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

INTERACTIVE MEDIA ENTERTAINMENT AND GAMING ASSOCIATION, INC.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

* * * * * * * * *

Interactive Media Entertainment and Gaming Association, Inc. ("Interactive Media"), by counsel, in support of its motion to dismiss and, in accordance with the briefing schedule established by this Court, states as follows.

The Second Amended Complaint should be dismissed for the following reasons: (1) *in rem* subject matter jurisdiction cannot be established because the subject domain names are not property within the state of Kentucky, and the Second Amended Complaint is fatally defective because it does not allege that the domain names are within Kentucky; (2) the Second Amended Complaint is fatally defective and fails to state a claim upon which relief can be granted because a domain name is not a "gambling device" under KRS 528.010(4), and therefore cannot be the subject of a civil forfeiture action; (3) the Plaintiff's seizure of domain names unconstitutionally burdens interstate commerce in violation of the dormant Commerce Clause of the United States Constitution; and (4) the elements of a public nuisance claim cannot be met and a domain name is not a proper defendant to such an action.

Further, Interactive Media hereby adopts and incorporates by reference the arguments of all other filings made in this action on behalf of the 141 Internet Domain Names defendants.

I. THE COURT LACKS JURISDICTION TO HEAR THIS ACTION, AND TO DO SO WOULD VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. Property Subject to *In Rem* Jurisdiction Must Be Located in Kentucky.

Plaintiff's misguided attempt to seize Defendant 141 Internet Domain Names fails, as the domain names are not subject to *in rem* jurisdiction in Kentucky, and any action by a Kentucky court with regard to them is void under the Due Process Clause of the Fourteenth Amendment. It is well settled that *in rem* jurisdiction only is valid within a state if the property is located within that state. *See Durfee v. Duke*, 375 U.S. 106, 107–08 (1963) ("The Nebraska court had jurisdiction over the subject matter of the controversy only if the land in question was in Nebraska."); *see also* 20 Am. Jur. 2d *Courts* § 72 ("A decision *in rem* can be rendered by a state court only with reference to a *res* situated in the state . . . ."). A state's attempt to use *in rem* jurisdiction with respect to property not within the state is a violation of the Due Process Clause of the Fourteenth Amendment. *See Hanson v. Denckla*, 357 U.S. 235, 246–50 (1958).

In *Hanson*, the state of Florida attempted to exercise *in rem* jurisdiction over a trust established in Delaware by a settlor who later became domiciled in Florida. *Id.* at 238–39. The Court, in overturning the Florida Supreme Court's determination that the state could exercise jurisdiction over the trust, limited the reach of *in rem* jurisdiction to situations in which "the presence of the subject property [was] within the territorial jurisdiction of the forum State." *Id.* at 246. Moreover, the Court detailed the resulting Fourteenth Amendment violation:

> With the adoption of that Amendment, any judgment purporting to bind the person of a defendant over whom the court had not acquired *in personam* jurisdiction was void within the State as well as without. *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565. Nearly a century has passed without this Court being called upon to apply that principle to an *in rem* judgment dealing with property

> outside the forum State. The invalidity of such a judgment within the forum State seems to have been assumed—and with good reason. Since a State is forbidden to enter a judgment attempting to bind a person over whom it has no jurisdiction, it has even less right to enter a judgment purporting to extinguish the interest of such a person in property over which the court has no jurisdiction. Therefore, so far as it purports to rest upon jurisdiction over the trust assets, the judgment of the Florida court cannot be sustained.

Id. at 250. Because the domain names at issue are property not located within Kentucky, this Court has no jurisdiction over the subject matter at issue and therefore no constitutional basis with which to adjudicate this case. Accordingly, jurisdiction is absent.

1. Domain Name *Situs* Has Been Deemed by Congress to be Located in the District of the Registrar, and Therefore, the 141 Domain Names Are Not Subject to *In Rem* Jurisdiction in Kentucky

The *situs* of intangible property is one of two locations: (1) the domicile of the property owner; or (2) the location of the intangible instrument (i.e., a stock or bond certificate), if there is one. Fletcher R. Andrews, *Situs of Intangibles in Suits Against Nonresident Claimants*, 49 Yale L.J. 241, 242–43 (1939) (collecting historical cases); *see also, e.g.*, *In re De Lano's Estate*, 315 P.2d 611 (Kan. 1957) (holding that Kansas courts had no jurisdiction to adjudicate dispute over stock and bond certificates located in Missouri, as intangible property is located in the state of its certificate). This principle remains true for Internet domain names, and Congress has followed this tradition when enacting the Federal Anticybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. § 1125(d), *et seq*. However, a brief discussion of the domain name registration process is in order to elucidate this point.

To regulate the problem of directing traffic over the Internet, the Internet Corporation for Assigned Names and Numbers ("ICANN") was established in 1998. *See* ICANN, http://www.icann.org/tr/english.html (last visited Oct. 1, 2008). An international, quasi-governmental, non-profit partnership, ICANN has as its exclusive mission and purpose the task

of addressing Internet space allocation and Domain Name System assignment. ICANN organizes and directs traffic over the Internet. *Id.* The Domain Name System ("DNS") was established to make it easier for people to find their way around the Internet by allowing users to use a familiar string of letters (a "domain name") instead of a string of archaic numbers, thus making Internet usage easier for the public. *Id.* Instead of typing the Internet Protocol address to visit a website, a user can type a familiar phrase to visit the same website (e.g., typing "www.icann.org" instead of "192.0.34.163"). This makes the Internet more user friendly.

Domain names are issued to holders through a domain name registrar. A domain name registrar is one of several entities licensed by ICANN to grant domain names to applicants, or "registrants." *Mattel, Inc. v. Barbie-club.com*, 310 F.3d 293, 296 n.2 (2d Cir. 2002). For a fee, a domain name registrant obtains the exclusive right to use a domain name for a specified time, while the registrar holds title to the certificate, which the ACPA establishes is a "document sufficient to establish [a court's] control and authority regarding . . . the use of a domain name." 15 U.S.C. § 1125(d)(2)(C)(ii). This certificate is located in the headquarters of the registrar.

