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.*

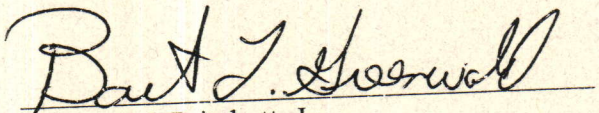
APPELLEES

**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**

AMICUS CURIAE BRIEF FOR THE POKER PLAYERS ALLIANCE



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STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION AND INTEREST OF AMICUS

Amicus Curiae Poker Players Alliance ("PPA") is a nonprofit advocacy group comprised of individual poker playing enthusiasts. It is dedicated to preserving and promoting the ability of Americans to legally play America's favorite card game. [1] The PPA has more than 1,000,000 members in the United States and more than 13,000 members in the Commonwealth of Kentucky. Significant numbers of PPA members enjoy playing the game of poker over the internet, both professionally and recreationally. These members, whether in Kentucky or anywhere else in the world, will have this source of enjoyment and income denied if the Commonwealth of Kentucky is successful in forfeiting the Internet domain names of sites that offer a venue for playing the game of poker.

One of the key objectives of the PPA is to make the public, the political community, and the legal community aware of the fact that Poker is a game in which the skill of the player is the predominant factor in determining the outcome of the game. Thus Poker is different, and should be considered independently, from the "games of chance" that are typically the subject of gambling laws. In accordance with this objective,

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[1] Poker has been an American pastime for more than a century and a half, and it has firm roots in American history. Poker truly came of age during the Civil War, entertaining Union and Confederate soldiers alike, including General Ulysses S. Grant, who reportedly widely enjoyed the game. Poker soon grew to become a favorite pastime of the United States' highest elected officials. For example, Harry S. Truman loved to play poker, referring to poker as his "favorite form of paper work." *David McCullough*, Truman, p. 142, 611 (1993). Poker is also a favorite pastime of many in the American judiciary. For example, in 1972, Washington attorney Bob Bennett invited the newly appointed United States Supreme Court Associate Justice William H. Rehnquist to join him in his monthly poker game. *Jeffrey Toobin*, The Nine, p. 115 (2007). Other players in this monthly game have included Associate Justice Antonin Scalia and Judge Royce Lamberth of the United States Court of Appeals for the District of Columbia Circuit. *Id.* Today, as throughout its history, millions of Americans continue to play and enjoy the game. For example, during the last 10 years ESPN has been broadcasting the World Series of Poker in a manner similar to any other sporting event. That last year's World Series of Poker, the largest but only one of many such tournaments, had over 6,000 entrants from all over the world demonstrates poker's continued great popularity.

the PPA recently assisted in two cases in which a Court found the game of poker to be predominantly a game of skill. *Pennsylvania v. Dent*, No. 2008-733, slip op. (Pa. Ct. Com. Pl. Jan. 14, 2009); *South Carolina v. Chimento,* No. 98045DB, slip op. (Mount Pleasant Municipal Court, Feb. 19, 2009). Indeed, in the *South Carolina* case, the court found the body of evidence presented by the PPA to be "overwhelming." in proving poker to be a game of predominantly skill. *Id.* at 3. The PPA also insured the presentation of this body of evidence regarding skill's predominance in poker in a recent jury trial that resulted in a verdict of not guilty. *People v. Raley*, No. 08M2463, Weld County Court, Colorado, January 21, 2009.

The PPA sought to present the same body of evidence in this matter. Accordingly the Franklin Circuit Court granted the PPA *amicus* status to specifically address the issue of whether Poker is a game of predominantly skill and thus not gambling under Kentucky law. The PPA submitted an *amicus* brief to that Court with an attached affidavit that demonstrated, in short form, the predominance of skill in poker. No further evidence was taken by the Franklin Circuit Court despite the PPA's request to provide it. Instead, after only hearing statements from counsel, the Franklin Circuit Court issued an order declaring chance to be the "essence" of Poker and therefore "gambling." Franklin Circuit Court, Oct. 16, 2008 Opinion and Order at p. 26.

In the proceedings before the Court of Appeals, the PPA submitted an *amicus* Brief in support of the issuance of a Writ of Prohibition arguing that the ruling of the Franklin Circuit Court that poker is "gambling" was made in violation of Due Process by failing to hold an evidentiary hearing on this important issue of fact, and by basing its

ruling on a fact that is clearly erroneous and in direct contradiction to the only evidence that actually was before the Court.

