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APPENDIX A

RENDERED: DECEMBER 17, 2020
TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-0058-DG
2019-SC-0209-DG

COMMONWEALTH OF KENTUCKY, EX REL. J. MICHAEL BROWN, SECRETARY OF THE GOVERNOR'S EXECUTIVE CABINET	APPELLANT/CROSS-APPELLEE

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2016-CA-0221
FRANKLIN CIRCUIT COURT NO. 10-CI-00505

STARS INTERACTIVE HOLDINGS (IOM) LTD., F/K/A AMAYA GROUP HOLDINGS (IOM) LTD. AND RATIONAL ENTERTAINMENT ENTERPRISES, LTD.	APPELLEES/CROSS-APPELLANTS

OPINION OF THE COURT BY JUSTICE WRIGHT

<u>REVERSING</u>

This case originated as an action in Franklin Circuit Court brought pursuant to Kentucky's Loss Recovery Act, Kentucky Revised Statutes (KRS) Chapter 372. The trial court granted summary judgment in favor of Appellant/Cross-Appellee and Appellees/Cross-Appellants appealed to the Court of Appeals. The Court of Appeals reversed, holding there was no standing under the Loss Recovery Act in the present case. Appellant/Cross-Appellee petitioned this Court for discretionary review, and we granted the motion. Thereafter, Appellees/Cross-Appellants filed a cross-motion for discretionary review, which we also granted. Because we disagree with the Court of Appeals' construction and interpretation of the Loss Recovery Act, we reverse its holding that "person" is limited to a natural person and that the Commonwealth lacked standing to bring this suit. Since we reverse the Court of Appeals' holding on this issue, we must address the remaining issues in the parties' appeal and cross-appeal.

I. BACKGROUND

In 2010, Appellant/Cross-Appellee, the Commonwealth of Kentucky, through the Secretary of the Justice and Public Safety Cabinet, John Tilley, filed the underlying complaint in Franklin Circuit Court against Pocket Kings, Ltd. and "Unknown Defendants"[1] seeking

[1] Before the trial court, the Commonwealth filed multiple amended complaints. Because the number of defendants named in the complaints is extensive, we find it helpful to identify the few that we will discuss in detail: Oldford is the holding company that owns PokerStars and the group of subsidiaries that perform various roles in the PokerStars business. REEL is wholly owned by Oldford and operates PokerStars. In 2014, Oldford changed its name to Amaya Group Holdings (IOM) and subsequently Amaya Gaming Group Inc.

to recover under Kentucky's Loss Recovery Act.

In bringing suit, the Commonwealth relied on portions of the Loss Recovery Act, including KRS 372.020 and KRS 372.040. KRS 372.020 provides a losing gambler with a first-party cause of action to recover any losses suffered. It reads:

> If any person loses to another at one (1) time, or within twenty-four (24) hours, five dollars ($5) or more, or anything of that value, and pays, transfers or delivers it, the loser or any of his creditors may recover it, or its value, from the winner, or any transferee of the winner, having notice of the consideration, by action brought within five (5) years after the payment, transfer or delivery. Recovery may be had against the winner, although the payment, transfer or delivery was made to the endorsee, assignee, or transferee of the winner. If the conveyance or transfer was of real estate, or the right thereto, in violation of KRS 372.010, the heirs of the loser may recover it back by action brought within two (2) years after his death, unless it has passed to a purchaser in good faith for valuable consideration without notice.

Id. If a losing gambler fails to bring a recovery action under KRS 372.020 within six months, KRS 372.040 permits a third-party cause of action to be brought against the winning gambler by "any other person" and allows for

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acquired it.

the recovery of treble damages. It reads:

> If the loser or his creditor does not, within six (6) months after its payment or delivery to the winner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, any other person may sue the winner, and recover treble the value of the money or thing lost, if suit is brought within five (5) years from the delivery or payment.

Id.

In this case, the Commonwealth of Kentucky filed a civil lawsuit to recover statutory treble damages for money lost by its citizens playing real-money poker on an illegal internet website called PokerStars, which is owned by Appellees (collectively referred to as PokerStars). PokerStars does not participate as a player in the real-money poker games played on its site; instead, a "rake" is charged. A rake is a portion of the amounts wagered during the poker game. PokerStars charged a rake on the poker hands played on its website. Kentuckians lost at least $290,230,077.94 in the five years prior to the filing of this lawsuit (representing but a fraction of the amount of real dollars lost by Kentuckians over the entirety of PokerStars' operating history in Kentucky).

In 2001, the criminal syndicate that ran PokerStars began operation of its internet-based gambling website from Costa Rica and later moved to the Isle of Man, a small island in the middle of the Irish Sea. In 2006, Congress enacted the Unlawful Internet Gambling Enforcement Act, a powerful tool for prosecution of illegal internet gambling. 31 U.S.C. §§ 5361-5367. Section 5361 of the Unlawful Internet Gambling Enforcement Act

provides the purpose of the Act, stating in pertinent part: "(4) New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders."

The Commonwealth of Kentucky began investigating unlawful online gambling and the damage it was doing to the citizens of the Commonwealth in 2007 during the administration of then-Governor Ernie Fletcher. In 2008, during the administration of then-Governor Steve Beshear, the Commonwealth filed an *in rem* action in Franklin Circuit Court targeting the internet domain names owned and registered by operators of offshore internet gambling.

In 2010, the Commonwealth of Kentucky filed the underlying case before the Franklin Circuit Court seeking recovery of gambling losses by Kentucky citizens along with treble damages as allowed by KRS 372.040. In April 2011, the U.S. Department of Justice unsealed indictments against PokerStars, its founder, and others for criminal violations of the Unlawful Internet Gambling Enforcement Act, and PokerStars' deposits of gambling funds in the United States were frozen. PokerStars had survived and even flourished under every enforcement effort until its capital funds were frozen, which finally led to the cessation of its illegal operations in the United States.

During the pendency of this matter before the trial court, PokerStars refused to produce its Kentucky data for five years. The Commonwealth filed a motion for summary judgment based on evidence from their expert

witness, an economist. At that point, PokerStars finally offered to turn over its Kentucky gaming data after the 5-year limitation to sue the other winners had expired. The other winners are the individual players who conspired with PokerStars to violate the gambling laws and from whose winnings PokerStars took their rake or percentage of the winnings. The Franklin Circuit Court entered partial summary judgment against defendants REEL and Oldford on liability and a default judgment against defendants Amaya Group Holdings (IOM) and REEL. The judgments were based on the actual amount that Kentucky players lost on PokerStars' websites. As that court succinctly—and correctly—stated:

> Here, the Defendants reached into Kentucky in willful violation of its laws, and for over four and a half years, invited over 34,000 Kentucky players to place over 246,000,000 bets, at least 10 million of which resulted in losses of five dollars or more. In part due to the profit earned during that four-and-a-half-year period. PokerStars grew to the point that by 2014, it could be sold to Amaya for $4.9 billion dollars. While part of the Defendants' profit came at the expense of Kentucky players' calculable losses incurred while playing the defendants' illegal online games, another part of their profits came at the incalculable expense of the violation of Kentucky's laws. For even when Kentucky players won, the defendants still took a rake. And with the money that the defendants took from Kentucky's players, it was able to invest and

> expand its illicit operations making themselves all the more profitable.

PokerStars appealed and the Court of Appeals reversed the trial court, holding the Commonwealth lacked standing, as it did not qualify as "any other person." The Commonwealth filed a motion for discretionary review which we granted. PokerStars filed a cross-motion, raising other issues not addressed by the Court of Appeals. Specifically, PokerStars now argues: (1) the Court of Appeals should be affirmed, as the Commonwealth is not "any other person" under the Loss Recovery Act; (2) PokerStars could not be sued under the statute, as they were not the "winner" in any of the illegal real-money poker games; (3) the trial court imposed the wrong amount of damages for various reasons; (4) the judgment violates PokerStars' Due Process rights; (5) the Commonwealth's failure to allege specific players, dates, money lost and players violates required pleading under Kentucky Rules of Civil Procedure (CR) 8; and (6) allowing the Commonwealth to sue under the Loss Recovery Act to recover money lost in gambling goes against statutory limitations on the state's forfeiture powers. We granted PokerStars' cross motion, and now reverse the Court of Appeals and reinstate the well-reasoned judgment of the Franklin Circuit Court.

I. ANALYSIS

A. The Commonwealth Qualifies as a 'Person' under Kentucky's Loss Recovery Act.

The Court of Appeals held the Commonwealth of Kentucky did not qualify as a person under Kentucky's Loss Recovery Act. Rather, that court would limit the term to a natural person. However, this interpretation

does not follow our guideposts of statutory interpretation. We have held: "the plain meaning of the statutory language is presumed to be what the Legislature intended, and if the meaning is plain, then the court cannot base its interpretation on any other method or source." *Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815, 819 (Ky. 2005) (internal quotation marks and citation omitted). Further, "we assume that the Legislature meant exactly what it said, and said exactly what it meant." *Id.* (internal quotation marks and citation omitted). Therefore, "we must look first to the plain language of a statute and, if the language is clear, our inquiry ends." *Univ. of Louisville v. Rothstein*, 532 S.W.3d 644, 648 (Ky. 2017). The language here is clear.

The Loss Recovery Act does not define the word "person"; however, our general definitional statutes do. KRS 446.010(33), states "**unless the context requires otherwise** . . . 'person' may extend and be applied to bodies-politic . . . ." (Emphasis added.) While the statute does not *require* the term "person" extend to political bodies in *all* circumstances, the statute gives the parameters-within its plain language-in which a court may exercise its discretion: only *when the context requires otherwise*. The context does not require otherwise in the case at bar.

Nothing in the text of KRS 372.040 mentions or even suggests that the statute is limited to "natural persons." On the contrary, the General Assembly chose to modify the noun "person" with the adjective "any" — "any other person." This Court's predecessor held that the word "any" means "one indiscriminately of whatever kind or class; one, no matter what one" and "is an indefinite pronominal adjective . . . used to designate objects in a

general way without pointing out any one in particular." *Elliott v. Pikeville Nat'l Bank & Trust Co.*, 128 S.W.2d 756, 761 (Ky. 1939) (internal quotation marks and citation omitted). By using the phrase "any other person," the General Assembly plainly expressed that it meant to confer standing on all the kinds and classes of "person[s]" listed in KRS 446.010(33) without exception.

We have long held, "[i]t is an elementary rule of construction that effect must be given, if possible, to every word . . . of a statute." *Hampton v. Commonwealth*, 78 S.W.2d 748, 750 (1934) (citing *United States v. Standard Brewery*, 251 U.S. 210, 40 (1920)). Giving effect to the Legislature's use of the word "any," there is no interpretation of this statute that excludes the Commonwealth from having standing to sue.

The basis for resolving the question of whether the state is a person under the statute is not a determination left to the court's discretion. Courts are required to follow the clear language of the statute. Interpretation of the statute and the tools for such interpretation are only used when the statute is ambiguous. Courts are not free to interpret the statute according to their own preferences or inclinations. KRS 446.010 clearly states that a person may include bodies politic "**unless the context requires otherwise**."

1. Cases in which Statutory Context Compels Courts to find the State is not a Person

At times, the context of a statute clearly requires the word "person" to be interpreted to exclude the state. Some examples of this context include *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989); *Omosegbon v. Wells,* 335 F.3d 668, 673 (7th Cir. 2003); and

Hamilton v. Knight, 1:17-CV-04714-TWP-TAB, 2018 WL 928287, at *4 (S.D. Ind. Feb.16, 2018). Each of these cases holds that the state is not a "person" that can be sued under 42 U.S.C. § 1983. In those instances, the courts were curtailed from interpreting the word "person" to include the subject states, because the states had sovereign immunity; the states' sovereign immunity could only be waived if clearly and specifically stated. Since § 1983 does not clearly and specifically waive states' sovereign immunity, the context in those cases required a determination that the word "state" not be interpreted as "person" for purposes of the statutes. Since the Commonwealth was the plaintiff in the instant action, the context of KRS 372.020 does not require that the state be excluded from the definition of "any person" under the statute.

Further, PokerStars misplaces its support on *Will v. Michigan Department of State Police*, 491 U.S. 58, for the position that "person" does not include the state under KRS 372.040. We must consider the context of that case before jumping to such a broad, sweeping conclusion of law. *Will* involved § 1983 of the Civil Rights Act of 1871, and how it "provides a federal forum to remedy many deprivations of civil liberties"; this put the states' sovereign immunity at issue in the case. *Id.* at 66.

The United States Supreme Court explained "[t]he Eleventh Amendment bars such suits unless the State has waived its immunity, or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity." *Id.* (internal citation omitted). Importantly, it further clarified "**if Congress intends to alter the 'usual constitutional balance between the States and the Federal**

Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'" *Id.* at 65 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)) (emphasis added). Finally, it explained "[w]e cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent." *Id.* at 67.

Much to the contrary, the case at bar does not involve the Commonwealth's sovereign immunity (or even contemplate a case in which the Commonwealth is a defendant). This case involves the Commonwealth bringing a civil suit to remedy a wrong done to its people-and thereby deterring illegal activities. Even if we were to assume the common usage of "person" does not include the Commonwealth, our General Assembly has spoken otherwise in KRS 446.010(33), which allows the Commonwealth to be considered a "person."

PokerStars also relies upon other distinguishable cases in arguing the Commonwealth is not a "person" with standing to sue under the statute. One such case is *Commonwealth v. Illinois Central Railroad Co.*, 153 S.W. 459, 462 (Ky. 1913). In *Illinois Central*, our predecessor Court determined whether a corporation could be charged with murder. The Court held that "[m]anifestly, a corporation cannot be indicted for a form of homicide, the only punishment for which is death or imprisonment; for, being an intangible thing, it cannot be subject to such penalties." The Court went on to observe that lesser forms of the crime might include a corporation if the Legislature were to provide a penalty (at the time, the Legislature had not yet done so). In the century that has passed since that case, the Kentucky Legislature has

established corporate penalties for the lesser crimes of first-degree manslaughter pursuant to KRS 507.030 and second-degree manslaughter pursuant to KRS 507.040. In *Illinois Central*, the context of the statute—the lack of any penalty that could be imposed on the corporation—required a determination that the corporation could not be considered a person under the statute. In the present case before the Court, the Commonwealth is the plaintiff and the statute provides an applicable penalty for the corporation being sued.

Another readily distinguishable case is *Vinson v. Casino Queen, Inc.*, 123 F.3d 655, 657 (7th Cir. 1997). In that case, the Seventh Circuit stated: "Loss Recovery Acts should not be interpreted to yield an unjust or absurd result contrary to its purpose." In *Vinson*, the casino sued by a losing gambler's mother was a legally-established casino under the laws of the state. Loss Recovery Acts were established to permit suits against *illegal* gambling operations. In the case at bar, the suit is against an illegal internet criminal gambling syndicate, which is clearly within the purpose of the statute in deterring illegal gambling.