While the issue of a domain name's *situs* has not been addressed by the Kentucky courts or the General Assembly, Congress studied the issue exhaustively when enacting the ACPA. This analysis is relevant to the issue before this Court. Applying traditional notions of intangible property location and adapting these concepts to the Internet age, Congress found a constitutional mechanism permitting *in rem* jurisdiction over domain names. The ACPA allows *in rem* jurisdiction over a domain name only "in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located." *Id.* § 1125(d)(2)(A). Subsection (d)(2)(C) states that the *situs* of a domain name in an *in rem* action shall be deemed to be

> in the judicial district in which (i) the domain name registrar, registry or other domain name authority that registered or assigned the domain name is located; or (ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court.

Id. § 1125(d)(2)(C). The *Mattel* court expresses why Congress established *situs* in this manner. Mattel brought an action against several domain names under the ACPA in the U.S. District Court for the Southern District of New York. The trial court dismissed the action for lack of *in rem* jurisdiction on the ground that the defendants' registrar was in Maryland. *See Mattel*, 310 F.3d at 294. The Second Circuit upheld the district court's dismissal, stating that Congress recognized that allowing an *in rem* action against a domain name, accessible in every state in the U.S., in any federal court may offend due process or principles of international comity. *See Mattel*, 310 F.3d at 302. Requiring a "nexus" between the registrar and the court lessens these concerns as the domain name, the subject of the action, is most connected with the jurisdiction where the registrar resides. *Id.* at 302; *see also* H.R. Rep. No. 106-412, at 14 (1999). The presence of the domain name in the judicial district of the registrar "anchors the *in rem* action and therefore satisfies due process." *Mattel*, 310 F.3d at 302. This analysis has been followed in nearly all litigation under the ACPA. *See, e.g., Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214 (4th Cir. 2002) (holding that when Internet domain name was registered in Virginia, Virginia had *in rem* jurisdiction consistent with due process).

This Court should follow the traditions of intangible property *situs* analysis, and the lead of Congress, in refusing to find jurisdiction. Much like traditional intangible property, domain names have consistently been recognized as having a *situs* at the location of the registry, or in the location of the domain holder. *See* ICANN—Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy § 4.9 (discussed further *infra*).

Further, domain names are accessible in every state in the U.S. If any court within the U.S. can claim *in rem* jurisdiction over a domain name, domain names could be taken from their holders for a multitude of potential reasons. The result would stifle the dynamic and important function of the Internet as an outlet for national and international commerce. Only jurisdictions with a "nexus" to the domain name should properly adjudicate these disputes. Otherwise, any party that registers a domain name could be required to defend itself in any jurisdiction in the country. Such a notion would surely "offend traditional notions of fair play and substantial justice" that anchor the due process requirement. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Accordingly, this Court lacks jurisdiction.

2. The Authority Cited by Plaintiff in Support of Domain Name Seizure Does Not Address the Issues Before the Court

Plaintiff cites *People ex rel. Vacco v. World Interactive Gaming Corporation*, 714 N.Y.S.2d 844 (N.Y.S. 1999), as support for its position. *Vacco* does not address any of this issues before this Court, and is therefore inapplicable. In *Vacco*, the New York Attorney General brought an action seeking to enjoin a corporation from offering to residents of New York State gambling over the Internet. *Id.* at 846. However, the *Vacco* court had *in personam* jurisdiction over the defendant, as World Interactive, a registered Delaware corporation, maintained its headquarters and operated in Bohemia, New York. *Id.* at 849. The defendant also did business with other companies within the state, downloaded software from its New York headquarters, and engaged in a prolific advertising campaign targeting New York residents. *Id.* On this basis, the court found *in personam* jurisdiction.

Plaintiff in the instant case is not filing an *in personam* action but an *in rem* action. The *Vacco* case does not address two central issues before this Court: whether *in rem* jurisdiction exists, and whether the domain names fit within the definition of "gambling device" in KRS

528.010(4). Moreover, most of the analysis by the *Vacco* court dealt with whether there were "minimum contacts" sufficient to subject defendants to *in personam* jurisdiction. Thus, *Vacco* is irrelevant to this case.

B. The Uniform Domain Name Dispute Resolution Policy Does Not Require the Domain Names to Consent to Jurisdiction in Kentucky

Plaintiff also appears to assert in its Second Amended Complaint that this Court has jurisdiction over Defendants by virtue of the *ICANN Uniform Domain Name Dispute Resolution Policy* ("UDRP"). (*See* Second Am. Compl. ¶ 35.) Specifically, Plaintiff argues that since all domain name holders must comply with the UDRP as a condition of their registration, that the UDRP requires they consent to jurisdiction "through any court . . . that may be available." (*See* Second Am. Compl. ¶ 35); *see also* ICANN Uniform Domain Name Dispute Resolution Policy § 5. Plaintiff grossly misinterprets both the purpose of the UDRP and its specific language. The UDRP in no way requires the Defendants submit to jurisdiction in Kentucky.

1. The Purpose of the UDRP Is Only to Combat Cybersquatting or Bad Faith Registrations

The UDRP was adopted by ICANN in January, 2000 specifically to "permit the owner of a [trade]mark to initiate an administrative complaint against an alleged cybersquatter." 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 25:74.75 (4th ed. 2008). The ACPA defines cybersquatting as being performed by a person who "registers, traffics in, or uses a domain name that—in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark . . . ." 15 U.S.C. § 1125(d)(1)(A)(ii). In lay terms, cybersquatting is the practice of a party registering an unoccupied or abandoned domain name of a famous person or corporation and attempting to sell the rights to the domain name to the person or corporation for substantially more than the

standard price.[1] Because the practice became so widespread as popularity of the Internet grew, the UDRP was adopted to furnish "a simple, quick and inexpensive method of determining if a domain name has been the subject of cybersquatting." *See* 4 McCarthy at § 25:74.45.

Section 4 is the heart of the UDRP and effectuates the purpose and intent of the policy as a whole. Section 4 requires all domain name registrants to submit to a mandatory administrative proceeding for domain name disputes between the registrant and a third party. The most critical provision is section 4(a):

> **(a) Applicable Disputes.** You are required to submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure, that
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> (i) your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
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> (ii) you have no rights or legitimate interests in respect of the domain name; and
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> (iii) your domain name has been registered and is being used in bad faith.

ICANN Uniform Domain Name Dispute Resolution Policy § 4, *available at* http://www.icann.org/en/dndr/udrp/policy.htm (last visited Oct. 1, 2008) (emphasis added). Clearly this section, and thus the policy as a whole, is concerned only with cybersquatting and certainly not with a state agency suing a domain name *in rem* for an alleged criminal violation.