Because the Court of Appeals based the issuance of its Writ of Prohibition on other grounds, it did not address this issue in its ruling.

In its brief before this Honorable Court, the Commonwealth ignores the existence of this issue entirely and continues to assume that all of the activities of the internet sites in question constitute unlawful gambling without ever having offered evidence to prove this contention.

The PPA is therefore filing this brief to insure that the failure of the Franklin Circuit Court to comply with fundamental principles of Due Process regarding the game of poker is not forgotten. The PPA was entitled to a full and fair hearing on this matter and was denied one. This error was further compounded by the Franklin Circuit Court basing its ruling on a finding of a purported fact that is facially false, and contradicted by the only evidence that was actually placed in the record, the affidavit the PPA submitted. This denial of the PPA's fundamental right to Due Process therefore remains an independent basis for upholding the Writ of Prohibition issued by the Court of Appeals.

ARGUMENT

A Writ of Prohibition is the appropriate remedy when the petitioner demonstrates 1) immediate and irreparable harm; and 2) that the trial court is acting erroneously. *Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610, 616 (Ky. 2005).

I. Immediate and Irreparable Harm

Thousands of PPA members are professional poker players who earn their livelihood by playing poker, both in live games and over the internet. Even PPA members

who do not earn their livelihood through poker are able to make significant earnings through poker by playing the game on defendants' web sites, provided they possess the requisite level of skill needed for success. The trial court's proceedings threaten severe and irreparable harm to the livelihood and earnings of PPA members, whether they live in Kentucky or elsewhere.

If allowed to proceed, the trial court's wrongful confiscation of the domain names will cause irreparable harm because once a domain name is under the court's control or forfeited to the state, access to the web site can be blocked or the domain name can be shut down entirely. As a result, the domain name is inaccessible not only to those in Kentucky, but also to those in other states, and indeed the world, where poker playing is explicitly legal. The rights of PPA members in Kentucky and across the nation to use the web sites accessed via these domain names will be effectively eliminated.

There is no adequate remedy on appeal because seizing and freezing the domain names is irreparable. PPA members will have no way to recover the loss of access which forfeiture will inflict. The Commonwealth has not offered, and will not be able to offer, an appropriate mechanism whereby the courts of this state could compensate poker players for their loss of income pending appeal. But it is certain that the losses suffered by professional and skillful recreational poker players during the pendency of an action to overturn the forfeiture would be staggering.

The scope of the harm inflicted by an erroneous seizure order from the trial court is enormous. And not only is this harm significant, it is irreparable. There is simply no way to compensate the interested parties for the deprivations they will suffer as a result of the Franklin Circuit Court's erroneous ruling, even if that ruling is eventually overturned

by this Court on appeal. As a result, only the intervention of this Court now will serve to adequately protect the parties involved, and avoid irreparable, lasting harm.

II. The Trial Court is Proceeding Erroneously

The trial court is proceeding erroneously by basing its actions on the premise that poker is a game of chance, rather than a game of skill. Judge Wingate wrote:

> PPA urges this Court to deny the element of chance in poker and place domain names offering poker for profit beyond the reach of this statute. We decline to do so. KRS 528.010(3) does not require that chance be the only factor in the outcome of a gambling enterprise; ...Chance, though not the only element of poker, is the element which defines its essence. In the end, no matter how skillful or cunning the player, who wins and who loses is determined by the hands the players hold.

See Franklin Circuit Court, Oct. 16, 2008 Opinion and Order at p. 26 (emphasis added). This ruling is erroneous because it reached a factual conclusion without conducting a full evidentiary hearing and because it directly contradicts the limited, uncontested factual evidence that actually was placed in the record.

A. The Trial Court is proceeding erroneously by failing to conduct an evidentiary hearing on an issue of fact.

As further explained below, the trial court correctly found that whether poker is a game of chance hinges on whether the element of chance is the predominant element of the game -- whether chance defines the game's "essence." To determine whether chance is the "essence" or the predominant element of poker, the court was required to determine whether chance predominates over skill in the playing of poker. This is precisely the issue the PPA put into dispute in these proceedings, and this is precisely the issue that the PPA was granted *amicus* status to address. But while the correct legal test was adopted by the trial court, it was not applied in a manner consistent with Due Process. It is clear and settled law that whether poker is a game predominantly of skill or predominantly of

chance is a question of fact, not law. *See Meader v. Commonwealth,* 363 S.W.2d 219 (Ky. 1962); *Fall v. Commonwealth*, 245 S.W.3d 812 (Ky. App. 2008); *see also, State ex rel Schillberg v. Barnett*, 488 P.2d 255 (Wash. 1971); *Indoor Recreation Enterprises, Inc. v. Douglas*, 235 N.W.2d 398 (Neb. 1975); *State v. Eisen*, 192 S.E.2d 613 (N.C. App. 1972); *People v. Mitchell*, 444 N.E.2d 1153 (Ill. App. Ct. 1983); *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58 (Mo. 1994); *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626 (N.C. App. 2007).