2. Class of Persons

PokerStars argues we should employ a "class of persons" analysis and hold the Commonwealth of Kentucky is not a part of the "class of persons" authorized to sue under KRS 372.040. In relevant part, KRS 446.070 provides: "[a] person injured by the violation of any statute may recover." This statute has been used by the Commonwealth to create standing when the particular statute under which the suit was initiated did not provide a specific cause of action. *See Commonwealth ex rel. Keck v. Shouse*, 245 S.W.2d 441 (Ky. 1952). *Shouse* involved a

penal statute, so the Commonwealth used KRS 446.070 to have standing and bring the civil suit as a person injured by the penal violation.

The federal cases cited by PokerStars—*United States v. Kentucky National Insurance Co.*, 904 F.2d 708 (6th Cir. 1990) and *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208 (2d Cir. 2003)—are inapplicable to this issue as they are based on a separate statute from the Loss Recovery Act. In *Kentucky National Insurance*, the Sixth Circuit clarified "[the Unfair Claims Settlement Practice Act] does not provide the aggrieved party with a civil remedy and **therefore KRS 446.070 applies** to such a violation." 904 F.2d 708, *1 (6th Cir. 1990) (emphasis added). Then, in *Purdue Pharma L.P.*, that Court stated KRS 446.070 "establishes a general private right of action under state law." 704 F.3d at 215.

Here, since KRS 372.040 provides its *own statutory remedy* for violation of the civil statute, KRS 446.070 is neither necessary nor applicable. Therefore, since "person" is not defined in KRS 372.040, our general definitions for statutes—KRS 446.010—provides guidance for our Court. As previously noted, pursuant to that statute, "person" includes the Commonwealth.

3. Commonwealth has Standing as an Extension of its Power to Prosecute Criminal Cases

Furthermore, the Commonwealth of Kentucky is the entity that enforces the criminal laws of the Commonwealth. In the state's thirteen-year campaign under four different governors to stop illegal international internet gambling sites, the *only* successful effort came from freezing the money used for illegal gambling.

"The power to charge persons with crimes and to

prosecute those charges belongs to the executive department, and by statute, is exercised by the appropriate prosecuting attorney." *Gibson v. Commonwealth*, 291 S.W.3d 686, 689-90 (Ky. 2009). Stated otherwise, the Executive Branch of the Commonwealth of Kentucky has exclusive jurisdiction to enforce the criminal laws of the state. In KRS 372.040, the Legislature expanded the criminal laws against gambling to allow standing for illegal gambling losers to file civil lawsuits against the winners to recover the amount they lost—and then went even further to deter illegal gambling by allowing "any other person" to bring suit if the loser had not done so within six months after sustaining the illegal gambling loss. This expansion of the criminal statutes against illegal gambling has the effect of deputizing any person—in effect, every citizen of the Commonwealth—to help with the enforcement of the criminal illegal gambling statutes by authorizing the filing of civil lawsuits to render the illegal gambling unprofitable. The Commonwealth (having the sole authority to enforce the criminal statutes) would not be excluded from a statute that expanded enforcement against criminal activity by enabling "any person" to file civil lawsuits to deter the crime.

While the loser can only recover the amount he or she lost, "any other person" can recover *treble* damages. The fact that *any other person* may seek triple the recovery of the person who lost the funds displays the statute's intended deterrent effect. It is nonsensical to now interpret the statute in such a way that the Commonwealth—when it expanded the deterrent effect of its criminal laws into the civil realm with this statute—could not be a proper party to bring a civil lawsuit.

The Court of Appeals assigned greater importance on recovery by the losing gambler's family than the Commonwealth's recovery of loses and deterrence of illegal gambling. This purpose, while noble, is not within the plain language of the statute. Had the Legislature wished to narrow the class of persons who could recover treble the gambling losses or place the losing gambler's family in a separate class, it certainly could have done so. However, it did not; instead, it used the expansive language "any other person." We disagree with the Court of Appeals' conclusion that the context of the statute requires a ruling that the state lacks standing to render an illegal international internet criminal gambling syndicate unprofitable by seeking treble damages for losses sustained by Kentucky gamblers.

The Court of Appeals' opinion states that deterrence is one purpose of the Loss Recovery Act but allowing the Commonwealth to sue PokerStars "would completely contravene the other purpose of the Loss Recovery Act—to allow those 'losers' to recover their losses and avoid becoming destitute as a result of a gambling problem." This assumes that the controlling purpose of the Loss Recovery Act is to prevent losers from becoming destitute. Under this theory, the state would be prevented from protecting the other citizens of the Commonwealth in order to prevent losers—who voluntarily participated in illegal gambling—from becoming destitute. Deterrence would be the logical and stronger purpose of the statute. This is reinforced by the language in the statute stating that after six months "any other person" may bring suit and recover treble damages. Any person other than the loser may recover treble damages, which encourages other persons to sue and take the profit out of

illegal gambling. The statute gives a six-month grace period for losers to sue. It would be wrong of this court to expand the loser's preference in a suit beyond what the Legislature provided. Whatever purpose the statute has, our interpretation must be guided by the plain language that says the suit may be brought by "any other person." Person includes the state unless the context of the statute requires otherwise. The context of the statute requires a determination that the Commonwealth of Kentucky has standing to bring this lawsuit.

4. The Commonwealth can Sue under Civil Laws to Protect its Citizens

The Court of Appeals' opinion in this case states that "[w]e cannot accept that the Commonwealth must be incentivized with the promise of treble damages before it can be expected to bring suit to enforce its own laws." This statement seems to attribute a motive of profit in the Commonwealth's actions. Any ignoble assumption as to motive is obviously false, as it ignores several key facts, such as: the Commonwealth has a right to protect its citizens; a penalty that takes the profit from illegal gambling operations is an effective tool to protect Kentuckians; the Commonwealth started studying this problem in 2007; the state's first lawsuit was filed in 2008 to prevent illegal internet gambling by suing to prevent the use of the domain names of the internet illegal gambling websites; the website is run from the Isle of Man, and the founder of the site has been a fugitive from a federal warrant for nearly a decade. If the federal government is unable to capture and bring the founder before the federal justice system, then it is obviously beyond the ability of the Commonwealth of Kentucky to bring the illegal gambling criminal syndicate and its

founder before the courts of the Commonwealth of Kentucky to answer criminal charges. KRS Chapter 372 is the best (and perhaps the only effective) tool for dealing with this insidious problem.

As our predecessor Court stated in a case involving a civil action brought by the Commonwealth against a gambling house, "[t]o say that a court of equity may not enjoin a nuisance of this sort, when the criminal laws have proven inadequate, is to say that the commonwealth is unable to protect its citizens." *Goose v. Com. ex rel. Dummit*, 205 S.W.2d 326, 329 (Ky. 1947) (internal quotation marks and citation omitted). Just as we refused to disallow the Commonwealth to protect its citizenry almost three-quarters of a century ago, we decline to do so today. The existence of a criminal statute does not prevent the Commonwealth from suing civilly.

Some criminal entities are so strong, organized, and insidious that they are almost impossible to deal with using traditional police tools and methods. Criminal syndicates operating internet websites from distant countries are an extremely difficult problem. These overwhelming problems have led to the state and federal government adopting new approaches in their statutes. The federal government passed Title IX of the Organized Crime Control Act of 1970, better known as the Racketeer Influenced and Corrupt Organization Act (RICO). The Supreme Court of the United States has recognized: "[i]t is the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Russello v. United States*, 464 U.S. 16, 27 (1983) (citation and internal quotation marks omitted). In 2006, Congress

enacted the Unlawful Internet Gambling Enforcement Act, a powerful tool for prosecution of illegal internet gambling. 31 U.S.C. §§ 5361-5367.

The Commonwealth of Kentucky passed KRS 506.120, entitled "[e]ngaging in organized crime," in 1978. Subsection (4) of that statute provides that:

> [a]s used in this section, 'criminal gang syndicate' means three (3) or more persons acting as a part of or members of a criminal gang in collaborating to promote or engage in any of the following on the continuing basis: . . . (d) any gambling offense as defined in KRS 411.090, KRS chapter 528, or section 226 of the Constitution . . . .

Under this statute, the corporate defendant's fine may be up to double the defendant's gain. KRS 500.090(2) provides that "[m]oney which has been obtained or conferred in violation of any section of this code shall, on conviction, be forfeited for use of the state[;]" Kentuckians lost at least $290,230,077.94 that would be forfeited to the State under the statutes. If that amount is added to a potential fine of double the defendant's gain it would total $870,690,233.82—the exact amount that the court awarded in the final judgment in this case. This makes it clear that the judgment in this case is an appropriate amount to deter illegal gambling by a criminal syndicate rather than some incentive for the Commonwealth "to enforce its own laws."

5. PokerStars' Illegal Online Gambling Harms the Commonwealth

The Court of Appeals' contention that the Legislature intended victims' families—to the exclusion of the

Commonwealth—to recover these treble damages is ill-conceived. The loser has exclusive rights to sue within six months of payment of his losses from the winner or his transferee under the provisions of KRS 372.020. "Any person entitled to recovery under KRS 372.020 may have discovery and relief in equity; but when such relief is obtained, the winner shall be discharged from all penalty and forfeiture for having won the money . . . ." KRS 372.030. Under the provisions of KRS 372.040, "any other person may sue the winner" if the loser or his creditor does not within six months after payment or delivery to the winner.

If the loser or his creditor sues, then the Commonwealth's right to proceed against the winner or his transferee is extinguished. PokerStars failed to assert the defense that anyone had ever successfully sued to recover any money lost on their website in any wager. In the statute, the Legislature clearly provided for action against the winner by providing that only the loser could file a lawsuit against the winner for the first six months. Any restrictions on who could file after six months is in clear contradiction with the plain language of the statute.

According to the Court of Appeals' logic, the statutory language allows a stranger to the illegal gambling transaction to recover so long as he or she is a "natural person." There is no requirement the triple recovery benefit *anyone* who was harmed by the gambling loss. As noted, the Legislature could have easily limited recovery to the family of the gambler; however, it did not. As it is, the Court of Appeals' decision would restrict a person (the Commonwealth) who *has* suffered tangible harm due to the gambling losses of its citizens from recovering under the statute.

In *Purdue Pharma*, 704 F.3d 208, the federal court recognized the state could sue to recover for damages done to its citizens. This trend is followed by many states in attempting to deal with the drug epidemic. The Commonwealth of Kentucky also received money as compensation from a federal lawsuit against the tobacco companies for damages done to its citizens. As this Court has explained:

> To resolve threatened litigation, forty-six states, six other jurisdictions and several tobacco companies entered into a Master Settlement Agreement, (MSA). An element of the agreement provided that the Commonwealth of Kentucky would receive $3.45 billion over a period of twenty-five years. By the terms of the agreement, the Commonwealth of Kentucky was required to file suit naming Phillip Morris, Inc., Brown & Williamson Tobacco Corp. (individually and as successor by merger to The American Tobacco Company), Lorillard Tobacco Company, R.J. Reynolds Tobacco Co., Liggett Group, Inc., and United States Tobacco Company, (Tobacco Companies), as defendants. The lawsuit was filed in the Franklin Circuit Court and was dismissed by agreement with prejudice three days later. The Circuit Court entered a Consent Decree and Final Judgment approving the M.S.A. and retaining jurisdiction over the case to ensure compliance.

Arnold v. Commonwealth ex rel. Chandler, 62 S.W.3d 366,

367-68 (Ky. 2001).

Even assuming the General Assembly's intent was to limit recovery to victims, there is no doubt the Commonwealth of Kentucky is harmed by illegal internet gambling. The Commonwealth *is* the people—and Kentuckians and their families are harmed by the impact of illegal gambling, not to mention the government funds that have been expended to address the societal and fiscal harm caused by PokerStars.

A report on a 2008 telephone survey conducted by the University of Kentucky Survey Research Center indicated there were 9,000 addicted gamblers, 51,000 problem gamblers, and 190,000 who were at risk of developing a gambling addiction in Kentucky. In fact, the "social cost to Kentucky from gambling addiction" is a minimum of $81,000,000 per year. Annual Report, Kentucky Council for Problem Gambling, Out of the Shadows, Problem Gambling: From Hidden Addiction to Public Awareness (Dec. 14, 2020), https://www.kycpg.org/wp-content/uploads/2017/05/20th-Annual-Report-1.pdf. This estimate is based on the minimum estimated social harm by the 9,000 addicted gamblers without consideration of any increase caused by the ease of availability of gambling on PokerStars internet website or the 51,000 problem gamblers and 190,000 at risk of developing gambling addiction. The gamblers who developed an addiction while using the PokerStars website are likely to be an ongoing cost of the state for years after PokerStars ceases operations in Kentucky.

In 1996, the United States Senate Committee on Governmental Affairs held a hearing based on the findings of the Gambling Impact Study Commission. The Senate particularly considered the impact of gambling on

teenagers and young adults. "[G]ambling is the fastest growing teenage addiction, with the rate of pathological gambling among high school and college-age youth about twice that of adults." *Id.* According to Howard J. Shaffer, director of the Harvard Medical School Center for Addiction Studies, "there are more children experiencing adverse symptoms from gambling than from drugs . . . and the problem is growing." *Id.*

The laws in Atlantic City restrict casino gambling to people twenty-one years of age or older. In spite of these laws, a survey of teenagers at Atlantic City High School revealed that 64% had gambled in a local casino. Even more shocking, 40% had done so before the age of fourteen. *Id.* Atlantic City casino security personnel report ejecting about 20,000 minors every year. *Id.* When you add the attractiveness of quick, easy-access internet gambling to the fact that the victims of problem gambling or gambling addiction are younger and younger, you end up with a recipe for disaster in the Commonwealth.

Problem gamblers and gambling addicts, desperate to pay off mounting gambling debt, often turn to the commission of felonious financial crimes such as "embezzlement, check kiting, tax evasion, and credit card, loan, and insurance fraud." *Id.* The cost to the Commonwealth just to incarcerate the perpetrators would be astronomical. A Florida study conducted to evaluate the impact of legalizing casinos found, "[n]ot counting the cost of prosecution, restitution, or other related costs, incarceration and supervision costs alone for problem gambler criminal incidents could cost Florida residents $6,080,000,000." *Id.*

Often, the state must use its limited resources to help individuals and their families who have lost funds to illegal

gambling through social welfare programs. From the bankruptcy or death by suicide of its citizens to otherwise law-abiding citizens turning to crime to keep up their gambling addictions, the Commonwealth has certainly faced real and tangible harm from PokerStars' *years* of illegal internet gambling in the state.