2. Nothing in the UDRP Requires Jurisdictional Consent by Domain Name Registrants

An examination of the UDRP language belies Plaintiff's claim that Defendants assented to jurisdiction in the Kentucky courts. Plaintiff does not cite, and counsel for Interactive Media cannot find, any case or UDRP decision interpreting section 5 in this manner. Moreover, comparing the mandatory provision of section 4(a) with section 5 shows there is no requirement

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[1] The UDRP and ACPA were specific responses to cybersquatting. For example, in *Charo Rasten v. URLPro*, NAF FA0412000384835 (Feb. 2, 2005), decided under the UDRP, defendant registered over 900 domain names of famous names and marks and registered *charo.com* shortly after the performer celebrity known as "Charo" inadvertently allowed her own registration of the same domain name to lapse. Defendant's action was a bad faith attempt to prevent "Charo" from re-registering her name.

under section 5 for Defendant to consent to jurisdiction. Finally, the language in section 5 is still subject to conventional jurisdictional doctrines, discussed *supra*, which clearly hold that Kentucky lacks jurisdiction to adjudicate this dispute.

a. Section 5 Does Not Require Defendant to Consent to Jurisdiction in this Dispute

As discussed *supra*, section 4(a), by its plain language, requires domain name holders to submit to a mandatory administrative proceeding upon complaint by a third party regarding cybersquatting. Presumably, this shows that the drafters of the UDRP were aware of how to require jurisdictional consent as a condition of domain name registration. Such language is absent from section 5. Section 5 states in its entirety:

> **5. All Other Disputes and Litigation.** All other disputes between you and any party other than us regarding your domain name registration that are not brought pursuant to the mandatory administrative proceeding provisions of Paragraph 4 shall be resolved between you and such other party through any court, arbitration or other proceeding that may be available.

ICANN Uniform Domain Name Dispute Resolution Policy § 5 (emphases added). Noticeably lacking in this section is similar language to section 4(a)s, "You are required to submit to a mandatory administrative proceeding . . . ." ICANN Uniform Domain Name Dispute Resolution Policy § 4(a) (emphases added). In contrast to the exacting, rigorous and binding language of section 4(a), section 5 exhibits no intent by the drafters to require domain name holders to consent to jurisdiction in any court regardless of the nature of the dispute.

In fact, the intent is quite the opposite. In the Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy,[2] section 4.9, the drafters address the jurisdictional issue. They concluded:

> Based on comments received, the staff has concluded that the basic two-part approach of the posted documents is fair to all parties (in the case of accredited

[2] *See* http://www.icann.org/udrp/udrp-second-staff-report-24oct99.htm.

registrars, domain-name holders have themselves submitted to jurisdiction in the location of the registrar), but that an additional option should be added so that in all cases the submission to jurisdiction can, at complainant's option, be at the location of the domain-name holder as shown in the registrar's Whois data.

ICANN—Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy § 4.9 (emphases added). This makes clear that the intent of the policy, to the extent that the domain holder was required to submit to jurisdiction, would be to submit either in the location of the registrar or the location of the domain name holder. There are only two jurisdictional options available to Plaintiff, and neither option is the Kentucky courts.

Additionally, Plaintiff's reading of section 5 leads to absurd results that contradict the purpose behind the policy. Plaintiff would have this Court believe that the drafters of the UDRP, while making sure to carefully craft section 4(a)'s parameters, would then in section 5 coerce domain name holders, for "all other disputes" to submit to jurisdiction in "any court, arbitration or other proceeding." Considering that ICANN is an international body it is highly unlikely that, for example, if a housewife in Frankfort, Kentucky registered a domain name to share pictures with family in other states, the UDRP would require her to submit to jurisdiction in Madgascar should a non-section 4(a) dispute emerge. Such a result would be outrageous, yet this is what Plaintiff is arguing before this Court. Clearly the purpose of this section is to limit the application of the policy to section 4(a)'s substantive measures, while acknowledging that the UDRP is not the exclusive remedy for any and all disputes that might arise.[3]

b. Section 5 Does Not Pertain to the Subject Matter of this Dispute

Again, analyzing the section 5 provision shows that it does not even address the subject matter of this dispute. By its plain language section 5 applies to "[a]ll other disputes between you and any party other than us regarding your domain name registration . . . ." ICANN

[3] This is especially true since a substantial number of complainants under the UDRP would likely have a concurrent cause of action for cybersquatting under the ACPA. *See* 15 U.S.C. § 1125(d).

Uniform Domain Name Dispute Resolution Policy § 5. The issue in this case has nothing to do with registration. At issue is use.[4] As discussed *supra*, the purpose of the UDRP is to adjudicate disputes with the actual registration name itself; the policy does not address any use of the website associated with the domain name. McCarthy makes this point clearly:

> [T]he ICANN UDRP policy covers only a rather limited class of domain name disputes. A dispute may be resolved under ICANN's policy only if it involves a bad faith registration of a domain name made with intent to profit commercially from another's trademark. This is the kind of conduct known as cyber-squatting or cyber-piracy. Thus, unlike the previous NSI procedure, the UDRP procedure does not cover domain name disputes where each of the parties has some legitimate legal claim to the use of the domain name, as where both of the contesting parties have longstanding trademark rights in the word which comprises the domain name. This narrower dispute resolution procedure was consciously chosen by ICANN to be "minimalist" in coverage.

4 McCarthy, *supra*, at § 25:74.75.[5] Because there is no genuine dispute as to the domain names themselves, the subject matter of the case at issue does not fall under the UDRP, and any argument made by Plaintiff to the contrary must fail.

D. Plaintiff's Complaint is Fatally Defective Because It Fails to Allege that the 141 Internet Domain Names Are Located in Kentucky

An *in rem* action generally may be brought in Kentucky courts if the property at issue is located in the Commonwealth. For example, "[g]enerally, state courts of general jurisdiction

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[4] The action Plaintiff attempts to bring is related to the use of the website associated with the domain name, not the domain name itself. The Commonwealth has no dispute with the names, e.g. *123bingo.com* or *casinoclassic.com*. Its issue deals with the use of the website connected with the domain name.