It is a fundamental principle of Due Process that when called upon to determine a fact in dispute a Court must hold an evidentiary hearing, or its equivalent, at which the parties present the evidence upon which the disputed factual issue will be resolved. *See, e.g., Crowell v. Benson*, 285 U.S. 22, 48 (1932) ("An award not supported by evidence in the record is not in accordance with law."). In this case, the trial court made a factual conclusion -- that the outcome of a game of poker is determined by the cards held by the players -- without an evidentiary hearing, and without supporting its conclusion with any evidence presented by the parties or independently obtained by the court. This failure to engage in any fact-finding whatsoever is an obvious misapplication of the relevant legal standard and violative of the clearly established Due Process rights of the Petitioners and poker players worldwide.

B. The Trial Court is proceeding erroneously by basing its ruling on a clearly erroneous finding of fact.

There was, however, evidence actually presented to the Franklin Circuit Court via the affidavit of Professor Robert C. Hannum ("Hannum") submitted by the PPA. Professor Hannum is a professor of statistics qualified as an expert many times in the past. In fact, Professor Hannum recently testified on this subject in both the Colorado

and South Carolina cases in which the issue of skill in poker was contested. That evidence, however, was not only ignored by the Franklin Circuit Court, but stands in direct opposition to the Court's ruling. Professor Hannum's affidavit concludes:

> Poker is predominated by the elements of skill, not chance -- the skill elements expressed through the player's betting strategy; i.e. whether to (when possible) check, bet, call, raise, or fold. A player making betting decisions randomly (i.e., zero skill) will lose convincingly to a player whose betting strategy is raise when permitted and call otherwise. In a heads-up match of Texas Hold 'Em, by far the most popular form of poker, the skilled player wins nearly 97% of the hands and an average of more than one-and-a-half big bets per hand. Again, the results show that the players with strong poker skills win convincingly over the players with weak poker skills.

Hannūm Affidavit, ¶ 32.

Thus, the uncontroverted record before the trial court established that the more skilled poker player wins an overwhelming majority of the hands played. The Commonwealth offered no evidence refuting this fact. The record therefore supports only one conclusion-- that poker is a game based on skill, not chance. Despite the clarity of the record in favor of the Petitioners' position, the trial court reached an opposite conclusion, without affording the Petitioners an opportunity for any further development of the facts. The trial court's decision to dispense with fact-finding, and then to ignore the facts already in the record, is clear error which directly affected the outcome of the proceedings.

A comparison of the trial court's decision with the uncontroverted evidence in the record demonstrates the extent of its error. The trial court held that who wins and who loses a poker game is always determined by "the hands they hold." Franklin Circuit Court Oct. 16, 2008 Opinion and Order at 26. This conclusion is clearly erroneous. It appears based on a commonly held but fundamentally incorrect belief about how poker is

played. Contrary to this belief, successful poker play is largely unrelated to the cards held by the players.[2] As Professor Hannum's affidavit states, the cards held by the players are revealed in only a small minority of poker hands. The larger share of hands (75%) are determined without a showdown (i.e. where players reveal the cards they hold) and instead are determined by all the players "folding" their hands to the winner. Hannum Affidavit, ¶ 31. Had the court engaged in the minimal fact-finding required by due process, or even considered the existing facts proffered by the Petitioners, it would have seen that the conclusion that poker is based on the cards held by the players was facially incorrect. The cards a player holds cannot and do not determine whether he wins or loses if those cards are never shown nor revealed.

Had the Franklin Circuit Court reviewed the undisputed factual record, it would have found ample evidence demonstrating that poker is a game of skill and, more importantly, evidence directly contradicting its ultimate conclusion. The Cabinet offered no evidence to the contrary. It was therefore undisputed that poker hands are not usually won or lost "based upon the cards held by the players" as the Franklin Circuit Court stated in its ruling. Hence there can be no other conclusion but that this finding of fact was clearly erroneous.