The statute allows *any* person apart from the loser to sue to recover three times the amount lost to illegal gambling. How, then, could the Commonwealth of Kentucky be excluded from suing to protect both its citizenry and its public purse? Indeed, it is difficult—if not outright impossible—to imagine any loser on the PokerStars internet site who would have the money, resources, and time to sue PokerStars, particularly when it is located on the Isle of Man and its founder has been a fugitive from justice under indictment from the United States for nearly a decade.

B. PokerStars was a "Winner" in the Poker Games.

As is apparent from the plain language of the statute, and as our predecessor Court has held, "[u]nder the terms of the statute, in order for appellant to recover . . . it was incumbent upon him to show that Goodman was the 'winner' of the money lost by him . . . ." *Tyler v. Goodman*, 240 S.W.2d 582, 584 (Ky. 1951). As the Seventh Circuit Court of Appeals has acknowledged: "They say the house always wins." *United States v. Hill*, 818 F.3d 289, 291 (7th Cir. 2016). This is a widely recognized fact-casinos and online poker sites like PokerStars would not exist if they were not "winners." While PokerStars admits it took a percentage from the wagers in each of the poker games, it disputes that taking a rake makes it a "winner" under KRS 372.040. However, our predecessor Court ruled

otherwise long ago—and the reasoning is as apt today as it was one hundred thirty years ago:

> It is not satisfactorily proven that either of the appellees ever won any money from the appellant by playing with him, but it does satisfactorily appear from the evidence that the appellees, as partners, owned and run the poker-room on the corner of Sixth and Market streets, at which the appellant played poker with divers[e] gentlemen assembled there for that purpose; and at each game a certain per cent. of the winning was taken by the appellees, out of which was defrayed the expenses of the players for suppers, cigars, etc., and the balance of the per cent., sometimes amounting to as much as $50 a night, went to the appellees, as partners, as profits. This per cent., or "take out," as it is called, is a part of the loser's losses. So the question is, does the taking of this per cent. make the appellees jointly interested in the winnings as wrong-doers, so as to make them winners of the appellant's money in the sense of the statutes, supra? We do not understand that the winner, in the sense of said statutes, must be one of the players with cards in his hands; but if he is to receive a per cent. of the winnings by the actual player, he is, in the sense of the statute, a winner. According to an arrangement with the players and himself, he is to receive a part of the winnings as his profits. Why should

he not be regarded as a winner in the sense of the statute? He certainly has a community of interest in the stakes with whoever wins; and this interest is the result of an arrangement with all the players, and this arrangement and division makes him a joint wrong-doer with the winner, it makes no difference which one it may be. If by an arrangement the winning was divided between the actual player and another, there is no doubt that the latter would be responsible as a joint wrong-doer for the whole sum won as a winner. Here the arrangement does not make him a partner with any particular player as against the others; but it does make him jointly interested with the winner, in the stakes. It is true that he may be indifferent as to which will be the winner; but as soon as one or the other has won, the arrangement gives him a joint interest in the winnings with the actual player, which makes him, in the sense of the statute, a winner. It is not to be understood that the actual winner cannot recover from him said per cent. of his own stakes; but this is so because the statute gives the remedy against him in the sense that he is a winner, even from the successful player; but nevertheless he is jointly interested with the winner in the loser's losses, which makes him responsible for them as a wrong-doer. It is not the extent, but the community, of interest that makes wrong-doers responsible for the whole wrong. If each is

> to receive a certain amount of the result of the unlawful enterprise, this gives them such a community of interest as to render each responsible for the whole amount received.

Triplett v. Seelbach, 14 S.W. 948, 949 (Ky. App. 1890).

Seven years later, our predecessor Court faced the same issue in *White v. Wilson's Adm'rs*, 38 S.W. 495, 496-97 (Ky. 1897). There, we held: "[i]n our judgment, appellant was a joint wrongdoer with the winners . . . , in that he had an interest in the winnings, no matter how small. . . . [I]f Wilson had paid his losses at the time they were incurred to the various winners, he might have recovered them from White." *Id.*

The statute the Court interpreted in *Triplett* and *White* is identical to that in the present case. In *Triplett*, the partners took a percentage of the winnings—just as PokerStars does. In *White*, it was a manager who acted in concert with a gambler. Just as in *Triplett* and *White*, the persons who took the percentage were sued rather than the poker players in the game. The only discrepancy between the cases is that, in the case at bar, the Commonwealth is the "person" suing to recover the amounts lost. Since we have already determined the Commonwealth is a "person" pursuant to the statute, this is a distinction without a difference.

PokerStars fails to cite any contradictory precedent on this issue from this Court or its predecessor. Instead, it cites to a federal district court in New Jersey which held in an unpublished case, "[i]n Kentucky, only the "winner" of money from a gambling loser is liable under the statute." *Humphrey v. Viacom, Inc.*, 06 2768 DMC, 2007

WL 1797648, at *10 (D.N.J. June 20, 2007) (citing *Tyler v. Goodman,* 240 S.W.2d 582, 584 (Ky. 1951)). However, in spite of this citation, our predecessor Court did not depart from its precedent in *Tyler*. Rather, in that case, the Court made it clear that only "winners" may be sued under the statute but did not change the definition of winner Kentucky's courts has followed for over 100 years—the house taking a rake or percentage of the pot is a winner. There was simply no proof the individual sued (Goodman) was a winner. As the Court stated:

> There was no attempt to show that Goodman paid the rent on the premises used as the handbook, or that he owned any of the gambling paraphernalia, or exercised any control or supervision over the gambling operations. There is no testimony that he was ever in the gambling quarters, or that he accepted any of appellant's bets, or received any of the money lost by appellant.

Id. at 583.

Further relying on our precedent that a party who takes any part of a rake is a winner, we continued with our analysis in *Tyler,* concluding, "in the absence of proof that he received, **either directly or indirectly, some part of the money lost by appellant**, the court was not authorized to enter a judgment against him." *Id.* at 584 (emphasis added). Whatever point the New Jersey federal district court was making by its reliance on *Tyler*, the case did not change the definition of winner followed by Kentucky courts for over one hundred years. Based on PokerStars' conspiracy with the winning players to violate the laws of the Commonwealth of Kentucky, PokerStars

is a winner under the Loss Recovery Act. We do not abandon precedent merely on the basis of its age and see no valid reason to reverse these cases today. PokerStars took a portion of the money lost by Kentuckians in the illegal online real-money poker games. Therefore, they were a "winner" under KRS 372.040.

Our Court has interpreted winners to include individuals who take any portion of the amount lost since at least 1890. PokerStars is charged with knowledge of the law. Both the plain language of our statutes and the precedent from our predecessor Court gave PokerStars notice of the state of the law in the Commonwealth.

> "There is a maxim as old as the law itself, ignorantia legis neminem excusat, 'ignorance of the law excuses no one', 42 C.J.S. page 380. This is a rule of necessity, otherwise ignorance of the law would furnish immunity from punishment for violations of the Criminal Code and immunity from liability for violations of personal and property rights.

Freeman v. Louisville & Jefferson County Planning & Zoning Com'n, 214 S.W.2d 582, 583 (Ky. 1948).

C. Amount and Calculation of Damages

PokerStars makes several claims regarding the amount and calculation of damages awarded, including that the award violates the excessive fines and due process clauses of the United States and Kentucky Constitutions and that the measure of damages violates Kentucky precedent. We disagree. First, as PokerStars points out, civil penalties are treated as fines for constitutional inquiries. *United States v. Bajakajian*, 524 U.S. 321, 334

(1998). Fines do not violate the excessive fines clause of the Eighth Amendment of the United States Constitution or Section Seventeen of the Kentucky Constitution unless they are disproportionate. *Id.* Here, the award was proportionate to the amount of money lost by Kentucky gamblers in five years on the PokerStars site. In fact, it is *exactly* that amount, times three, as calculated based on PokerStars' records. This "fine" is not excessive and is the very definition of mathematically proportionate.

PokerStars also argues its right to due process was violated, as the Kentucky law was not clear and presented an "open question." However, PokerStars' argument is belied by the fact that the statutes are clear that PokerStars actions were illegal, the violated the laws of the Commonwealth of Kentucky, and for over one hundred years the courts had defined taking a rake or percentage of winnings as being a winner under the Loss Recovery Act. PokerStars ignored a 2008 order from the Franklin Circuit Court ordering it to cease and desist internet gambling operations as to Kentucky-based players. Instead of obeying that court order, PokerStars continued its criminal enterprise to the detriment of Kentuckians until its assets were frozen by the federal government. Furthermore, it is clear both the past and current owners of PokerStars had full knowledge of a potential substantial recovery in Kentucky since the purchase contract included an indemnification clause *specifically* referencing the Kentucky litigation. The fact that PokerStars did not believe Kentuckians actually *would* recover the funds to which they were statutorily entitled does not amount to a due process violation.

PokerStars also argues the manner in which the trial court calculated damages in this case was contrary to

precedent. We disagree. Kentucky has *never* calculated an operator's "fine" in terms of its rake, as PokerStars now insists we must. The plain language of the statute states "any other person may sue the winner, and recover treble the value of the money or thing lost." That is precisely the amount of damages, based on PokerStars' own records, the trial court awarded.

PokerStars argues that if this Court will not base any award on the amount of the rake, we should base it on the amount the individual players' losses offset by their wins. While we would offset the parties' losses if they were both players, that is not the case herein. *See Elias v. Gill*, 18 S.W. 454 (Ky. 1892). Here, as noted above, PokerStars was a winner who took a percentage of the wagers in any given game. As such, it is liable for the entire amount lost. PokerStars argues this amounts to joint and several liability, which Kentucky has abandoned in favor of comparative fault. While we agree that is the case in *tort* claims, this is no such claim; and, as our precedent makes clear, the award is not based on the amount of the "winnings" claimed. It is based on the fact that PokerStars acted in concert with the winning player. PokerStars could have filed a claim against the winning players for the losses it incurred as a result of this suit; however, the statute of limitations has passed for any such action. PokerStars refused to comply with discovery of the identity of the players for five years, which prevented the Commonwealth of Kentucky from suing the individual players until the five-year period for filing a lawsuit had passed. PokerStars' choices required that it pay the full amount under the Loss Recovery Act because it chose to form an illegal internet criminal gambling syndicate, violated court orders to stop, and hid the identity of the co-

conspirators until they could no longer be sued under the Loss Recovery Act.

PokerStars argues it is improper for the Commonwealth to file one suit in which all the losses are aggregated without pleading specific facts about particular losses. However, there is no prohibition against this in either the statute or our caselaw. The amount of recovery was based on PokerStars' records regarding individual players' losses within a twenty-four-hour period, which is exactly what is envisioned by the statute.

We recently addressed Kentucky's pleading standard at length in *Russell v. Johnson & Johnson, Inc.*, 2019-SC-0118-DG, 2020 WL 6390218, at *4-5 (Ky. Oct. 29, 2020):

> "Kentucky is a notice pleading jurisdiction, where the 'central purpose of pleadings remains notice of claims and defenses.'" *Pete v. Anderson*, 413 S.W.3d 291, 301 (Ky. 2013) (citing *Hoke v. Cullinan*, 914 S.W.2d 335, 339 (Ky. 1995)). In accordance with Kentucky Civil Rule 8.01(1), "[a] pleading which sets forth a claim for relief . . . shall contain (a) a short and plain statement of the claim showing that the pleader is entitled to relief and (b) a demand for judgment for the relief to which he deems himself entitled." As interpreted by this Court, "[i]t is not necessary to state a claim with technical precision under this rule, as long as a complaint gives a defendant fair notice and identifies the claim." *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 844 (Ky. 2005) (citing *Cincinnati, Newport, &*

> *Covington Transp. Co. v. Fischer*, 357 S.W.2d 870, 872 (Ky. 1962)).
>
> Importantly, "[w]e no longer approach pleadings searching for a flaw, a technicality upon which to strike down a claim or defense, as was formerly the case at common law." *Smith v. Isaacs*, 777 S.W.2d 912, 915 (Ky. 1989). When reviewing a complaint to determine whether it states a cause of action, it "should be liberally construed." *Morgan v. O'Neil*, 652 S.W.2d 83, 85 (Ky. 1983). Our liberal pleading standard was recently demonstrated when we held that a complaint "couched in general and conclusory terms, complied with CR 8.01(1)." *KentuckyOne Health, Inc. v. Reid*, 522 S.W.3d 193, 197 (Ky. 2017).
>
> Applying Kentucky's well-established notice pleading principles, we hold Appellant's complaint alleged a sufficient cause of action to survive a motion for judgment on the pleadings. We refuse to mandate a heightened pleading standard and, therefore, reiterate Kentucky's requirement of bare-bones, notice pleading.

Kentucky Civil Rule (CR) 8.01(1) allows just the sort of pleadings the Commonwealth filed below. Any information the Commonwealth lacked was due to PokerStars' withholding of information regarding the players and their wins and losses. The Commonwealth met our bare-bones notice pleading standards.

Finally, PokerStars argues:

> Adopting the Secretary's view would raise significant constitutional and procedural fairness concerns, particularly in light of the U.S. Supreme Court's recent recognition that government use of fines and forfeitures as "a source of revenue" creates a temptation to impose them "in a measure out of accord with the penal goals of retribution and deterrence." *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019).

We are mindful that *Timbs* reiterates the Supreme Court of the United States' stance that the Excessive Fines Clause is applicable to the states. However, as the fine was not disproportionate, there was no violation. Many of our statutes call for treble damages. This is not a disproportionate award.

The Commonwealth's recovery in this case is certainly not a windfall, as the Court of Appeals seems to assume; rather, it is a recoupment of some portion of the countless dollars the criminal syndicate has cost Kentucky collectively and Kentuckians individually. The Commonwealth of Kentucky suffered financial losses along with the tragic damage to its citizens. Mental and physical healthcare systems that care for the citizens harmed by the illegal gambling are supported in part by the state. Money sent to offshore gambling accounts is lost and the state deprived of the taxes to which it is entitled. The cost to prosecute and incarcerate individuals who resort to crime to support their gambling is a huge cost on Kentucky's strained and overextended penal system. The Commonwealth of Kentucky has losses due to PokerStars' illegal internet gambling criminal syndicate. The amount recovered in this case may not

cover the actual cost suffered by the Commonwealth of Kentucky.

III. CONCLUSION

For the foregoing reasons, we reverse the Court of Appeals and reinstate the judgment of the trial court.

All sitting. Keller, Lambert, and Nickell, JJ., concur. VanMeter, J., dissents by separate opinion, in which Minton, C.J., and Hughes, J., join.

