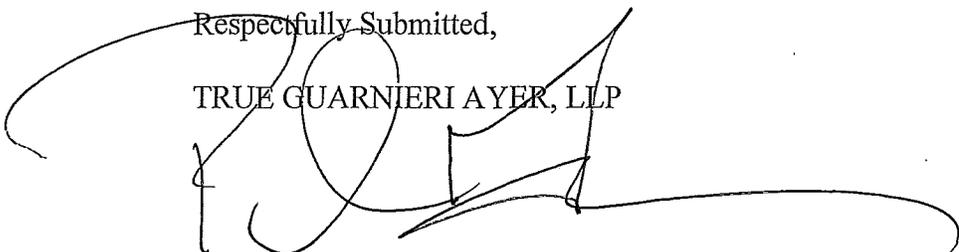
punish defendant for conduct that was lawful where it occurred); and (4) prohibiting uncompensated takings of property, *see, e.g., Mattel, Inc. v. Barbie-Club.com*, 310 F.3d 293, 300, n.7 (2d Cir. 2002) (treating domain name as property).

#### V. CONCLUSION

For the above-stated reasons, REEL and RIHL respectfully request that the Second Amended Complaint against PokerStars.com be dismissed with prejudice, and the Seizure Order vacated accordingly.

Respectfully Submitted,

TRUE GUARNIERI AYER, LLP



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#### NOTICE

Please take notice that this Motion will be brought on for hearing at a specific date and time to be determined after consulting with other counsel in the case and determining a date that is convenient for all parties and is available for the court.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion was served by US Mail,

postage prepaid on the 25 day of July, 2013 upon:

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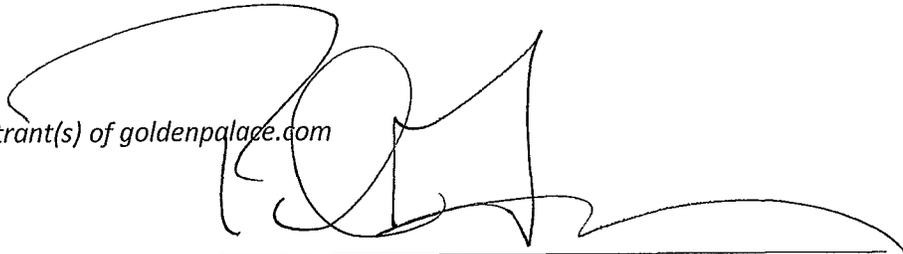
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*Counsel for unidentified registrant(s) of goldenpalace.com  
and goldencasino.com*

A handwritten signature in black ink, appearing to be 'P. Douglas Barr', written over a horizontal line. The signature is stylized and cursive.

Attorney for Defendants Rational Entertainment  
Enterprises, Ltd., Rational Intellectual Holdings,  
Ltd.

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION II  
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COMMONWEALTH OF KENTUCKY, *ex*  
*rel.* J. Michael Brown, Secretary, Justice and  
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PLAINTIFF,

v.

141 INTERNET DOMAIN NAMES,

DEFENDANTS.

\* \* \* \* \*

**AFFIDAVIT**

I, PAUL TELFORD, DECLARE AS FOLLOWS:

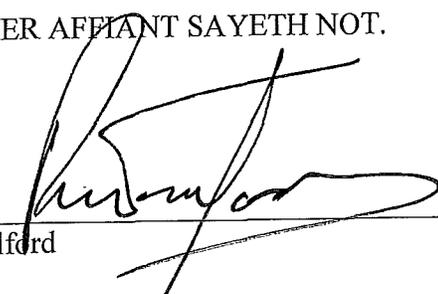
1. My name is Paul Telford. I am over the age of 18. I have full personal knowledge of the matters hereinafter set forth.
2. Rational Entertainment Enterprises Limited (“REEL”) and Rational Intellectual Holdings Limited (“RIHL”) are two of a number of companies that trade under or in connection with the name “POKERSTARS” (“the PokerStars Group”). RIHL is the intellectual property rights holding company for the PokerStars Group. I am the General Counsel of the PokerStars Group.
3. The PokerStars Group has, since at least 2001, been the registrant and owner of the domain names <pokerstars.com> and <pokerstars.net> (“the Domain Names”). Currently, the Domain Names are held in the name of RIHL. As such, the PokerStars Group has sole and exclusive ownership of, and rights to use, the domain names <pokerstars.com> and

<pokerstars.net>. The current term of the registration for <pokerstars.com>, which is renewable and extendable at RIHL's will, runs through 2021. See Exhibit A, attached hereto. The current term of the registration for <pokerstars.net>, which is renewable and extendable at RIHL's will, also runs through 2021. See Exhibit B, attached hereto.

4. In addition, RIHL is the owner of the trademark "POKERSTARS," which is registered with the United States Trademark Office, Registration No. 3381727. See Exhibit C, attached hereto.

5. On or about April 19, 2011, PokerStars, for and on behalf of all of its affiliated and subsidiary companies (including REEL and RIHL) entered into a Domain Name Use Agreement with the Office of the United States Attorney for the Southern District of New York. A true copy of this Domain Name Use Agreement is attached hereto as Exhibit D.

FURTHER AFFIANT SAYETH NOT.

  
Paul Telford

[NOTARY JURAT]

4820-6595-4580, v. 2

SWORN BEFORE  
ME AT ONCHAH,  
ISLE OF MAN  
ON THE 23RD DAY  
OF JULY 2013

  
SIMON JOEL HARDING  
NOTARY PUBLIC  
33-37 AT HOL STREET,  
DOUGLAS, ISLE OF MAN