While the Commonwealth may take issue with Professor Hannum's conclusions now, it failed to do so at the trial court level. The record reviewed by the trial court,

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[2] A striking example of the limited role that the cards play in determining the outcome of a hand may be found in the recent story of Annette Obrestad, a 19-year-old poker prodigy who beat 179 other players -- without looking at her own cards. *See* Shawn Patrick Green, Online Poker: Interview With Annette 'Annette_15' Obrestad, http://www.CardPlayer.com/on-line-poker/poker-beat/article/2536 (Aug. 12, 2007). Obrestad's feat shows it is the player's skill rather than the deal of the cards that determines outcomes.

therefore, supported only one conclusion: that skill predominates over chance in the play of poker.

This Honorable Court is now required to intervene by upholding the Writ of Prohibition to make certain the trial court fulfills its duty to consider the facts in the record as it reaches its decision, and before it determines the rights of the parties before it. Indeed in this case, it is necessary to make certain that the trial court does not base its ruling on a finding of fact that stands in direct contrast to uncontested evidence placed before it. To do otherwise would sanction a violation of Petitioners' rights to Due Process and uphold a clearly erroneous finding of fact. This must not be allowed. *See Hilltop Basic Resources, Inc. v. County of Boone*, 180 S.W.3d 464, 469 (Ky. 2005).

In anticipation of a response, the PPA surmises that the Commonwealth will recognize that the trial court's decision that poker is determined by the hands held by the players simply cannot be defended as an accurate factual finding, certainly not based on the existing record. As a result, it may argue, if it chooses to address the issue at all, that the trial court did not need to determine that poker is predominately a game of chance. Instead it may argue, as it did in the trial court, that as long as the play of a game involves some element of chance, it is a game of chance, and that the trial court simply recognized that poker is a game of chance because the game does contain some element of chance. This is an incorrect view of the Franklin Circuit Court's October 16, 2008 Opinion and Order, and an incorrect statement of Kentucky law. The language of the Circuit Court's Opinion and Order clearly reflects the view -- which was correct as a matter of Kentucky law -- that chance must form a game's "essence" before a game is considered one of chance subject to the gambling prohibition.

The Franklin Circuit Court stated that poker was a game of chance because chance formed the game's "essence." In other words, in poker, the element of chance predominates over the element of skill. This is an adoption of the common law "predominance" test for determining whether a game is one of skill or chance. In reaching this conclusion, the Franklin Circuit Court was following long-standing Kentucky authority on the issue of the skill/chance distinction and adhering to the plain meaning of KRS 528.010(3)(a). *See Commonwealth v. Allen*, 404 S.W.2d 464 (Ky. 1966); Ky. OAG 93-58 (Aug. 5, 1993); Ky. OAG 79-215 (Feb. 23, 1979); and Ky. OAG 99-8 (Nov. 15, 1999) (which states clearly on page 4, footnote 4: "The test for the element of 'chance' in Kentucky is the 'dominant factor' test.").

It should be also noted that in its haste to dispense with the critical issue of whether poker is a game of skill or chance without engaging in fact-finding, the trial court quickly analogized this case to the recent case of *Fall v. Commonwealth*, 245 S.W.3d 812 (Ky. App. 2008). It is anticipated that the Commonwealth may also make use of this case in a manner similar to their argument before the trial court. *Fall*, however, has little relevance to the game of poker or this case.

In *Fall*, the Court of Appeals stated that cockfighting was a game of chance under KRS 528.010(3)(a). In reaching its conclusion, the Appeals Court, and apparently the trial court, engaged in no fact-finding. Reliance on *Fall* as an example of how to make the critical chance/skill distinction in this case is misplaced for a number of reasons.

First, and most importantly, cockfighting's status as a game of chance was both beyond dispute and never seriously disputed in the *Fall* case. The court in *Fall* could, therefore, reach the obvious conclusion that cockfighting was a chance game absent any

fact-finding, because to do so would not compromise the due process rights of the parties to a hearing on a disputed factual issue. By contrast, the parties in this case have, since the outset of the litigation, disputed whether poker is a game of chance. Whereas the academic and scientific communities have never considered cockfighting a game based on the skill of its participants, the skill elements inherent in poker have been subject to considerable study, and the vast weight of empirical evidence suggests it is a game of skill. *See generally*, Anthony Cabot & Robert Hannum, Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition, 22 T.M. Cooley L. Rev. 443 (2005).