VANMETER, J., DISSENTING: I respectfully dissent. The majority opinion sets forth compelling policy reasons why we should reverse the Court of Appeals and reinstate the Franklin Circuit Court judgment. While I might agree with many of those policy reasons, the remedy sought must be authorized in the statutes enacted by our legislature. In *Tyler v. Goodman*, 240 S.W.2d 582, 584 (Ky. 1951), our predecessor court noted that "appellant's right to recovery depends solely on [statutory authority]. At common law money lost at gaming could not be recovered." (citing *Craig v. Curd*, 309 Ky. 549, 218 S.W.2d 395 (1949)).

This case involves an issue of statutory construction: whether the Commonwealth of Kentucky qualifies as a "person" under KRS 372.010 to 372.050,[2] specifically KRS

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[2] These statutes have been referred to as Kentucky's Loss Recovery Act. This designation is perhaps misleading in view of their historic origins. Statutes prohibiting gambling, or gaming, came to Kentucky via its Virginia parentage. *See* 1 Morehead & Brown, Digest of the Statute Laws of Kentucky (1834) 749 (An Act to suppress excessive Gaming. Henning Stats. at Large, vol. X, p. 205). The ability of the loser, or any other person, to sue to recover the losses was statutorily authorized at least as early as 1798. 2 Littrell,

372.040, to have standing to bring a third-party claim against online gambling companies.

The portions of the Act upon which the Commonwealth relied in bringing suit include KRS 372.020, which provides a losing gambler with a first-party cause of action to recover any losses suffered. It states:

> If any person loses to another at one (1) time, or within twenty-four (24) hours, five dollars ($5) or more, or anything of that value, and pays, transfers or delivers it, the loser or any of his creditors may recover it, or its value, from the winner, or any transferee of the winner, having notice of the consideration, by action brought within five (5) years after the payment, transfer or delivery. Recovery may be had against the winner, although the payment, transfer or delivery was made to the endorsee, assignee, or transferee of the winner. If the conveyance or transfer was of real estate, or the right thereto, in violation of KRS 372.010, the heirs of the loser may recover it back by action brought within two (2) years after his death, unless it has passed to a purchaser in good faith for valuable consideration without notice.

KRS 372.020.

If a losing gambler fails to bring a recovery action

Statute Law of Kentucky 103 (1810). The statutes now comprising KRS 372.010 to 372.050 are almost verbatim reenactments of provisions contained within the legislature first codification of the Commonwealth's statutes. Rev. Stat. ch. 42 §§ 1-5 (Ky. 1852).

under KRS 372.020 within six months, KRS 372.040 permits a third-party cause of action for "any other person" and allows for the recovery of treble damages. It states:

> If the loser or his creditor does not, within six (6) months after its payment or delivery to the winner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, **any other person** may sue the winner, and recover treble the value of the money or thing lost, if suit is brought within five (5) years from the delivery or payment.

KRS 372.040 (emphasis added).

KRS 372.020 is virtually identical to the version enacted by the legislature in 1852. *See* Rev. Stat. ch. 42, § 2 (Ky. 1852). KRS 372.040 has a similar provenance in Rev. Stat. ch. 42 § 4 (Ky. 1852), with one notable exception. The 1852 version provided:

> If such loser or his creditor do not sue for the money or thing lost, within six months after its payment or delivery, and prosecute the suit to recovery with due diligence, any other person may sue the winner and recover treble the amount or value of the money or thing lost, if suit be so brought within five years from the delivery or payment.
>
> **One-half of what is so recovered shall be for the person suing, and the other half for the commonwealth**. The loser, creditor or other person first suing,

> after the six months, to have the preference, if the suit be prosecuted to recovery with due diligence.

In 1873, the legislature amended the gaming statutes to delete from this section the recovery benefit to the Commonwealth. Gen. Stat. ch. 47, Art. I, § 4. That same year, it amended the gambling forfeiture statute to mandate that all seized property be retained by the Commonwealth, as opposed to the prior version that allowed a private seizor to retain half of the seized property. *Compare* Rev. Stat. ch. 42 § 6 (Ky. 1852) *with* Act of 1873, Gen. Stat. Ch. 47, Art. 1, § 6 (Bullitt & Feland 1877). The legislative intent for both amendments would seem to clarify the available recovery: it saw fit to provide exclusively to the Commonwealth the certain recovery of money or tangible items seized under the forfeiture provision, while providing the less certain recovery, following a lawsuit, to private persons. Had the legislature intended to confer on the Commonwealth standing to sue or collect under the recovery section, it could have easily done so.[3]

This interpretation is supported by *Perrit v. Crouch*,

[3] Just as the gambling recovery statutes have continued to the present, so have the property seizure statutes. KRS 500.090(2) provides that "[m]oney which has been obtained or conferred in violation of any section of this code shall, upon conviction, be forfeited for use of the state[;]" KRS 528.020 and KRS 528.030 make it illegal to knowingly advance or promote illegal gambling; and KRS 528.100 provides that gambling devices or records used in illegal gambling be forfeited to the Commonwealth. *See also Gilley v. Commonwealth*, 312 Ky. 584, 587, 229 S.W.2d 60, 63 (1950) ("Money may be subject to seizure along with gambling devices, when the circumstances make it clearly apparent the money formed an integral part of the illegal gambling operation[]").

68 Ky. 199 (1868). In *Perrit*, a father and the Commonwealth brought a joint action under Rev. Stat. ch. 42, § 4 [KRS 372.040] to recover the son's gambling loses. This was before the 1873 amendment, so that the Commonwealth was entitled to one-half of any recovery. Apparently, the defendant challenged the joint petition, as to which the court held: "[t]here is no misjoinder in the petition. The relator and the Commonwealth being equally entitled to the recovery, the joinder of both as co-plaintiffs was proper[.]" 68 Ky. at 205. In other words, after the legislature amend the statute in 1873, the Commonwealth, no longer being entitled to any recovery, was no longer a proper plaintiff.

KRS 446.010 provides definitions for statutes generally, to assist in construing statutes where the words are not otherwise defined. It states in relevant part, "[a]s used in the statute laws of this state, unless the context requires otherwise: . . . (33) "Person" **may** extend and be applied to bodies-politic and corporate, societies, communities, the public generally, individuals, partnerships, joint stock companies, and limited liability companies[.]" (emphasis added). "May" is clearly permissive. KRS 446.010(26); *Hardin Cty. Fiscal Court v. Hardin Cty. Bd. of Health*, 899 S.W.2d 859, 861 (Ky. App. 1995) (holding that "[i]t is elementary that 'may' is permissive"). While the majority opinion states that the legislature "plainly expressed that it meant to confer standing on all the kinds and classes of 'person[s] listed in KRS 446.010(33) without exception[,]" our case law has not recognized that broad interpretation. In *Moore v. Settle*, 82 Ky. 187 (1884), a wife sued under Gen. Stat. ch. 47, art. 1, § 4 [KRS 372.040] to collect her husband's gambling losses. Clearly, she was a person to whom the

statute should provide a remedy. However, and notwithstanding the broad language of "any other person," the court held a married woman had no right to sue in her own name.[4]

"The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect." *Cabinet for Human Res., Interim Office of Health Planning & Certification v. Jewish Hosp. Healthcare Servs., Inc.,* 932 S.W.2d 388, 390 (Ky. App. 1996). Additionally, when the language of a statute is clear and unambiguous on its face, we are not free to construe it otherwise even though such construction might be more in keeping with the statute's apparent purpose. *Whittaker v. McClure,* 891 S.W.2d 80, 83 (Ky. 1995). "We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes." *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011). And "[w]e presume that the legislature intends to make a change in existing law by enacting an amendment." *Smith v. Teachers' Ret. Sys*., 515 S.W.3d 672, 678 (Ky. App. 2017).

The majority opinion largely ignores the historical context and case law interpreting KRS 372.010 to 372.050, which, save for the important 1873 amendment, are virtually unchanged since the 1852 statutory codification.

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[4] Admittedly this decision was rendered when women's property rights were restricted, but it still demonstrates the broad interpretation advocated by the majority opinion is erroneous. This holding, furthermore, occurred despite the virtually identical statutory definition of "person" as contained in KRS 446.010(33), that permissibly "may extend and be applied to bodies-politic and corporate, societies, communities, and the public generally, as well as individuals." Gen. Stat. ch. 21, § 12 (Ky. 1879).

The historical context of the loss recovery section, KRS 372.040, demonstrates that the legislature had originally established an illegal gambling prevention regimen to spread benefit between private individuals and the Commonwealth. The legislature, in the 1870s, changed that regimen, and that structure has continued to the present in KRS 372.010 to 372.050. Since the legislature deleted the recovery in favor of the Commonwealth, we are not at liberty to reinsert it under the guise of statutory construction now. I therefore conclude that within the context of these statutes, the word "person" only refers to natural persons and does not include the Commonwealth as a body-politic.[5]

I would affirm the Court of Appeals decision.

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[5] This interpretation is further supported by the fact that no one, not the majority, the trial court, or the Commonwealth, has cited, and we have not found, any case from 1873 until this case was filed in 2010 in which the Commonwealth filed an action under KRS 372.040 seeking recovery.

APPENDIX B

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000221-MR

STARS INTERACTIVE
HOLDINGS (IOM) LTD.,
F/K/A AMAYA GROUP
HOLDINGS (IOM) LTD.;
AND RATIONAL
ENTERTAINMENT
ENTERPRISES LTD. APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT
HONORABLE THOMAS D. WINGATE,
JUDGE
ACTION NO. 10-CI-00505

COMMONWEALTH OF
KENTUCKY EX REL.
JOHN TILLEY,
SECRETARY, JUSTICE
AND PUBLIC SAFETY
CABINET APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, JOHNSON,[1] AND JONES, JUDGES.

JONES, JUDGE: Appellee, the Commonwealth of Kentucky *ex rel.* John Tilley, Secretary, Justice and Public Safety Cabinet ("the Commonwealth"), initiated the underlying action in Franklin Circuit Court against numerous entities seeking to recover treble damages under Kentucky's Loss Recovery Act (the "LRA").[2] After extensive motion practice and a multitude of discovery issues, the Franklin Circuit Court entered an order finding Appellants, Stars Interactive Holdings (IOM) Limited f/k/a Amaya Group Holdings (IOM) Limited ("Amaya") and Rational Entertainment Enterprises Limited ("REEL"), liable to the Commonwealth in the amount of $870,690,233.82. Amaya and REEL now appeal. Following review of the record, applicable law, and oral arguments, we REVERSE and REMAND for the reasons more fully explained below.

I. BACKGROUND

The procedural history of this case is long and somewhat complicated. Accordingly, we recite only the facts and procedural history relevant to the parties to this appeal.

In March of 2010, the Commonwealth filed a complaint against Pocket Kings, Ltd. and "Unknown Defendants" seeking recovery for the Commonwealth under the LRA. The provisions of the LRA relied on by the Commonwealth state as follows:

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[1] Judge Robert G. Johnson dissented in part and concurred in part in this opinion prior to the expiration of his term of office. Release of the opinion was delayed by administrative handling.

[2] Kentucky Revised Statutes ("KRS") 372.005-050.

> If any person loses to another at one (1) time, or within twenty-four (24) hours, five dollars ($5) or more, or anything of that value, and pays, transfers, or delivers it, the loser or any of his creditors may recover it, or its value, from the winner, or any transferee of the winner, having notice of the consideration, by action brought within five (5) years after the payment, transfer or delivery. . . .

KRS 372.020.

> If the loser or his creditor does not, within six (6) months after its payment or delivery to the winner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, any other person may sue the winner, and recover treble the value of the money or thing lost, if suit is brought within five (5) years from the delivery or payment.

KRS 372.040.

Thereafter, the Commonwealth filed a number of amended complaints, each of which added various online poker playing forums and casinos, as well as some individuals, as party defendants. On November 2, 2011, the Commonwealth filed a third amended complaint adding, among others, PYR Software Ltd. ("PYR"), Oldford Group Ltd. ("Oldford"), and REEL (collectively referred to as the "PokerStars Defendants"). The third amended complaint alleged that the PokerStars Defendants were three of several entities used to conduct business for PokerStars, an Internet poker company that provided real-money gambling on Internet poker games

to Kentucky residents. The Commonwealth alleged that when PokerStars hosted these online poker games, the PokerStars Defendants took a percentage of the amount bet, won, or lost as the "rake" or "commission" for hosting the poker games. The Commonwealth contended that thousands of Kentucky residents had lost five dollars or more, either at one time or within 24 hours, while playing on the PokerStars websites. Therefore, those residents were considered "losers" under KRS 372.020. Additionally, the Commonwealth contended that receiving a "rake" from the games played qualified the PokerStars Defendants as "winners" under the statute. As the Commonwealth believed none of the Kentucky "losers" had brought a claim under KRS 372.020, it contended that it was entitled to collect trebled damages from the PokerStars Defendants pursuant to KRS 372.040. Like the prior complaints, the Commonwealth's third amended complaint was generic insomuch as it did not identify the specific transactions at issue, the names of any affected Kentucky residents, the specific locations the gambling took place within this Commonwealth, the amounts bet, or any specific information of the like.

On January 11, 2013, REEL filed a motion to dismiss the third amended complaint or in the alternative, a motion for a more definite statement.[3] In its memorandum accompanying the motion, REEL argued that the Secretary, acting as relator for the Commonwealth, lacked standing to pursue a claim against REEL under the LRA and that the third-amended

[3] The Commonwealth had great difficulty obtaining service on the PokerStars Defendants as none were located or had agents within the United States. As a result, REEL and PYR were not served with the third amended complaint until November 27, 2012.

complaint failed to satisfy the notice pleading requirements of CR[4] 8.01. On January 22, 2013, PYR filed a motion to dismiss the third amended complaint or, in the alternative, for a more definite statement. PYR's motion adopted and incorporated by reference the motion to dismiss filed by REEL.

In its response to the motions to dismiss, the Commonwealth noted that other defendants in the case had previously asserted standing and insufficiency of pleading arguments, which the circuit court had rejected. Accordingly, the Commonwealth incorporated by reference its earlier memoranda to the court. In those memoranda, the Commonwealth maintained that the allegations in its complaint were sufficient under CR 8.01, as KRS Chapter 372 does not require a heightened pleading standard, and that the Commonwealth had standing to bring the claims as "any other person" under KRS 372.040. Following a hearing, the circuit court denied both motions to dismiss by order entered April 17, 2013, and ordered the parties to proceed with discovery.[5]

The Commonwealth obtained service on Oldford on March 17, 2014. Thereafter, Oldford filed a notice of removal to federal district court. As grounds for removal, Oldford contended that the Secretary, in his individual capacity, was the actual real party in interest in this case,

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[4] Kentucky Rules of Civil Procedure.