[5] *See also* Second Staff Report on Implementation Documents for the Uniform Dispute Resolution Policy § 4.1(c) (Oct. 25, 1999), *available at* http://www.icann.org/udrp/udrp-second-staff-report-24oct99.htm ("In contrast to the policy currently followed by NSI, the policy adopted by the Board in Santiago, as set forth in the final WIPO report and recommended by the DNSO and registrar group, calls for administrative resolution for only a small, special class of disputes. Except in cases involving "abusive registrations" made with bad-faith intent to profit commercially from others' trademarks (e.g., cybersquatting and cyberpiracy), the adopted policy leaves the resolution of disputes to the courts (or arbitrators where agreed by the parties) and calls for registrars not to disturb a registration until those courts decide. The adopted policy establishes a streamlined, inexpensive administrative dispute-resolution procedure intended only for the relatively narrow class of cases of "abusive registrations." Thus, the fact that the policy's administrative dispute-resolution procedure does not extend to cases where a registered domain name is subject to a legitimate dispute (and may ultimately be found to violate the challenger's trademark) is a feature of the policy, not a flaw. The policy relegates all "legitimate" disputes—such as those where both disputants had longstanding trademark rights in the name when it was registered as a domain name—to the courts; only cases of abusive registrations are intended to be subject to the streamlined administrative dispute-resolution procedure.").

have *in rem* subject matter jurisdiction over real property in the state." *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 431 (Ky. App. 2008).

However, "[w]henever it appears that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." CR 12.08.

Plaintiff's Second Amended Complaint fails to set forth any fact establishing that the "141 Internet Domain Names" are located in Kentucky. In fact, the complaint utterly fails to allege their presence in Kentucky. Plaintiff alleges only that subject matter jurisdiction is proper in this Court because "property was used in the commission of multiple crimes and statutory violations within Kentucky and the use of said property constitutes a public nuisance and otherwise violates Kentucky law." (Second Am. Compl. at ¶ 11, "Jurisdiction and Venue.")

The "commission of multiple crimes and statutory violations within Kentucky" alleges only the commission of crimes within Kentucky. This is woefully insufficient as to *in rem* jurisdiction. Nowhere in the complaint does Plaintiff state, allege, or explain how it is that the domain names at issue can be deemed to be in Kentucky themselves and therefore within the jurisdiction of this Court. A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." CR 8.01. Because the Second Amended Complaint is silent as to the *situs* of the 141 Domain Names, it fails to a state a claim.

II. AN INTERNET DOMAIN NAME IS NOT A "GAMBLING DEVICE" UNDER KENTUCKY STATUTES. THEREFORE, DOMAIN NAMES ARE NOT PROPER DEFENDANTS AND THE CLAIMS ARE NOT COGNIZABLE UNDER KENTUCKY LAW

Plaintiff's assertion that "Internet domain names" are "gambling devices"[6] as set forth in KRS 528.010(4) is without foundation, without precedent, and without basis in Kentucky law.

[6] "Each Domain Defendant is a gambling device such as is ordinarily used for gambling money or property . . . Each Domain Defendant is a device designed primarily for use in connection with gambling, ..." (Second Am. Compl. at 5.)

The assertion that domain names are "gambling devices" is the foundation upon which both claims in Plaintiff's complaint stand.[7] Because the assertion has no validity under Kentucky law, both Count I, asserting grounds for forfeiture under KRS 528.100, and Count II, asserting "Public Nuisance," cannot be maintained.

By its plain language, and by common rules of construction, Kentucky's 34-year-old statute defining "gambling device," KRS 528.010(4), does not permit the interpretation that Internet domain names are "gambling devices." Additionally, domain names simply are not of a character permitting such a reading. Thus, there can be no basis for an *in rem* civil action against domain names pursuant to KRS 528.100. Such a complaint simply does not state a claim that is cognizable under Kentucky law.

Under KRS 528.010(4), a "gambling device" means:

> (a) Any so-called slot machine or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and which when operated may deliver, as a result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
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> (b) Any other machine or any mechanical or other device, including but not limited to roulette wheels, gambling tables and similar devices, designed and manufactured primarily for use in connection with gambling and which when operated may deliver, as the result of the application of an element of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

KRS 528.010(4) (emphases added).

[7] "Each Domain Defendant is a registered internet domain and is a gambling device, and as such, is subject to this *in rem* action under KRS 528.100." (*Id.* at ¶ 44, Count I.) "By virtue of the actions as more specifically alleged above, the Domain Domains (*sic*) have been used as a gambling device in the Commonwealth." (*Id.* at ¶ 51, Count II.)

The statute was enacted in 1974, long before the Internet was a fixture of American life. The legislature could not have intended such a vastly expansive application of the definition as Plaintiff seeks to apply in this action.

By its clear language, the definition of "gambling device" in KRS 528.010(4) encompasses nothing other than mechanical devices.

As to sub-paragraph (a), it is beyond dispute that Internet domain names are not slot machines, and that "a drum or reel with insignia thereon" cannot be found as essential parts of Internet domain names. Therefore, Internet domain names cannot conceivably be deemed as falling within the definition of (a).

Under sub-paragraph (b), a "gambling device" is "any other machine or any mechanical or other device, including but not limited to roulette wheels, gambling tables and similar devices." The second use of the word "device" clearly is a reference to other mechanical gambling devices "similar" to roulette wheels and gambling tables. The legislature clearly envisioned its definition encompassing tangible gambling equipment and could not have intended to include such intangible concepts as Internet domain names.

The language of KRS 528.010(4) is more than critical to Plaintiff's complaint. Indeed, both of its claims in this action are hinged entirely upon its broad and unsupported interpretation of the definition to encompass domain names. Without such reading of the definition, Plaintiff has no claim. Plaintiff cites no case supporting such a broad reading of KRS 528.010(4). In fact, while ample cases can be found in Kentucky finding that such devices as slot machines[8] and pinball machines[9] are gambling devices under the predecessor of KRS 528.010(4), there are no

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[8] *See, e.g.,14 Console Type Slot Machines v. Commonwealth*, 273 S.W.2d 582 (Ky. 1954); *Pace Mfg. Co. v. Milliken*, 70 F. Supp. 740 (W.D. Ky. 1947).

[9] *See, e.g.,Three One-Ball Pinball Machines v. Commonwealth,* 249 S.W.2d 144 (Ky. 1952); *A.B. Long Music Co. v. Commonwealth*, 429 S.W.2d 391 (Ky. 1968).

Kentucky cases finding anything so remote, intangible and insubstantial as "domain names" to fall under the statutory definition. In essence, without any support in the law, Plaintiff is asking this Court to vastly expand state law into a realm the legislature clearly did not intend.