Along the same lines, *Fall* is inapplicable because it involved wagering on a game played by others. Wagering on the outcome of a game played by others has always been distinguished from wagering on the outcome of a game in which the wagerer participates and thus controls or influences the outcome. *Id.* Furthermore, a player placing a wager and gambling (including placing a wager with another player) is legal in Kentucky – it's the promoting, accepting, or housing bets that is illegal. *See* KRS § 528.010(7), et seq. Here, the poker web sites are not accepting wagers, they are simply providing a forum for poker players to legally play against each other.

Finally, *Fall* is also distinguishable because, unlike poker and other games involving human competitors, cockfighting involves no element of human skill. The outcome is totally dependent on the skills of the roosters. And while some people may, correctly or incorrectly, believe that they are better at picking winning roosters than other people, the key fact remains that once the wager is made, the human has neither influence nor control over the outcome of the contest.

In contrast, as is explained in Professor Hannum's affidavit, in the game of poker the "bets" are not really "bets" at all, they are more like the "moves" a player makes in a chess match, or the "swing" in a golf game. Choosing whether to "bet" or "raise" or "call" or "fold" is the manner in which one plays poker, and choosing correctly or not is the manner in which one plays better or poorer poker. The choice in deciding what play to make, either by folding yourself or by making a play designed to induce other players to fold, directly influences the outcome of the game. In fact, as previously stated, all players folding to one player without the cards ever being revealed is the manner in which 75% of poker hands are resolved. Hannum Affidavit, ¶¶ 20-31. The implication that a poker player is "betting" on what the next card will be is manifestly incorrect. Playing poker has nothing in common with betting on a cockfight. As such, *Fall* is of no use in the determination of whether poker is a game of chance. Any reliance on *Fall* is therefore inappropriate, and certainly no substitute for the full Due Process fact-finding hearing required to adequately adjudicate the contested issue of the predominance of skill or chance with respect to the game of poker.

Before concluding, it is important to note that the parties to this proceeding are prepared, in the event this Court upholds their Due Process rights by ordering that the Writ of Prohibition be upheld at least until an evidentiary hearing is conducted, to present substantial additional evidence demonstrating that skill predominates in the game of poker. Specifically, the parties can present eight separate scientific studies (at present, more are being conducted) demonstrating the significance of skill in playing poker; the PPA can also present an independent statistical study of more than 100 million actual online poker hands which empirically verifies that 75% of poker hands are won without

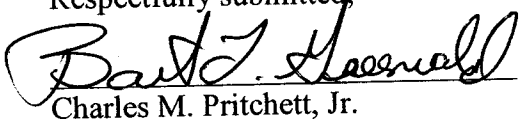
the cards ever being consulted. *Hope and McCulloch*, Statistical Analysis of Texas Hold'Em, 2009 (published online at http://www.cigital.com/resources/gaming/poker/). That study further revealed that in the remaining group of hands where the cards are actually consulted, the player whose cards would have won had he played to the end has instead lost by folding 50% of the time; another clear indication of the predominance of how one plays their cards over the actual cards held. The PPA also can produce more than 500 separate books written and published regarding poker strategy; and would finally submit the testimony of professional poker players concerning the amount of skill and thought necessary to play poker successfully, and the fact that their skill as players, not "luck," is what allows them to be professionals at the game. It was this body of evidence that the Judge in South Carolina declared "overwhelming." *South Carolina v. Chimento,* slip op. at 3. To have denied the PPA the opportunity to present this body of evidence constitutes a denial of basic principles of Due Process and fundamental fairness that cries out for a remedy. A Writ of Prohibition is that remedy.

CONCLUSION

The Franklin Circuit Court failed to comport with Due Process when it proceeded to rule on an issue of fact without an evidentiary hearing. The Franklin Circuit Court compounded this error by making a finding of fact that was clearly erroneous and in direct contradiction with the only evidence in the record. As the forfeiture of the domain names at issue, to the extent they include sites offering a venue for individuals to play poker, will cause irreparable and immediate harm to millions of poker players world-wide, a Writ of Prohibition is the appropriate remedy. The Writ should direct that no further action be taken by the Franklin Circuit Court until the PPA, is at a minimum,

given the opportunity to present a full argument based upon a full record. The PPA is confident that if given a fair opportunity it will be able to convince the Court, as it has others, that poker is in fact a game predominated by skill and therefore not gambling as that term is legally defined. The Franklin Circuit Court's denial of that opportunity therefore constitutes an entirely independent basis for the Writ of Prohibition issued by the Court of Appeals, and the issuance of the Writ should therefore be upheld.

Respectfully submitted,



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