[5] The vast majority of the proceedings below dealt with non-compliance with discovery requests and orders. While Appellants take issue with sanctions entered against them for their apparent non-compliance with discovery orders, we are ultimately able to resolve this appeal without reaching those issues. Accordingly, the procedural history of this case relating solely to discovery issues has been omitted from this opinion.

not the Commonwealth. Accordingly, Oldford alleged that diversity of citizenship existed, giving the federal court jurisdiction under 28 U.S.C.[6] § 1332(a)(2). Once the case had been removed to federal court, REEL filed a motion to stay discovery, the Commonwealth filed a motion to remand to state court and a motion to stay the proceedings, and Oldford filed a motion to dismiss the third-amended complaint. By opinion and order dated March 31, 2015, the federal district court remanded the case to state court. *Commonwealth v. Pocket Kings, Ltd.*, No. 14-27-GFVT, 2015 WL 1480311 (E.D. Ky. Mar. 31, 2015). In its opinion, the federal district court noted the question of who was the proper real party in interest was "difficult"; however, it ultimately concluded that the proper party was the Commonwealth, thereby divesting the federal district court of jurisdiction. *Id.* The pending motions were therefore dismissed as moot. *Id.* During the pendency of the case's removal to federal court, all PokerStars Defendants were sold to Amaya.

On May 14, 2015, the Commonwealth moved for partial summary judgment against REEL and Oldford. The Commonwealth stated that in Oldford's objections and answers to the Commonwealth's first request for admissions, Oldford had admitted that, between October 12, 2006, and April 15, 2011, residents of Kentucky had played and lost money on PokerStars' sites and that Oldford and REEL had received part, or all, of a "rake" charged as a fee for hosting the games. The Commonwealth contended that Kentucky law on the LRA was clear: one who receives any part of a losing bet, including a "rake" charged in a game of poker, was liable for the full amount of the lost bet. Accordingly, the

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[6] United States Code.

Commonwealth stated that the only remaining issue to be decided was the amount of damages owed, and that it was entitled to judgment as a matter of law on the issue of liability.

Oldford and REEL filed a joint motion in opposition to the Commonwealth's motion for partial summary judgment. Therein, they contended that the Commonwealth's motion had obscured the numerous remaining genuine disputes of material fact. Specifically, Oldford and REEL contended that: while Oldford had admitted that there were individuals living in Kentucky who had lost money playing on a PokerStars site, the Commonwealth had yet to identify any specific "loser" under the statute; there was still an issue as to whether poker was a game of skill, as opposed to a game of chance as used in KRS 528.010(3); and there was still a genuine issue of fact as to whether the Secretary was legally authorized to bring claims under the LRA. The parties further argued that the Commonwealth could not rely on admissions made by Oldford to prevail on summary judgment against REEL. REEL and Oldford additionally disputed the Commonwealth's contention that Kentucky law was clear on their liability under the LRA.

On June 22, 2015, the circuit court heard the Commonwealth's motion for partial summary judgment, as well as its motion for sanctions against the PokerStars Defendants for alleged violations of discovery orders. In support of its motion for partial summary judgment, the Commonwealth pointed to the admissions Oldford had made and again stated that Kentucky law on liability under the LRA was clear. The Commonwealth reminded the circuit court that it had previously granted partial

summary judgment against another defendant in the action, Party Gaming, under substantially similar facts. REEL and Oldford argued that Oldford's admissions could not be used to support partial summary judgment against REEL. Further, REEL and Oldford disagreed with the Commonwealth that the law was in the Commonwealth's favor. REEL and Oldford distinguished cases relied on by the Commonwealth, noted that there was no precedent for the Commonwealth bringing an action under the LRA, and contended that there was still a factual issue of whether poker was a game of chance or a game of skill.

On August 12, 2015, the circuit court entered an order granting the Commonwealth's motion for partial summary judgment on liability, granting the Commonwealth's motion for sanctions in part, and entering default judgment against the PokerStars Defendants as a sanction. In its order granting partial summary judgment in the Commonwealth's favor, the circuit court first addressed REEL and Amaya's[7] liability under the LRA. The circuit court found that, under Kentucky law, any party who takes a portion of money lost in gambling is a "winner" under the LRA; this includes one who takes a rake from a poker game. As Amaya had admitted that it and REEL received a "rake" from games played on the PokerStars sites, the circuit court concluded that they were "winners" under KRS 372.020, despite the fact that they stood no chance of losing. The circuit court found that the Commonwealth had the ability to bring its claims against Amaya and REEL as "any other person"

[7] In July of 2015, the style of the case was changed to reflect Amaya's acquisition of the PokerStars Defendants. Oldford's name was changed to Amaya. REEL's name went unchanged.

under KRS 372.040 and that Amaya had admitted that Kentucky residents had played poker on the PokerStars sites thereby making the Commonwealth's failure to identify any specific residents irrelevant. The circuit court also noted that Amaya and REEL had offered no persuasive legal authority for their contention that playing poker could not be considered gambling because skill predominated over chance. Accordingly, the circuit court concluded as a matter of law that the Commonwealth was entitled to partial summary judgment on the issue of liability.

Thereafter, the parties litigated the issue of damages before the circuit court. The parties disputed how damages should be calculated, the reliability of the Commonwealth's damages calculation, as well as whether treble damages should be awarded in this instance. During this same time period, Amaya and REEL moved the circuit to reconsider its decision on liability. On November 20, 2015, the circuit court entered an opinion and order denying Amaya and REEL's motion to reconsider, granting partial summary judgment in favor of the Commonwealth, and awarding the Commonwealth $290,230,077.94 in damages. The circuit court reserved the issue of whether the Commonwealth was entitled to receive treble damages for a later date. Following additional motion practice and briefing, on December 23, 2015, the circuit court entered an opinion and order. Therein, the circuit court clarified its position as to whether damages recovered under the LRA should reflect "net" or "gross" losses and concluded that, under the facts of this case, the Commonwealth was not required to "net" the losses incurred by Kentucky poker players. The circuit court ultimately concluded that Amaya and

REEL were liable for the full amount of losses incurred by Kentucky players because they shared a "community of interest" with the actual winners. Accordingly, the circuit court concluded that the Commonwealth was not required to "net" the winnings it sought to recover and confirmed its original award of $290,230,077.94. The circuit court then concluded that treble damages were mandatory. The circuit court entered a judgment in favor of the Commonwealth in the amount of $870,690,233.82, plus post-judgment interest calculated at a rate of 12% per annum.

Amaya and REEL filed a motion to alter, amend, or vacate the final judgment and requested the circuit court make detailed findings of fact. Following a hearing, the circuit court denied the motion to alter, amend, or vacate in substance. It did, however, amend its prior judgment to properly reflect the names of the judgment debtors.

This appeal followed.

II. ANALYSIS

Appellants raise numerous assignments of error as part of this appeal. The primary argument put forth by Appellants, and the one we conclude is ultimately dispositive, is that the circuit court erred as a matter of law when it denied their motions to dismiss. Appellants argue that the circuit court should have dismissed the complaints against them because the Commonwealth/Secretary does not have standing to sue under the LRA. Alternatively, Appellants argue that even if the Commonwealth has standing to sue, its complaint should have been dismissed because it lacked sufficient detail to state a valid cause of action against them.

A. The Commonwealth's Ability to Bring Suit under the LRA

Much of Appellants' reasoning as to why the Commonwealth is not the proper party to bring a suit under the LRA is based on the text of KRS 372.040, the purpose of the LRA, its legislative history, and its interplay with other statutory authority. Before delving into those arguments, however, we must address and dispose of Appellants' argument that the Secretary lacks authority to bring a claim on behalf of the Commonwealth as a sovereign.

As grounds for the case's removal to federal court, the PokerStars Defendants contended that the proper real party in interest was the Secretary in his personal capacity—not the Commonwealth—based on the fact that the Secretary had retained private counsel and initiated this action without the authority of the Attorney General. The federal district court determined that the proper real party in interest was the Commonwealth because any sum recovered as a result of this suit would go to Commonwealth's treasury, not to the Secretary. *Pocket Kings, Ltd.*, 2015 WL 1480311 at *7. Following remand, Amaya and REEL argued that the Secretary cannot bring this action on the Commonwealth's behalf. They point out that no statute gives the Secretary the authority to file suit on the Commonwealth's behalf. Instead, the Secretary relies on an Executive Order issued by the Governor, which Appellants maintain is insufficient.

Appellants contend that the Governor's Executive Order is invalid because it impermissibly expanded the Secretary's power. They note that KRS 15A.040 sets out the duties of the Secretary of the Justice and Public Safety Cabinet, and bringing suit on behalf of the

Commonwealth is not one of those enumerated duties. Appellants maintain that bringing suit on behalf of the Commonwealth is vested exclusively in the Attorney General.

It is, of course, true that the Attorney General "is the chief law officer of the Commonwealth of Kentucky and all of its departments[.]" KRS 15.020. "[N]evertheless, the General Assembly may withdraw those powers [of the Attorney General] and assign them to others or may authorize the employment of other counsel for the departments and officers of the state to perform them." *Johnson v. Commonwealth ex rel. Meredith*, 291 Ky. 829, 165 S.W.2d 820, 829 (1942). KRS 12.210 gives the Governor, or any department with the Governor's approval, the authority to employ private counsel "to render legal services for one (1) or more departments, boards, program cabinets, offices or commissions." KRS 12.210(2). The Governor, as the chief executive of the Commonwealth, has the duty and authority to enforce Kentucky's laws. KY. CONST. § 81. As the Secretary is a member of the executive cabinet, KRS 11.065(1), he is authorized and required to assist the Governor in his duties. Accordingly, the Governor has the authority to order the Secretary to bring a suit to enforce the laws of Kentucky and, under KRS 12.210, the Secretary has the right to retain private counsel to assist him in so doing.

Having determined that the Secretary has the authority to bring an action on behalf of the Commonwealth, we now address Appellants' claim that the Commonwealth cannot bring suit under the LRA. The text of KRS 372.040, the specific provision of the LRA on which the Commonwealth relies as authority for it to bring this action, states as follows:

> If the loser or his creditor does not, within six (6) months after its payment or delivery to the winner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, **any other person may sue the winner**, and recover treble the value of the money or thing lost, if suit is brought within five (5) years from the delivery or payment.

(Emphasis added). The Commonwealth contends that it easily fits within the class encompassed by the phrase "any other person." Appellants posit that, while "any other person" does indeed cover a broad range of "people" with the ability to sue under the statute, it is limited to the common meaning of the word "person" – *i.e.*, a natural person.[8] Of course, KRS Chapter 372 does not define "person"; if it did, the question would be easily resolved.

"When interpreting statutes, our utmost duty is to 'effectuate the intent of the legislature.'" *Brewer v. Commonwealth*, 478 S.W.3d 363, 371 (Ky. 2015) (quoting *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002)). "That intent is perhaps no better expressed than through the actual text of the statute, so we look first to the words chosen by the legislature . . . ." *Id.* When examining the text, "a court should 'use the plain meaning of the words used in the statute.'" *Rhodes v. Commonwealth*, 417 S.W.3d 762, 765 (Ky. 2013) (quoting *Monumental Life Ins. Co. v. Dep't of Revenue*, 294 S.W.3d 10, 9 (Ky. App.

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[8] *See Person*, BLACK'S LAW DICTIONARY (10th ed. 2014): "1. A human being.—Also termed *natural person*; *Person*, OXFORD LIVING DICTIONARIES, http://en.oxforddictionaries.com/definition/person (last visited Mar. 3, 2018): "1. A human being regarded as an individual."

2008)). "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Hall v. Hosp. Res., Inc.*, 276 S.W.3d 775, 784 (Ky. 2008) (quoting *United States v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005)). Additionally, we "must consider 'the intended purpose of the statute—the reason and spirit of the statute—and the mischief intended to be remedied.'" *Commonwealth v. Kash*, 967 S.W.2d 37, 43 (Ky. App. 1997) (quoting *City of Louisville v. Helman*, 253 S.W.2d 598, 600 (Ky. 1952)). "The courts should reject a construction that is 'unreasonable and absurd' in preference for one that is 'reasonable, rational, sensible, and intelligent.'" *Id.* at 44 (quoting *Johnson v. Frankfort & C.R.R.*, 303 Ky. 256, 197 S.W.2d 432, 434 (1946)). "The interpretation of a statute is a matter of law." *Commonwealth v. Garnett*, 8 S.W.3d 573, 575 (Ky. App. 1999). Accordingly, we review the circuit court's interpretation *de novo*, in that we owe no deference to it. *Id.*

In finding that the phrase "any other person" as used in KRS 372.040 includes the Commonwealth, the circuit court relied on the Court's application of KRS 446.010(33) in *Commonwealth ex rel. Keck v. Shouse*, 245 S.W.2d 441 (Ky. 1952). KRS 446.010 gives general definitions for words in Kentucky statutes to aid the courts in construing statutes where the words are not otherwise defined. Under the statute, the word "person" "may extend and be applied to bodies-politic and corporate, societies, communities, the public generally, individuals, partnerships, joint stock companies, and limited liability companies[.]" KRS 446.010(33).

In *Shouse*, the Commonwealth brought a civil suit

against Shouse alleging that he had violated KRS 433.750 by cutting down trees located on property owned by the Commonwealth. The circuit court dismissed the complaint for failure to state a cause of action. On appeal, however, the Court found that while KRS 433.750 was a penal statute, the Commonwealth had a cognizable claim under Kentucky's negligence *per se* statute, KRS 446.070, which provides that "a person" who has sustained damages because of an offender's violation of a statute may recover. The *Shouse* court noted that KRS 446.010(33) provided that "person" may extend to bodies politic and concluded that, therefore, the Commonwealth had a cognizable claim.

We recognize that *Shouse* represents an instance where the Commonwealth was permitted to bring a statutory claim as a "person" and we do not disagree with the Court's holding in that instance. However, nothing in *Shouse* indicates that it was meant to create a steadfast rule that the Commonwealth will *always* be considered a "person" in whichever statute the word may be used. Citing to two other cases that relied on *Shouse* in conjunction with KRS 446.010(33), the Commonwealth asserts that "courts have uniformly held that the Commonwealth – and even the U.S. Government – may sue as a 'person' under Kentucky statutes." Appellee Br. 6. As in *Shouse*, both cases cited by the Commonwealth were determining whether a sovereign entity could be considered a "person" that can maintain an action through KRS 446.070. Neither case cited *Shouse* as supporting a general proposition that the Commonwealth is always considered a "person." *See U.S. v. Kentucky Nat. Ins. Co.*, No. 89-6246, 1990 WL 78173 (6th Cir. June 11, 1990); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208 (2d. Cir.

2013). Rather, both cases cited *Shouse* for the limited conclusion that a sovereign had the ability to maintain an action through KRS 446.070, which carries the additional requirement that a person bringing an action under it fall "within the class of persons the [penal] statute intended to be protected." *Hargis v. Baize*, 168 S.W.3d 36, 40 (Ky. 2005) (citation omitted). In *Shouse*, it was not difficult to make that determination because the Commonwealth owned the property where the felled trees were located. We cannot necessarily make the same conclusion with respect to the LRA.