Statutory interpretation is a matter of law. *Floyd County Bd. of Educ. v. Ratliff*, 955 S.W.2d 531 (Ky. 1997). Statutes are to be construed according to "the common and approved usage of language." KRS 446.080(4). "A court may not interpret a statute at variance with its stated language." *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001). The first principle of statutory construction is to use the plain meaning of the words used in the statute. *See Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005). "[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). The courts should lend words of a statute their normal, ordinary, everyday meaning, and is "not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used." *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000).

The United States District Court for the Western District of Kentucky in recent days addressed a question of legislative intent nearly identical to that raised by the case now before this Court. The federal court dismissed the complaint in *Louisville/Jefferson County Metro Government and Lexington-Fayette Urban County Government v. Hotels.com, LP, et al*, Case No. 3:06-CV-480-R (attached hereto as Exhibit A.). The case presented the question of whether a tax levied by local ordinance against hotels and motels of 7.5% of room charges could be assessed against the full price collected by companies that market the hotel rooms on the Internet. The ordinance at issue assessed the tax upon room charges collected by "motor courts,

motels, hotels, inns or like or similar accommodations businesses." The determinative question was whether the Internet companies facilitating the renting of rooms could be deemed "accommodations businesses." The Louisville ordinance was promulgated under KRS 91A.350, *et seq.* The federal court observed that Internet room-rental businesses

> were truly creatures of the future at the time the statute and ordinance originally were enacted. Such businesses have long since made the leap from a capitalist's imagination to reality, however, and both pieces of legislation have been amended more than once since then. The Court will not now stop in to do what the state and local legislative bodies—both of whom can be expected to be fully aware of the intent of their legislative forbears—either failed or chose not to do.

Ex. A, *Hotels.com* Mem. Op. at 9. The legislature in Kentucky now meets annually. If the General Assembly had ever desired to re-write the definition of "gambling device" as stated in KRS 528.010(4) to encompass Internet gaming sites, it has had ample opportunity to do so. This Court should not accept Plaintiff's invitation to do what the legislature has elected not to do.

The federal court in *Hotels.com* also called attention to reasoning expressed by Kentucky's highest court that

> [t]he judiciary is but one of three component parts of our form of government. Its duty is to interpret and construe laws, not to enact them, and if a plainly warranted construction of a statute should result in a failure to accomplish in the fullest measure that which the Legislature had in view, the remedy is a legislative action, and not judicial construction.

Id. (quoting *Western & Southern Life Ins. Co. v. Weber*, 208 S.W. 716, 718 (1919)).

Plaintiff cannot escape the clear fact that a domain name does not have a character permitting it to fall within KRS 528.020(4), any more than does a simple telephone number, a simple house address, or a number assigned to a checking account.

Plaintiff has extensively cited ICANN as an authority in the complaint. However, even a cursory look at ICANN's glossary provides a definition of the Domain Name System that simply does not fit within the definition of 528.010(4). The DNS:

> [H]elps users to find their way around the Internet. Every computer on the Internet has a unique address—just like a telephone number—which is a rather complicated string of numbers. It is called its "IP address" (IP stands for "Internet Protocol"). IP Addresses are hard to remember. The DNS makes using the Internet easier by allowing a familiar string of letters (the "domain name") to be used instead of the arcane IP address.

ICANN Glossary—Domain Name System, *available at* http://www.icann.org/en/general/glossary.htm (last visited Oct. 2, 2008); *see also Am. Girl, LLC v. Nameview, Inc.*, 381 F. Supp. 2d 876, 879 (E.D. Wis. 2005) (similarly defining domain names). Basically, calling a domain name a gambling device under the definition of 528.010(4) is akin to calling a telephone number a gambling device. A telephone number could not conceivably fit within the definition as written. A domain name is no different. Plaintiff's characterization of a domain name as a "gambling device" strains credulity and clearly contradicts the plain language of the statute.

It is no different from the analogy of an overseas business communicating with a Kentucky resident via telephone. If the Commonwealth were interested (for whatever reason) in moving against that business on a gambling claim, it would be illogical for the Commonwealth to proceed *in rem* against the business's telephone number itself as the "gambling device." That, however, is precisely what Plaintiff here is characterizing as the "gambling device."

In sum, an Internet domain name under Kentucky law simply cannot be a "gambling device," and that deficiency renders the entire claim of Plaintiff invalid.

III. PLAINTIFF'S ATTEMPTED SEIZURE OF DOMAIN NAMES UNCONSTITUTIONALLY BURDENS INTERSTATE COMMERCE

While Interactive Media disputes that jurisdiction exists, assuming, *arguendo*, this Court finds jurisdiction, the action still fails on constitutional grounds. The attempted seizure of Internet domain names used nationwide and worldwide by Plaintiff, and its attempt to persuade

this Court to command forfeiture of those names, impedes interstate commerce in violation of the dormant Commerce Clause of the United States Constitution.

The Supreme Court has been clear that the dormant Commerce Clause prohibits states from discriminating against interstate commerce in order to favor in-state economic interests over out-of-state economic interests. *See American Trucking Association v. Michigan Public Service Commission*, 545 U.S. 429, 433 (2003); *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995).

Indeed, as the Supreme Court recently explained in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 127 S.Ct. 1786, 1792 (2007), a state law or action motivated by economic protectionism is subject to a "virtually *per se* rule of invalidity" that can "only be overcome by a showing that the state has no other means to advance a legitimate local purpose." Thus, a state action motivated by protectionism is subject to the "strictest scrutiny" that is "so heavy that 'facial discrimination' by itself may be a fatal defect." See *Camps Newfoundland/Owatonna, Inc. v. Harrison, Me.*, 520 U.S. 564, 581-82 (1997).

Accordingly, "in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005), *quoting Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 99 (1994). In *Granholm*, the Supreme Court struck down under the "virtually per se rule of invalidity" certain statues enacted by Michigan and New York State, respectively, that allowed in-state wineries to sell their wares directly to those state's consumers but — by mandating separating licensure and distribution networks for out-of-state producers — deliberately made it economically difficult for out-of-state wine producers to do so.

Here the Commonwealth's own pronouncements in press conferences and to the media have made it clear beyond meaningful dispute that the Governor's motivation for this seizure action is to protect Kentucky's own gaming operations, both now and in the future, while at the same time collecting marginal tax revenues. State action of this sort would constitute a *per se* violation of the Commerce Clause if done to protect *solely* private sector in-state economic interests. Where, as here, the Commonwealth, itself, is or plans to be an industry actor on its own behalf, this *per se* violation only become even more aggravated.