KRS 446.010(33) does not dictate that "bodies politic or corporate" are always considered persons. It indicates that "unless context requires otherwise" the word "person" "*may* extend to bodies politic and corporate . . . ." KRS 446.010(33) (emphasis added). "It is elementary that 'may' is permissive . . . ." *Hardin Cty. Fiscal Court v. Hardin. Cty. Bd. of Health*, 899 S.W.2d 859, 861 (Ky. App. 1995). A court has the discretion whether to incorporate KRS 446.010's definition of person into the statute it is interpreting. *Commonwealth v. Illinois Cent. R. Co.*, 152 Ky. 320, 153 S.W. 459, 461-62 (1913).

Determining that neither the common usage of the word "person" nor *Shouse* and KRS 446.010(33) dictate that the phrase "any other person" necessarily includes the Commonwealth, we turn to the background and purpose of the LRA. The LRA derives from England's 1710 Statute of Queen Anne, which "prohibited the enforcement of gambling debts and provided for a recovery action by the losing gambler, or any other person on the gambler's behalf, for gambling debts already paid." Joseph Kelly, *Caught in the Intersection Between Public*

Policy and Practicality: A Survey of the Legal Treatment of Gambling-Related Obligations in the United States, 5 CHAP. L. REV. 87, 87-88 (2002). As it is in effect today, Kentucky's LRA retains all three tenets found in the Statute of Queen Anne: it declares all gambling contracts void (KRS 372.010); it allows the loser to recover the amount lost from the winner (KRS 372.020); and, if the loser does not file suit within a prescribed time-period, it allows a third-party to recover damages in the loser's stead (KRS 372.040).

In its present state, the LRA does not require that a claimant under KRS 372.040 split his recovery with the Commonwealth; however, that was not always the case. Earlier versions of the LRA mandated that a third-party claimant turn over half of the treble damage recovery to the Commonwealth. *See* Act of 1851, Rev. Stat., Ch. 42, § 4 (Stanton 1860); *Conner v. Ragland*, 54 Ky. 634, 634 (1855) ("[W]hen another sues after six months, and treble the amount is recovered, one-half the amount belongs to the commonwealth."). The LRA was amended in 1873 and the requirement that one-half of a third-party's recovery be given to the Commonwealth was removed. *See* Act of 1873, Gen. Stat., Ch. 47, Art. 1, § 4 (Bullitt & Feland 1877). That same year, the gambling forfeiture statute was amended to eliminate a provision that allowed a private seizor to retain half of the seized property. Instead, the amended statute mandated that all seized property be retained by the Commonwealth. *Compare* Act of 1799, Vol. 1, Digest Stat. Laws of Ky., Title 87, § 1 (Morehead & Brown 1834),[9] *with* Act of 1873, Gen. Stat., Ch. 47, Art. 1,

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[9] Providing in pertinent part as follows:

> *Be it enacted by the General Assembly,* That all moneys or other property, exhibited for the purpose

§ 6 (Bullitt & Feland 1877).[10] One could chalk up the fact that these amendments were made in the same year as mere coincidence; however, the more probable theory is that these amendments were made with intention—the LRA was to be used to provide recovery exclusively to private citizens, while the forfeiture statute was to provide recovery exclusively to the Commonwealth.

We gain further confidence in this interpretation by looking to the purpose of the LRA. Over the years, jurisprudence dealing with the LRA has opined on the

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> of alluring persons to bet at any game, or horse-race, or to make any bet whatsoever, and all moneys actually staked or betted, shall be liable to seizure by any magistrate or magistrates, or by any other person or persons, under a warrant from a magistrate, wheresoever the same may be found; and all such moneys, so seized, shall be accounted for and paid by the person or persons making the seizure to the court of the county, or corporation, wherein the seizure shall be made, and applied by the court, in aid of the county levy, **deducting thereout one half, to be paid to the person or persons making the seizure.**

(Emphasis added).

[10] Providing in pertinent part as follows:

> Any such bank, table, or machine, or articles used for carrying on [a game of chance], together with all money or other thing staked or exhibited to allure persons to bet, may be seized by any magistrate, sheriff, constable, or police officer of a city or town, with or without a warrant, and upon conviction of the person setting up or keeping the game, **such money or other thing shall be forfeited for the use of the Commonwealth**, and such table, machine, and articles shall be burnt or destroyed.

(Emphasis added).

reasons for its existence. The LRA has a dual purpose as a "means of suppressing an enormous public mischief, and of restoring to an individual that of which he has been illegally, if not fraudulently deprived . . . ." *McKinney v. Pope's Adm'r*, 42 Ky. 93, 99 (Ky. 1842). The purpose of suppressing illegal gambling was greater affected by allowing third parties to sue and receive treble damages. "Without that incentive [of treble damages], few men would encounter all the responsibilities incident to a service so unwelcome and perilous." *Perrit v. Crouch*, 68 Ky. 199, 204 (Ky. 1868). It is of relevance that the Statute of Queen Anne and its progeny were enacted in a time "where the absence of an organized police authority to enforce criminal statutes made necessary the use of such rewards for informers." *Salamon v. Taft Broad. Co.*, 475 N.E.2d 1292, 1298 (Ohio Ct. App. 1984) (in discussing third-party recovery of gambling losses under Ohio's Loss Recovery Act[11]). Further, allowing recovery of treble damages "is in the nature of punitive damages but from which the state derives nothing except the hope that it will deter a violation of one of its criminal laws." *Salonen v. Farley*, 82 F.Supp. 25, 27 (E.D. Ky. 1949).

In addition to the deterrence of illegal gambling, the LRA "is meant to protect the homes of those who cannot afford to be enticed into gambling establishments to

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[11] R.C. § 3763.04 states that:

> If a person losing money or thing of value, as provided in section 3763.02 of the Revised Code, within the time therein specified, and without collusion or deceit, does not sue, and effectively prosecute, for such money or thing of value, any person may sue for and recover it, with costs of suit, against such winner, for the use of such person prosecuting the suit.

dissipate their earnings or property to the distress of their families." *Hartlieb v. Carr*, 94 F.Supp. 279, 280 (E.D. Ky. 1950). A gambler who is a "loser" under KRS 372.020 often will not wish to pursue legal action against his winner. All too often, however, a gambler's losses affect not only the "loser" but also his dependents. The solution is to allow the dependent to sue to recover those losses. We recognize that KRS 372.040 uses the broad language of "any other person" rather than defining a specific class of those who may recover on the "loser's" behalf. Broad language, however, seems necessary to ensure that this purpose is adequately achieved:

> The makers of the statute were confronted with the proposition to enable defendants to recover money lost by their breadwinner at gambling and to deter gambling by allowing the recovery of treble damages. Under Kentucky statutes various relationships create a legal obligation of support and maintenance. By new enactment, amendments or judicial constructions the persons included as dependents might be enlarged. Consequently rather than have one of the purposes of the statute (that of protecting dependents) defeated by possibly omitting one later named to be a dependent it gave the right to all persons. For instance, there may be cases wherein a step-father acting in loco parentis would be held to be within the class of dependents contemplated by statutes requiring support.

Salonen, 82 F.Supp. at 28. Other courts interpreting the purpose of the LRA in their states have concluded

similarly. *See, e.g., Berkebile v. Outen*, 426 S.E.2d 760, 763 (S.C. 1993) (The statute "indicates that the General Assembly contemplated a policy which prevents a gambler from allowing his vice to overcome his ability to pay [and] to protect a citizen and his family from the gambler's uncontrollable impulses.").

While certainly not dispositive, it is not insignificant that the Commonwealth has never brought a claim under the LRA. *See U.S. v. Cooper Corp.*, 312 U.S. 600, 613-14, 61 S.Ct. 742, 748, 85 L.Ed. 1071 (1941), *superseded by statute*, 15 U.S.C. § 15a. In fact, in our research, we have failed to uncover any case in any sister jurisdiction with similarly-worded statutes where the state has brought a claim under its own version of LRA as a third-party.[12] Perhaps more significantly, our research shows that since 1949, there are no reported cases of a complete stranger bringing an action under KRS 372.040 to recover losses for himself. *Craig v. Curd*, 309 Ky. 549, 218 S.W.2d 395,

[12] In *U.S. v. Resnick*, 594 F.3d 562 (7th Cir. 2010), the United States sought to recover money Resnick had paid to a bookie, Poeta, to satisfy illegal gambling debts because Resnick was insolvent. The United States recovered this money using theories of fraudulent transfer under the Federal Debt Collection Procedure Act and common-law unjust enrichment. It was successful on those claims. When discussing whether Poeta was entitled to set-off the judgment against him by subtracting payments he had made to Resnick on winning bets, Judge Hamilton noted that 720 Ill. Comp. Stat. 5/28-8 provided a cause of action by which anyone could sue on behalf of an illegal gambling loser and allowed for recovery of all losses, not the net of gambling exchanges over some extended period of time. *Id.* at 570-71. We read the reference to Illinois' LRA, in dicta, as being used as support for why Poeta was not entitled to set-off his damages, not as stating that the United States could have successfully brought suit against Poeta under the LRA. No cases have cited *Resnick* for this proposition.

396 (1949) ("This is an equitable action, instituted by the appellant as an informer under KRS 372.020 and 372.040."). Of course, the plaintiff bringing suit under KRS 372.040 is a "stranger" to the gambling transaction, but in all cases has some relationship to the "loser" for whom they are bringing the action.[13]

Allowing the Commonwealth to bring this claim as "any other person" may well serve the purpose of suppressing illegal gambling. The large judgment the Commonwealth received in the circuit court would certainly deter similar Internet gaming/betting services from conducting business with residents of Kentucky. The Commonwealth undoubtedly has an interest in the public policy behind suppressing illegal and unregulated gambling. Thus, there is a strong argument that reading KRS 372.040 to embrace claims brought by the Commonwealth would serve to better effectuate the policy purposes behind the LRA. However, allowing the Commonwealth to recover the losses in the stead of the actual "losers," or the family members and other dependents of those "losers," would completely contravene the other purpose of the LRA—to allow those "losers" to recover their losses and avoid becoming destitute as a result of a gambling problem. The Commonwealth is not bringing this action to collect the

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[13] *See Akers v. Fuller*, 312 Ky. 502, 228 S.W.2d 29 (1950) (Plaintiff recovering husband's losses); *Kindt v. Murphy*, 312 Ky. 395, 227 S.W.2d 895 (1950) (Plaintiff recovering son's losses); *Hartlieb v. Carr*, 94 F.Supp. 279 (E.D. Ky. 1950) (Plaintiff recovering husband's losses); *Scott v. Curd*, 101 F.Supp. 396 (E.D. Ky. 1951) (Plaintiff recovering husband's losses); *Veterans Serv. Club v. Sweeney*, 252 S.W.2d 25 (Ky. 1952) (Plaintiff recovering wife's losses); *Tabet v. Morris*, 285 S.W.2d 143 (Ky. 1955) (Plaintiff recovering son's losses); *Gumer v. Sailor*, 286 S.W.2d 515 (Ky. 1956) (Plaintiff recovering son's losses).

money and then return losses to the "losers." It is bringing this action to collect treble damages for its own benefit.

"[T]he Loss Recovery Act should not be interpreted to yield an unjust or absurd result contrary to its purpose." *Vinson v. Casino Queen, Inc.*, 123 F.3d 655, 657 (7th Cir. 1997). In common parlance, the word "person" does not encompass the Commonwealth; without a modifier (such as juristic or artificial), the word "person" is limited to human beings. While KRS 446.010(33) permits the Commonwealth, as a body-politic, to be included as a "person" when the word is used in a statute, it does not mandate it. Here, allowing the Commonwealth to recover under KRS 372.040 contravenes one of the stated purposes—ensuring that a losing gambler and his family are not left impoverished as a result of the gambler's vice—by allowing the Commonwealth to take what could, absent the Commonwealth's suit, be recovered by a suit of the gambler's own representative. The purpose of suppressing illegal gambling is not thwarted by the Commonwealth's inability to sue under the LRA. Other, natural persons still have the ability to sue under the LRA and collect treble damages from the "winner." In so doing, the treble damages that person collects will still work as a deterrent against illegal gambling.

Had the General Assembly intended to confer on the Commonwealth an ability to recover under KRS 372.040, it knew how to do so. Earlier versions of the LRA provided that one-half of the recovery received by a third party went to the Commonwealth. Under those versions, it can be assumed that the "person" suing under the statute is someone other than the Commonwealth itself. The provision dictating that one-half of the recovery be

given to the Commonwealth was later removed by amendment; however, no language was added indicating that the Commonwealth could sue on its own behalf to receive treble damages.

Moreover, it is abundantly clear that treble damages were made available to incentivize private persons to bring LRA actions. *See Perrit*, 68 Ky. at 204. A private individual who knows of illegal gambling activity is not under any obligation to report it to authorities. The LRA sought to encourage private persons to bring LRA actions by increasing the judgment available to them. The hope was that the provision for treble damages would incentivize private individuals to undergo the burdens associated with enforcing the LRA. The Commonwealth, in this case the Secretary acting on the Governor's order, is already under an obligation to enforce the laws of the Commonwealth. We cannot accept that the Commonwealth must be incentivized with the promise of treble damages before it can be expected to bring suit to enforce its own laws.

In fact, no such incentive is necessary because the General Assembly has provided the Commonwealth with its own mechanism to deter illegal gambling. KRS 528.100 provides that gambling devices or records used in illegal gambling shall be forfeited to the Commonwealth. "Money may be subject to seizure along with gambling devices, when the circumstances make it clearly apparent the money formed an integral part of the illegal gambling operation." *Gilley v. Commonwealth*, 312 Ky. 584, 229 S.W.2d 60, 63 (1950). KRS 500.090(2) states that "[m]oney which has been obtained or conferred in violation of any section of this code shall, upon conviction, be forfeited for use of the state." KRS 528.020-.030 make it illegal to

knowingly advance or promote illegal gambling.

In light of the foregoing, we conclude that the term "person" as used in LRA does not authorize suit on behalf of the Commonwealth. Neither the purpose nor history of the statute support the Commonwealth's inclusion as a "person" authorized to bring suit and recover treble damages under the LRA. Accordingly, we hold that the phrase "any other person," as it is used in KRS 372.040, is limited to natural persons. Accordingly, the circuit court erred in denying the PokerStars Defendants' motions to dismiss this action.

B. Pleading Requirements under KRS 372.040

Even if the Commonwealth were a proper person to bring suit under the LRA, we do not believe that the Commonwealth's third amended complaint stated a valid claim in this particular instance. In its third amended complaint, the Commonwealth alleged that: during the five years preceding the filing of the action, "thousands of Kentucky residents" lost five dollars or more in gambling games hosted by PokerStars; the PokerStars Defendants received a rake of the amounts lost; and, "on information and belief" no "loser" located in Kentucky, or any creditor, had sued under KRS 372.020.

Appellants sought dismissal of the third amended complaint on the basis that it contained only generalized allegations that were too vague to support a valid cause of action under the LRA. The circuit court denied the motions to dismiss. It concluded that the Commonwealth's third amended complaint: "satisfied[d] the notice pleading requirements of CR 8.01 and state[d] a valid claim for relief." R. 2001. Appellants again raised the fact that the Commonwealth had failed to identify any

specific "loser" in their opposition to the Commonwealth's motion for partial summary judgment on liability. The circuit court found that the Commonwealth's failure to identify a "loser" was irrelevant in light of Oldford's admission that Kentucky residents had lost money while playing poker on the PokerStars platform. R. 4239.

CR 8.01 requires only that that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Kentucky has long adhered to the notice pleading theory: "All that is necessary is that a claim for relief be stated with brevity, conciseness and clarity." *Nat. Res. and Envtl. Prot. Cabinet v. Williams*, 768 S.W.2d 47, 51 (Ky. 1989) (citation omitted); *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 293 (Ky. App. 2009); CR 8.01(1). "The true objective of a pleading stating a claim is to give the opposing party fair notice of its essential nature." *Cincinnati, Newport & Covington Transp. Co. v. Fischer*, 357 S.W.2d 870, 872 (Ky. 1962).

The Commonwealth's complaint informed Appellants that the Commonwealth was bringing an LRA action against them. It did not provide Appellants with even the most basic notice of what gambling transactions were at issue. The reason for this is that the Commonwealth never identified any particular transactions prior to filing its complaint. Instead, the Commonwealth sought to hold Appellants collectively liable for thousands of different as-of-yet unidentified acts of illegal gambling occurring during the widest time frame the LRA allowed. Specifically, the Commonwealth's complaint alleged that it had the right to bring suit based on the losses of "thousands of Kentucky residents," yet it failed to identify even one Kentucky resident who had lost wagers on the

PokerStars cite. It indicated that alleged losses had occurred within the past five years—*i.e.*, within the statutory period—but failed to identify a specific date on which these alleged losses had occurred. The Commonwealth believed that these losses were in amounts of five dollars or more, but failed to even place an approximate dollar figure on the amount of the losses.

While the LRA may not be subject to a heightened pleading, the statute itself contemplates that the plaintiff will be able to identify a particular (specific) act of illegal gambling prior to receiving a judgment. A prerequisite for bringing a claim under the statute is that the "loser" or his creditor has not brought a claim under KRS 372.020 within six months of delivering payment to the winner. KRS 372.040. Thus, before there can be a cause of action in a third party, there must be a specific, definite person who failed to bring suit. The specific "loser" is a necessary part of the statute. The Commonwealth cannot allege that those six months have passed, or that it has timely brought its claim, without alleging a specific "loser" and the date on which that "loser" lost. Without that information the Commonwealth—and indeed, no plaintiff—can demonstrate a valid cause of action under KRS 372.040. *See Hartlieb v. Carr*, 94 F. Supp. 279, 281 (E.D. Ky. 1950) (holding that without alleging the date the losses were sustained wife's cause of action under KRS 372.040 was too vague and indefinite to support a cause of action).

In *Humphrey v. Viacom, Inc.*, No. 06 2768 DMC, 2007 WL 1797648, at *6 (D.N.J. June 20, 2007), a New Jersey federal district court considered whether a plaintiff could maintain a cause of action under New Jersey's LRA statute in light of the state's liberal notice pleading

requirement. Ultimately, the court determined that the plaintiff could not do so. It reasoned as follows:

> Plaintiff does not identify any individual who paid an entry fee to play one of the Defendants' fantasy sports games; he does not identify the nature of the "wager" or "bet" made between such an individual and either of the Defendants; he does not allege when the loss occurred; and, . . . he does not allege that such an individual lost such a "wager" or "bet" to either of the Defendants.
>
> Plaintiff fails to identify even one individual who participated in even one of the subject leagues, much less one who allegedly lost money to Defendants in those leagues, and concedes that he has done neither himself. (Compl.¶¶ 9, 71). In short, Plaintiff asks this Court to indulge a gambling qui tam suit seeking a "recover[y] for his own use, unknown amount of money lost by unnamed and unknowable persons." *Salamon*, 475 N.E.2d at 1298.
>
> New Jersey's adoption of more modern notice pleading rules has not changed the strict requirement that a plaintiff seeking to pursue a claim under the gambling loss-recovery statute "must, in his pleading, allege all the facts necessary to bring him within the statute." *Zabady v. Frame*, 22 N.J.Super. 68, 70 (App. Div. 1952).

Id. at *4-6. The New Jersey federal court is not alone in

holding that a plaintiff seeking to recover under a gambling loss recovery statute, like Kentucky's statute, must allege certain foundational facts to state a prima facie claim. *See Fahrner v. Tiltware LLC*, 13-0227-DRH, 2015 WL 1379347, at *6 (S.D. Ill. Mar. 24, 2015), aff'd sub nom. *Sonnenberg v. Amaya Group Holdings (IOM) Ltd.*, 810 F.3d 509 (7th Cir. 2016) ("The allegations of Daniel Fahrner's losses are devoid of detail, failing to allege the exact amounts he purportedly lost gambling, when he lost the sum, to whom he lost the sum, and what type of game he was playing. Thus, plaintiffs have failed to allege the "who," "what," and "when" to sustain a cause of action, individually and on behalf of others, under the LRA."); *Langone v. Kaiser,* 12 C 2073, 2013 WL 5567587, at *4 (N.D. Ill. Oct. 9, 2013) ("[I]n order to allege a ripe claim under the Loss Recovery Act, Langone must allege that a specific loser lost a certain amount and failed to bring a claim for that amount within six months. He has failed to do that here.").

We agree with the rationale of the above-cited opinions. Kentucky's LRA contemplates that the third-party bringing suit to recover for another's losses will have some knowledge of the illegal gambling he seeks to redress. A third-party cannot state a valid claim under the LRA without identifying the basic facts necessary to give rise to a statutory cause of action. In other words, a third party must do more than assert that the defendant fostered illegal gambling in the state that caused unidentified Kentuckians unspecified amounts of damages as the Commonwealth did in this case.

Allowing a complaint, like the one put forth by the Commonwealth, to move forward would lead to an absurd, unjust result. It would mean that any private person with

knowledge of the general nature of Appellants' electronic gaming format could allege an LRA claim in a wholly conclusory and generic fashion and walk away a billionaire without ever having identified a single gaming transaction with specificity. The LRA was never intended to be used in this fashion. It was intended to promote natural persons who had knowledge of specific instances of illegal gambling to file suit to assist the Commonwealth in enforcing its anti-gambling regulations. To that end, we hold that even under our liberal notice requirements, a third-party LRA complaint must set forth basic facts such as the identity of the parties, date of the conduct, and nature of the gambling losses at issue. This conclusion does not eviscerate or do violence to our liberal pleading requirements. To the contrary, it is in conformity with their purpose of supplying the defendant with a concise statement of the general nature of allegations at issue.

III. CONCLUSION

In light of the foregoing, we reverse the judgment of the Franklin Circuit Court. On remand, an order shall be entered dismissing the action.

ACREE, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS IN PART AS TO LIABILITY AND CONCURS IN PART AS TO DAMAGES, WITHOUT FILING A SEPARATE OPINION.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Sheryl G. Snyder	William C. Hurt, Jr.

Theresa A. Canaday
Griffin Terry Sumner
Jason P. Renzelmann
Louisville, Kentucky

James L. Deckard
William H. May, III
Lexington, Kentucky

APPENDIX C

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 10-CI-00505

COMMONWEALTH OF KENTUCKY *ex rel*. John Tilley, Secretary, JUSTICE AND PUBLIC SAFETY CABINET — **PLAINTIFF**

vs.

POCKET KINGS, LTD, *et al*. — **DEFENDANTS**

OPINION AND ORDER

This matter is before the Court on the Defendants' (Amaya Group Holdings (IOM) Ltd. f/k/a The Oldford Group Ltd., Rational Entertainment Enterprises Ltd., PYR Software Ltd. d/b/a Amaya Software Services, Rational Intellectual Holdings Ltd., and Stelekram Ltd.) *Motion to Alter, Amend or Vacate Final Judgment and Request to Make Required Findings* filed on January 4, 2016.

Counsel was heard in Open Court following the Court's regularly scheduled civil motion hour on Monday, January 25, 2016. The Court being sufficiently advised hereby **DENIES** the Defendants' *Motion* except insofar as it

AMENDS its *Opinion and Order* of December 23, 2015 to properly identify the judgment debtors as Amaya Group Holdings (IOM) Ltd. and Rational Entertainment Enterprises Ltd. The Court hereby **AFFIRMS** its award of damages to the Plaintiff of $870,690,233.82, plus any and all continuing costs of collection of this judgment, plus interest at the judicial rate of twelve percent (12%) per annum until paid in full.

STATEMENT OF FACTS

The background of this case is well-known and requires no further introduction.[1] The pertinent procedural facts for the Court's decision today are as follows: On December 23, 2015, the Court denied the Defendants' two motions: (1) *Motion to Vacate Award of Damages Due to Calculation Error* in the Court's *Opinion and Order* of November 20, 2015, and (2) *Motion for Partial Summary Judgment on the Plaintiff's Demand for Treble Damages.* The Court denied both of the Defendants' *Motions* and it clarified its calculation of damages in its November 20, 2015 *Opinion and Order.* Also in its December 23, 2015 *Opinion and Order,* the Court granted the Plaintiff's *Motion for Summary Judgment on Damages* thereby awarding the Plaintiff $870,690,233.82 in damages.

The Defendants filed their *Motion to Alter, Amend or Vacate Final Judgment and Request to Make Required Findings* on January 4, 2016. The Plaintiff responded on

[1] *See, e.g., Commonwealth v. Pocket Kings Ltd.,* Franklin Circuit Court, Div. II, No. 10-CI-00505, *Opinion and Order,* (Aug. 12, 2015), *Commonwealth v. Pocket Kings Ltd.,* Franklin Circuit Court, Div. II, No. 10-CI-005050, *Opinion and Order,* (Nov. 20, 2015), *Commonwealth v. Pocket Kings Ltd.,* Franklin Circuit Court, Div. II, No. 10-CI-00505, *Opinion and Order,* (Dec. 23, 2015).

January 19, 2016. The Defendants filed a *Notice of Supplemental Authority* on January 21, 2016, attached to which was a January 15, 2016 decision from the U.S. Court of Appeals for the Seventh Circuit in the case of *Sonnenberg v. Amaya Group Holdings (IOM) Ltd,* Nos. 15-1885, 15-1887 (7th Cir. Jan. 15, 2016). Counsel was heard in Open Court on Monday, January 25, 2016. Following oral argument, the Defendants made three further filings with the Court: (1) a *Reply in Support of their Motion to Alter, Amend or Vacate* filed on January 25, 2016; (2) a *Post-Hearing Rebuttal Regarding the Time Period for Damages Awarded* filed on January 28, 2016; and (3) a *Notice of Filing Oldford Group Limited's Objections and Answers to Plaintiff's Requests for Admission* filed on January 28, 2016. The Plaintiff filed its *Post Hearing Rebuttal and Supplemental Memorandum in Response to PokerStars' Motion to Alter, Amend or Vacate* on February 4, 2016. The Defendants filed their *Supplemental Post-Hearing Rebuttal Memorandum* on February 11, 2016.

ANALYSIS

Kentucky Rule of Civil Procedure (CR) 59.05 provides that "[a] motion to alter or amend a judgment, or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." A party may make a CR 59.05 motion in order to dispute an order that it believes is incorrect. *Gullion v. Gullion,* 163 S. W.3d 888, 891, 892 (Ky. App. Ct. 2005). A trial court has unlimited power to amend and alter its own judgments. *Id.* In construing when a court may alter, amend, or vacate its previous judgment, the Kentucky Supreme Court has adopted the four basic grounds from the Federal Rules of Civil Procedure. *Id* at 893. They are as

follows:

> First the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law." *Id.*

Reconsideration of a judgment after its entry is considered to be an extraordinary remedy and should be used sparingly. *Id.*

DISCUSSION

The Defendants' attack on this Court's December 23, 2015 ruling is an attempted "death by a thousand cuts." However, the Defendants' volley of arguments cannot mask the one fact that goes unacknowledged in their twenty-five page *Memorandum* in support of their *Motion:* That for five years, the Defendants operated an online business in Kentucky that was patently illegal, facilitating hundreds of millions of illegal bets resulting in the loss of approximately $290 million by Kentucky players. The Defendants actions make them liable under Chapter 372.

The Defendants make a number of arguments in their *Motion to Alter, Amend or Vacate* that the Court will attempt to address in order. The main arguments proceed as follows:

1. The Court incorrectly identified the Defendants in its December 23, 2015 *Opinion and Order;*
2. The Court's analysis permitting and computing gross losses is without precedent and is based on inadmissible evidence and otherwise insufficient evidence;
3. The Court's finding that the Defendants were not "winners" under Chapter 372 requires entry of judgment in their favor;
4. The damages award was excessive, included periods of time outside the applicable statute of limitations, and violated KRS 411.186;
5. The enforcement of Chapter 372 in this case violates the Due Process Clauses of the U.S. and Kentucky Constitutions;
6. The Commonwealth does not have constitutional standing to pursue these claims; and
7. The post-judgment interest rate on statutory damages should be reduced to the prevailing market rates, and post-judgment interest should not be awarded on the trebled damages.

The Defendants raise many of these arguments to preserve them for appeal. Several of the Defendants' arguments have previously been addressed by the Court or could have been raised at other times during the course

of this litigation. Indeed, the Plaintiff has generally objected to all of the Defendants' arguments for not being properly before the Court on a CR 59.05 *Motion to Alter, Amend or Vacate.* The Plaintiff cites several cases for the proposition that CR 59.05 may not be used to raise new arguments that should been presented before the entry of judgment. *See Gullion v. Gullion,* 163 S.W.3d 888, 893 (Ky. 2005); *Rogers v. Integrity Healthcare Servs.,* 358 S.W.3d 507, 512 (Ky. Ct. App. 2012); and *Hopkins v. Ratliff,* 957 S.W.2d 300, 301-02 (Ky. Ct. App. 1997). Still, the Court has elected to address each argument on the merits, save for the Defendants' argument concerning the Plaintiff's standing to bring this suit.