Where a statute regulates evenhandedly "to effectuate a legitimate local public interest," Courts may still find a constitutional violation where "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). "In balancing the burden versus benefit, 'the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.'" *Id.* In *American Libraries Association v. Pataki,* 969 F. Supp. 160 (S.D.NY 1997),

> the court invalidated a New York statute criminalizing the dissemination of material harmful to minors, ruling that the statute violated the Commerce Clause in three particulars: (1) it sought to regulate conduct occurring wholly outside New York state, (2) its burden on interstate commerce far exceeded the benefits of the statute and (3) any regulation of the internet by the states exposed users to inconsistent regulations.

American Booksellers Foundation for Free Expression v. Strickland, 512 F. Supp. 2d 1082, 1102 (S.D.Ohio 2007) (quoting *Pataki*, 969 F. Supp. at 169). In other words, state regulation has been deemed violative of the dormant Commerce Clause where the state regulation's "scope reached to all Internet communications." *American Booksellers,* 512 F.Supp.2d at 1103.

The application by Plaintiff of KRS 528.100 to Internet domain names falls well within the *Pataki* test, and in turn the *Pike* test. Through the seizure of domain names, the state beyond

question has reached to, and has blocked, Internet communications entirely outside of Kentucky, and in fact throughout the entire world. The burden on those affected communications is absolute, and excessive, far exceeding the benefit of the application of the statute. And, Plaintiff's action certainly exposes Internet users to inconsistent regulation.

Therefore, in balancing the burden and the excessive scope of the actions of the Commonwealth against their benefits, the application of KRS 528.100 clearly fails the *Pike* balancing test — particularly in the absence of any adversarial proceeding leading to a factual finding by this Court of illegal conduct. The Commonwealth thus has acted unconstitutionally.

IV. THE PUBLIC NUISANCE CLAIM SHOULD BE DISMISSED BECAUSE THE ELEMENTS CANNOT BE MET AND A DOMAIN NAME IS NOT A PROPER DEFENDANT

Under the law of Kentucky, a public nuisance is a tort consisting of

> the doing of or failure to do something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience, or injury to the public, although it is not, of course, essential that the injury, annoyance, or inconvenience should affect the whole body of the public.

Commonwealth v. South Covington & C.S.R. Co., 205 S.W. 581, 583 (Ky. 1918.)

The complaint utterly fails to identify any acts or failures to act on the part of anyone constituting the tort of public nuisance. The *in rem* Domain Name Defendants are legally incapable of committing a tort. The injunctive relief sought under this claim is a legal impossibility, as there is no named person or entity to enjoin. Therefore, as a matter of law, the complaint fails to state a claim upon which relief can be granted, and the claim of public nuisance should be dismissed.

WHEREFORE, for the foregoing reasons, the Defendants respectfully request this Court dismiss the action with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by U.S. Mail on this 3rd day of October, 2008 upon:

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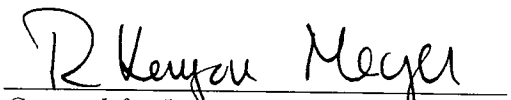

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CASE NO.: 3:06-CV-480-R

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT — PLAINTIFF

and

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — INTERVENING PLAINTIFF

V.

HOTELS.COM, LP, et al. — DEFENDANTS

MEMORANDUM OPINION

On August 10, 2007, this Court entered an Opinion & Order denying a Motion to Dismiss filed by the Defendants (*see* docket no. 60). Defendants promptly filed a Motion for Reconsideration (docket no. 88) pursuant to FED. R. CIV. P. 59(e). After careful review of Defendants' Motion and Plaintiff's response, the Court finds part of it to be well-taken. Specifically, the Court finds that the Defendants have established that the court erred in its construction of the taxing ordinances at issue. *See Roger Miller Music, Inc. v. Sony/ATV Publishing, LLC* 447 F.3d 383, 395 (6th Cir. 2007)("a motion under Rule 59(e) must either establish a manifest error of law or must present newly discovered evidence" (internal citations omitted)). Unfortunately for Plaintiff, the revised ruling is dispositive of the action. Accordingly, for the reasons stated herein, the Court will supersede its prior Opinion & Order in

Exhibit A

its entirety and order that the case be dismissed.[1]

I.

Louisville/Jefferson County Metro Government filed this lawsuit seeking to recover what it believes are unpaid transient room taxes that are due it pursuant to Chapter 121 of the Louisville/Jefferson County Code of Ordinances (the "Metro Ordinances"), which imposes transient room taxes totaling 7.5% of the rent of rooms "charged by all persons, companies, corporations, or other like or similar persons, groups or organizations doing business as motor courts, motels, hotels, inns or like or similar accommodations businesses."

The Defendants are internet travel companies whose businesses assist on-line customers with the rental of hotel[2] rooms across the world, including those in Louisville, Kentucky. The Defendants agree to pay local hotels a certain negotiated fixed amount per room if the Defendants are able to find persons to rent the hotels' rooms. (Plaintiff refers to this as the "wholesale price.") Customers then book rooms on-line for a rate that is higher than the negotiated amount (Plaintiff refers to this as the "retail price"), and pay the Defendants that rate, plus an amount that includes applicable taxes and a service fee. Defendants then remit to the hotels the original negotiated amount (the "wholesale price"), plus any taxes due on that amount. The rest they keep. The hotels then remit to the taxing authority the tax due on the amount they actually received (*i e*, the "wholesale price"). Defendants remit nothing to the taxing authority.

---

[1]Because the same issue of statutory construction is also dispositive of Defendants' Motion to Dismiss the Lexington-Fayette Urban County Government's Intervening Complaint (docket no. 141), the Court will also grant that motion for the reasons articulated in this Memorandum Opinion.

[2]The Court will use the term "hotel" generically to refer not only to hotels, but also motels, motor courts, and inns.

Therein lies the crux of the parties' dispute.

Plaintiff alleges that the amount of tax due the taxing authority should not be calculated on the basis of the negotiated amount (*i.e.*, the "wholesale price"), but on Defendants' higher advertised rate (*i e.*, the "retail price"), which they construe to also include the service fee For example, if Defendants and the hotels agree upon a negotiated amount of $60 per room, but then Defendants advertise those rooms for the rate of $90, plus a $10 service fee, Defendants allegedly remit to the hotels only 7.5% of $60, instead of 7.5% of $90 (the advertised rate) or $100 (the advertised rate, plus the service fee), a difference of $2.75 or $3.50 per room. There has been no allegation that the hotels are not properly remitting the tax collected on the "wholesale price." Rather, the dispute is concerned solely with the tax putatively due on the "retail price" and the service fee. Depending on the typical amount of the difference between the "wholesale price" and the total cost to the on-line consumer, this constitutes a potentially significant loss of tax revenue for Metro Government. Hence this lawsuit.

II.

Plaintiff alleges that Defendants are required to remit the tax due on the advertised room cost pursuant to Metro Ord. §§ 121.01 and 121.02. Because Defendants have not remitted anything directly to the taxing authority, and have only remitted to the hotels the tax due on the "wholesale price," Plaintiff asserts that Defendants not only have violated the transient room tax ordinances, but are also liable under common law theories of unjust enrichment, money had and received, and conversion. The Plaintiff therefore has asked the Court to impose a constructive trust on Defendants and to hold the amount in dispute as a constructive trustee for the Plaintiff. Plaintiff also requests a declaratory judgment that the Defendants' business practices are

unlawful, deceptive, and illegal. Finally, Plaintiff asks the Court to certify a class of counties and cities throughout Kentucky it asserts are owed money by the Defendants and requests damages not only for Metro Government, but the class as well.

Defendants have asked the Court to dismiss Plaintiff's claims because they have failed to state a cause of action upon which relief may be granted. *See* Mot. to Dismiss (docket no. 10) Defendants first argue that Chapter 121 of the Metro Ordinances does not apply to them because they are not "doing business as motor courts, motels, hotels, inns or like or similar accommodations businesses." Metro Ord. § 121.01 (A) -(D) and § 121.02(A), (B). They also assert (1) that any extension of the transient room tax to their services fees constitutes an excise tax that is violative of Kentucky's constitution; (2) that imposing the tax on their service fees constitutes impermissible double taxation; (3) that Plaintiff lacks standing to bring this lawsuit; (4) that Plaintiff has failed to exhaust its administrative remedies; (5) that Plaintiff's common law claims fail as a matter of law; and, because of the foregoing assertions, (6) that declaratory judgment is improper.

In its original Opinion & Order (docket no. 60), the Court disagreed with all of Defendants' arguments in their Motion to Dismiss, and denied the Motion. In all candor, however, the Opinion was not as detailed as some of the Court's typical memorandum opinions. Perhaps this was because the Court was not irrevocably wedded to its decision in a way that was reflected in its exposition, and the case presents some issue of first impression Whatever the reason, after reviewing Defendants' Motion for Reconsideration and all responses and replies thereto, the Court agrees with Defendants that it erred on one significant point: Read with an appropriate eye toward Kentucky's jurisprudence regarding statutory construction, the taxing

ordinances do not apply to Defendants.

III.

Chapter 121 of the Metro Ordinances imposes a transient room tax totaling 7.5% of "the rent for every occupancy of a suite, room or rooms, charged by all persons, companies, corporations, or other like or similar persons, groups, or organizations, doing business as motor courts, motels, hotels, inns or *like or similar accommodations businesses*." Metro Ord. § 121.01 (A)-(D) and § 121.02(A), (B) (emphasis added). The parties disagree about whether the Defendants are subject to the aforementioned ordinances. Whether they are depends on whether they are properly considered to be "like or similar accommodations businesses" to motor courts, motels, hotels, or inns.

In construing a piece of legislation, the Court must first try to give effect to the intent of the legislature. "To determine legislative intent, a court must refer to the words used in enacting the statute rather than surmising what may have been intended but was not expressed." *Hale v Combs*, 30 S.W.3d 146, 151 (Ky. 2000)(internal citations omitted); *see also* Ky. Rev. Stat 446.080(1)("All statutes of this state shall be liberally construed with a veiw to promote their objects and carry out the intent of the legislature."). Yet, as Kentucky's highest court has noted with respect to the type of statute and ordinance at issue in this case,

> Taxing laws should be plain and precise, for they impose a burden upon the people. That imposition should be explicitly and distinctly revealed. If the Legislature fails so to express its intention and meaning, it is the function of the judiciary to construe the statute strictly and resolve doubts and ambiguities in favor of the taxpayer and against the taxing powers.
>
> We do not overlook the concomitant and equally as firm rule ... that an intention of the Legislature to grant an exemption from taxation will not be presumed or implied, since taxation of all is the rule and

> exemption is the exception. But the rule calls for no strained construction adverse to the apparent intention of the Legislature It requires a normal and reasonable construction.

George v Scent, 346 S.W.2d 784, 789 (Ky. 1961)(emphasis added)(internal citations omitted); *see also Esbeco Distilling Co v Shannon*, 129 S.W.2d 172, 175 (Ky. 1939)(noting the "well-recognized rule that statues imposing license or privilege taxes be strictly construed against the state or taxing power and may not be extended beyond their clear import" and that "[d]oubts as to the construction of such statutes must be resolved in favor of the taxpayer"). Accordingly, this court must attempt to steer the ship of statutory construction between the Scylla of attempting to discern legislative intent and the Charybdis of having any "reasonable and normal" construction of a statute's words drown in the whirlpool of presumed intent.

The sections that comprise Chapter 121 of the Metro Ordinances were promulgated pursuant to the authority granted by Ky Rev. Stat. § 91A 350, *et seq* , which permit local governing bodies to establish tourist and convention commissions "for the purpose of promoting convention and tourist activity," and directs the local governing bodies that have done so to impose transient room taxes to fund the commissions. As stated therein, the intent of Ky. Rev Stat. §91A.390, which establishes the transient room tax at issue here, is "the attraction and promotion of tourist and convention business." Similarly, in Metro Ord. § 121.01, which Louisville promulgated pursuant to the authority granted it by Ky. Rev. Stat § 91A 390, the stated intent, repeated in every subsection is "the promotion of tourist and convention business." As Kentucky's highest court has wisely observed, however, "legislative intent is at best a nebulous will-o'-the-wisp," *Gateway Construction Co. v Wallbaum*, 356 S W.2d 247, 249 (Ky 1962), and while "the promotion of tourist and convention business" is a helpful generality, it

does not exactly definitively clarify whether the intent of the legislatures that enacted the statute and ordinance was to impose the tax on businesses such as the defendants.

The Court must therefore attempt to interpret the precise words of the statute. In so doing, the Court will first attempt to interpret those words in terms of their "plain and commonly accepted meaning." *Barnes v Dep't of Revenue,* 575 S.W 2d 169, 171 (Ky. App. 1978); *see also* Ky. Rev. Stat 446.480(4)("All words and phrases shall be construed according to the common and approved usage of language . .") At issue here generally are the words "doing business as motor courts, motels, hotels, inns or like or similar accommodations businesses," but more specifically the words "like or similar accommodations businesses," since the Defendants clearly are not motor courts, motels, hotels, or inns, as those words are commonly and plainly understood. As the Court noted in its original Opinion & Order, one view of the Defendants' businesses, is that they are engaged in the process of subletting living quarters and accommodations. Viewed in that light, they might reasonably be thought of as accommodations businesses, and the Court will assume, for the sake of argument only, that they are The Court's focus now is on the words that precede "accommodations businesses" in the statute and ordinance – namely the phrase "like or similar"– to which the Court previously did not give sufficient consideration.

Even if one accepts as true that the nature of Defendants' businesses is properly characterized as "subletting living quarters and accommodations," that does not necessarily mean that their businesses are "like or similar" to "motor courts, motels, hotels, or inns." To determine whether they are, the Court must be guided by the rule of statutory interpretation known as *ejusdem generis*. As Kentucky's highest court has noted, when employing the rule as

an aid to statutory construction:

> The rule of *ejusdem generis* (of the same kind) is that where, in a statute, general words follow or precede a designation of particular subjects or classes of persons, the meaning of the general words ordinarily will be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose.

See, e g , Steinfeld v. Jefferson County Fiscal Court, 229 S.W.2d 319, 320 (Ky. 1950)(internal citations omitted). The things specifically enumerated in both Ky. Rev. Stat. 91A.350 and Metro Ord. §§ 121.01 and 121.02 are physical establishments that actually contain the rooms rented by transient visitors and whose occupancy is subject to the tax. That being said,

> the rule of *ejusdem generis* does not necessarily require that the general provision be limited in its scope to the identical things specifically named, nor does it apply when the context manifests a contrary intention. The maxim is only an illustration of the broader rule of *noscitur a sociis* which is that the meaning of a word is known from the accompanying words.

Robinson v Ehrler, 691 S.W 2d 200, 207 (Ky.,1985). Nevertheless, the Court is also guided by the maxim that "no intention must be read into the statute not justified by the language," *Gateway Construction*, 356 S.W.2d at 249, and the ruling in *George*, that it must "construe the statute strictly and resolve doubts and ambiguities in favor of the taxpayer and against the taxing powers," 346 S.W.2d at 789. With those guideposts in mind, the Court cannot find a principled basis for determining (whatever the proper characterization of the precise nature of Defendants' businesses may be) that internet businesses that have neither ownership, nor physical control, of the rooms they offer for rent are "like or similar" to "motor courts, motels, hotels, or inns." *Cf Lexington Relocation Services, LLC v Lexington-Fayette Urban County Gov't*, 2004 WL 1418184 (Ky App. 2004)(The appellate court determined that the intent of the legislature was to

authorize the taxation of businesses that "supply" short-term lodgings suitable for visitors to the area and interpreting the statute to include a company that leased apartments, assumed physical control of them, and then rented them fully-furnished for periods of time generally shorter than the term of the leases.)

In making this determination, the Court recognizes that the intent of the legislature was to promote tourism and convention business through revenue generated by the transient room tax. The Court is also fully aware that businesses' such as Defendants' were truly creatures of the future at the time the statute and ordinance originally were enacted. Such businesses have long since made the leap from a capitalist's imagination to reality, however, and both pieces of legislation have been amended more than once since then The Court will not now step in to do what the state and local legislative bodies – both of whom can be expected to be fully aware of the intent of their legislative forebears – either failed or chose not to do.

IV.

In conclusion, the Court finds that the words of Justice Thomas of the former Court of Appeals of the Commonwealth of Kentucky (now known as the Kentucky Supreme Court) best sum up the philosophy underpinning this Court's reasoning:

> The judiciary is but one of the three component parts of our form of government. Its duty is to interpret and construe laws, not to enact them, and if a plainly warranted construction of a statute should result in a failure to accomplish in the fullest measure that which the Legislature had in view, the remedy is legislative action, and not judicial construction.

Western & Southern Life Ins Co v Weber, 208 S.W. 716, 718 (1919). As noted previously, the Court is of the opinion that this is a circumstance where an ordinance and the statutes permitting its promulgation have simply failed to keep up with the times. The appropriate response to that

is legislation, not litigation. The Court will therefore order this case dismissed

DATE: September 29, 2008

Thomas B. Russell, Judge
United States District Court

cc: counsel of record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION
CASE NO.: 3:06-CV-480-R

LOUISVILLE/JEFFERSON COUNTY METRO GOVERNMENT — PLAINTIFF

and

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — INTERVENING PLAINTIFF

V.

HOTELS COM, LP, et al. — DEFENDANTS

ORDER

For the reasons set forth in the Court's Memorandum Opinion entered concurrently with this Order, Defendants' Motion for Reconsideration (docket no. 88) is **GRANTED** and the Court's Opinion & Order (docket no. 60) is **SUPERSEDED IN ITS ENTIRETY.**

IT IS FURTHER ORDERED that the Defendants' Motions to Dismiss (docket nos. 10 and 141) are **GRANTED**, although not for all of the reasons proffered by Defendants. The Court has determined that Plaintiffs' claims that the Defendants are subject to Louisville Metro Ordinances §§ 121.01 and 121.02 and Lexington-Fayette Urban County Government Code of Ordinances § 2-172 because they are "doing business as motor courts, motels, hotesl, inns or like or similar accommodations businesses" fails as a matter of law. These dispositive claims are therefore **DISMISSED WITH PREJUDICE,** Plaintiff's case is hereby **DISMISSED IN ITS ENTIRETY,** and all other pending motions are hereby **DENIED AS MOOT.**

This is a final and appealable Order and there is no just reason for delay in its entry.

DATE: [illegible]

Thomas B. Russell

cc counsel of record

Thomas B. Russell, Judge
United States District Court