A. The Court Amends its Previous Order for the Limited Purpose of Properly Identifying the Judgment Debtors.

The Defendants first argument consists of several "housekeeping" matters. First, they argue that the Court's December 23, 2015 *Opinion and Order* must be amended to identify the judgment debtors by their correct corporate names. In that *Opinion and Order,* the Court identified one of the Defendants as "Amaya Holdings Limited." The Defendants argue that the correct name of that Defendant is "Amaya Group Holdings (IOM) Ltd. f/k/a The Oldford Group Ltd." The Plaintiff concedes the point, acknowledging that, in this regard, the Court's *Order* contained a "minor typo." Thus, the Court finds that its *Opinion and Order* of December 23 contained an error and corrects the record to reflect that the correct name of one of the judgment debtors is "Amaya Group Holdings (IOM) Ltd. f/k/a The Oldford Group Ltd." The Court also clarifies the record to show that Rational Entertainment Enterprises Limited ("REEL") is also a

judgment debtor along with the aforementioned Amaya Group Holdings (IOM) Ltd. (hereinafter, "Amaya"). Thus, the Court hereby **GRANTS** the Defendants' *Motion* to **AMEND** its December 23, 2015 *Opinion and Order* to properly identify the judgment debtors.

During oral argument and their January 28, 2016 *Notice of Filing,* the Defendants requested that the Court clarify its judgment against Amaya Group Holdings (IOM) Ltd. to find that its judgment against Amaya is a default judgment entered as a discovery sanction, not a judgment on the merits. In the Court's *Opinion and Order* of December 23, 2016, the Court found that the Defendants REEL and Amaya were liable under *Triplett v. Seelbach,* 14 S.W. 948, 949 (Ky. 1890) as "winners" because they received a per cent of the winnings from the actual players. This "per cent of the winnings" is also known as a "rake." The Defendants argue that The Oldford Group Ltd. n/k/a Amaya Group Holdings (IOM) Ltd. did not charge a rake, and as a result, it should not found liable on the merits but only on the entry of default judgment. At oral argument, the Plaintiff disagreed arguing that Oldford admitted in its Answers to taking a rake. The Defendants dispute this claim, citing to Oldford's Answers to the Plaintiffs Request for Admissions in which Oldford admitted that PokerStars charged a "rake," but that Oldford as PokerStars' parent company never charged a rake.

To argue that Oldford itself, as a parent company of PokerStars, did not charge a rake is to exalt form over substance. The *Triplett* Court was not concerned with "rakes" and who charged them; rather, it was concerned with the individuals or entities who received "a per cent of the winnings." *Id.* at 949. Parent companies profit from

the activities of their subsidiaries and holdings. To that end, the Defendant Amaya f/k/a Oldford cannot deny that it received "a per cent of the winnings" from the Kentucky players, regardless of whether it or its subsidiary, PokerStars, actually "charged" the "rake." Thus, the Defendant Amaya Group Holdings (IOM) Ltd. f/k/a The Oldford Group Ltd. is liable on the merits along with the Defendant REEL for the Kentucky players' losses, not simply by virtue of the Court's entry of the sanction of default judgment.

B. The Court's Award of $870 Million is Based on Admissible and Sufficient Evidence Provided by the Defendants.

The Defendants next argue that the Court's analysis permitting and computing "gross losses" (or, as the Plaintiff would characterize it, not allowing the Defendants an "offset") is without precedent, and is based on inadmissible and otherwise insufficient evidence. On review, the Court disagrees and finds that its reasoning was soundly based on the evidence in front of it, its reasonable interpretation of Chapter 372, the pertinent case law, and the legislative purpose to be served by Chapter 372.

1. *Caldwell* Does Not Require that Losses Be Counted at the End of Each Game Rather than at the End of Each Hand.

In support of their argument that the Court's decision to not require the Plaintiff to account for the Kentucky players' winnings is without precedent, the Defendants cite the very case upon which the Court based its decision – *Caldwell v. Caldwell*, 2 Bush 446 (Ky. 1867) – arguing that it does not allow for a calculation of losses on a hand-

by-hand basis. Rather, the Defendants argue that *Caldwell* only permits calculation of wins and losses after the termination of a game. The implication is that while many hands may make up a game, it is only after the completion of a game of hands at which point losses may be counted. However, the Defendants' argument misses the forest for the trees by placing too much emphasis on mere semantics. Chapter 372 only speaks of losses.[2] No section of Chapter 372 defines a loss as only occurring after the termination of a game rather than a hand. Nor does *Caldwell* stand for the proposition that the Court may only count losses after the termination of a game rather than a hand; rather, it stands for the proposition for which the Court cited it – that in a creditor's action to recover losses under Chapter 372, the creditor need not account for the loser's winnings. *Caldwell,* 2 Bush at 451, 452.[3]

2. The Plaintiff is Not Required to Produce an Economics Damage Expert.

The Defendants next argue that the Plaintiffs calculations are "complex data queries" prohibited by Kentucky Rule of Evidence (KRE) 701 (c) as lay testimony on a technical matter.[4] Thus, in order to introduce

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[2] *See e.g.,* KRS 372.020 ("If any person loses to another at one (1) time, or within twenty-four (24) hours, five dollars ($5) or more. . . .").

[3] When read with *Elias* v. *Gill,* 18 S.W. 454 (Ky. 1892), it becomes clear that third party suits (those brought by creditors under KRS 372.020 and "any person" under KRS 372.040) need not account for the loser's winnings in suits to recover the loser's losses. *See Commonwealth v. Pocket Kings, Ltd.,* Franklin Circuit Court, Div. II, 10-CI-00505, *Opinion and Order,* pp. 5-20 (Dec. 23, 2015).

[4] KRE 701(c) provides "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are: . . . Not based on scientific,

evidence of their calculations, the Defendants argue that the Plaintiff needs to produce an economic damages expert and allow for appropriate discovery and disclosures regarding the expert's opinions. The Plaintiff argues that it does not need to produce an expert because its calculations are in fact straightforward and based on the Defendants' own gaming data. The Court agrees with the Plaintiff.

In support of its argument, the Plaintiff quotes from the Court's October 8, 2015 *Order* in which the Court ordered the Defendants to "produce the [gaming] data in a format that is *easily analyzed* by the Plaintiffs [sic]."[5] (Emphasis added). The Defendants produced the gaming data on 3,847 spreadsheet files, each of which contained approximately 64,000 rows representing each individual wager.[6] Each row contained the following information about each wager:

- A unique identifying number for the wager;
- The date and time of the wager;
- The amount (in cents) that the player won or lost on the wager;
- The rake (in cents) that PokerStars charged on the wager; and

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technical, or other specialized knowledge within the scope of Rule 702."

[5] *Commonwealth v. Pocket Kings, Ltd.*, Franklin Circuit Court, Div. II, 10-CI-00505, *Order* (Oct. 8, 2015). The Court ordered the Defendants to produce the gaming data by October 21, 2015.

[6] The Defendants submitted the gaming data to the Plaintiff on the afternoon of October 16, 2015. The Plaintiff filed the gaming data under seal with the Court on a zip drive attached as Exhibit A to its October 21, 2015 *Supplemental Memorandum in Support of the Commonwealth's Motion for Summary Judgment as to Damages.*

- Whether the player was registered in Kentucky at the time the wager was made.

The Plaintiff's calculations are anything but "complex," to use the Defendants' characterization. Indeed, all the Plaintiff did was to first strike the wagers that were outside the scope of the five-year statute of limitations and the recoverable losses under Chapter 372, and then add the remaining losses.[7] Using the search query feature available in Microsoft Access and Excel, the Plaintiff removed this information. The Plaintiff then added the remaining losses of five dollars or more lost at one time or within twenty-four hours by Kentucky players.

Search queries allowed the Plaintiff to process the data more efficiently than it could have done by hand. Without the benefit of the software, the Plaintiff would have had to manually process millions of wagers on spreadsheets, using a sharpie to cross out all of the extraneous wagers. Handwritten work would have been admissible under the Rules. However, the hand method would have been time-consuming, tedious, and error-prone. Using search queries, the process is – as the Plaintiff put it – easy, quick, and error-free.

It must not be forgotten that the Plaintiff is using the Defendants' own gaming data to arrive at its calculations.

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[7] The Defendants provided the Plaintiff with additional gaming data that was either outside the five-year statute of limitations or outside the scope of a recoverable loss under Chapter 372. Thus, the Plaintiff needed to cull the following wagers: (1) Wagers from players not registered in Kentucky; (2) Losses of less than five dollars at one time or within twenty-four hours; (3) Wagers from which the Defendants did not take a rake; and (4) Wagers that occurred prior to October 12, 2006.

This gaming data is unlike the data that the Plaintiff originally filed with the Court prior to the Defendants' production of the gaming data. Indeed, before the Defendants produced the gaming data, the Plaintiff was prepared to proceed on its *Motion for Summary Judgment on Damages* with figures generated by its expert relying on the data provided by former defendants to this case and other publically available sources.[8] Once trebled, this data showed losses exceeding $1.6 *billion.* Had the Plaintiff proceeded relying on its expert's figures, the Defendants would have been entitled to depose the Plaintiff's expert. However, the Plaintiff chose to rely instead on the Defendants' gaming data. If the Defendants would like to check the Plaintiff's math, the Defendants could use the very programs that they used to compile the information in the first place, remove the wagers for which recovery is not permitted under Chapter 372 as the Plaintiff explained to the Defendants (at their request),[9] and then simply add up the remaining losses.

[8] On August 13, 2015, the Plaintiff filed under seal its *Report by Commonwealth Economics* which found that Kentucky players lost a total of $535,951,020 from October 12, 2006 to April 15, 2011. Once trebled, the damage figure amounted to $1,607,853,060. The Plaintiff stipulated to withdraw the Commonwealth Economics report if the Defendants submitted the gaming data as ordered by the Court, which the Defendants did on October 16, 2015.

[9] In an October 12, 2015 letter from the Defendants' Counsel to Plaintiff's Counsel, the Defendants' Counsel wrote: "Finally, we request that you produce to us both the contents and the results of any SQL [Structured Query Language] scripts or queries you run on the 'gaming data' well in advance of any hearing at which you present those results to the Court. If you do not give fair notice of your calculations, and an opportunity for them to be tested by us in advance of a damages hearing [held on October 26, 2015], we will be unable to meaningfully participate in the hearing and will request a continuance." On October 20, 2015, six days before the damages

Surely the Defendants have privately done this. If there were any discrepancies in the Plaintiff's math, the Defendants should have brought this to the Court's attention. They have not done so.

In sum, since all the Plaintiff has done is to add up the Defendants' own data to arrive at its loss figures, the Defendants are not entitled to discover the Plaintiff's math for the very simple reason that they already have it. The Defendants could easily run their own calculations; indeed, this is within the competency of any practicing attorney or office staff, just as it is to use Microsoft Word, Outlook, or any other Microsoft Office program that is standard issue in virtually every office and school in the United States.

3. The Plaintiff has Laid a Proper Foundation for its Damage Total.

Second, the Defendants argue that the evidence of damages is a summary for which a proper foundation has not been laid pursuant to KRE 1006. The effect of not laying a proper foundation is to deny the Defendants an opportunity to cross-examine the creator of the summaries. The Plaintiff disagrees, arguing that it has complied with the notice and filing requirements of KRE 1006.

KRE 1006 provides as follows:

> The contents of voluminous writings, recordings, or photographs which cannot

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hearing, Counsel for the Plaintiff emailed their calculations to the Defendants. The email also references a letter sent earlier in the day from Plaintiff's Counsel to the Defendants' Counsel in which Plaintiff's Counsel described issues with the gaming data such as "zero rake hands, losses of $4.99, etc."

> conveniently be examined in court may be presented in the form of a chart, summary, or calculation. A party intending to use such a summary must give timely written notice of his intention to use the summary, proof of which shall be filed with the Court. The originals, duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Here, the Plaintiff has clearly met the notice and filing requirements of KRE 1006 to use a summary. The Plaintiff gave the Defendants timely notice of its intention to use the spreadsheets in the Plaintiff's *Supplemental Memorandum in Support of Motion for Summary Judgment as to Damages* filed with the Court on October 21, 2015. Indeed, the Plaintiff delivered to the Defendants the data, the queries, and the resulting spreadsheets six days before the October 26, 2015 damages hearing, and all of the foregoing information was filed with the Court.

4. The Court's Construction of Chapter 372 Accords with KRS 446.080.

The Defendants argue that the Court intentionally and impermissibly interpreted Chapter 372 liberally in order to create a penalty in favor of the Plaintiff that does not appear in the plain language of the statute. The Defendants further argue that the punishment afforded in Chapter 372 is penal, and as such, the pertinent sections of Chapter 372 must be construed strictly. In support of their position, the Defendants cite the 1903 case of *Jacob v. Clark* in which the Court found that "[t]he action here allowed is in the nature of a penalty for the violation of the

law . . . . All gaming statutes are necessarily penal . . . . It is therefore to be strictly construed." *Jacob v. Clark,* 72 S.W. 1095, 1096 (Ky. Ct. App. 1903).

During oral argument, the Plaintiff objected, arguing that KRS 446.080 provides that "(1) All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature . . . (2) There shall be no difference in the construction of civil, penal and criminal statutes." KRS 446.080 became law in 1942, nearly forty years after *Jacob v. Clark.* Thus, to the extent that the Court of Appeals in *Jacob v. Clark* held that Chapter 372 must be read strictly, the Court finds that KRS 446.080 overrules that particular holding.

Furthermore, the Court has not expanded the meaning or enlarged the scope of Chapter 372. The Plaintiff has proven all of the essential elements for a claim brought under Chapter 372:

(1) The Commonwealth has standing under KRS 372.040 as "any Person";[10]

(2) The Defendants are "winners" because they took a rake, i.e., "a per cent of the winnings" *Triplett v. Seelbach,* 14 S.W. 948,949 (Ky. 1890);[11]

(3) The Defendants engaged in illegal gambling in violation of KRS 372.010; and

[10] *See Commonwealth v. Pocket Kings Ltd.,* Franklin Circuit Court, Div. II, No. 10-CI-00505, *Order* (Nov. 2, 2011); *Commonwealth v. Pocket Kings Ltd.,* Franklin Circuit Court, Div. II, No. 10-CI-00505, *Opinion and Order,* pp. 11-13 (Nov. 20, 2015).

[11] *See Commonwealth v. Pocket Kings Ltd.,* Franklin Circuit Court, Div. II, No. 10-CI-00505, *Opinion and Order,* pp. 15-17 (Dec. 23, 2015).

(4) The Plaintiff proved "losses" as defined by the statute with support from the case law.[12]

Nothing that the Court has decided exceeds the scope of Chapter 372 and the pertinent case law interpreting it.

Still, the Defendants argue that recent Kentucky case law requires the Court to strictly construe Chapter 372. The Defendants cite *Ky. Registry of Election Finance v. Blevins* for the proposition that "laws penal in nature are to be strictly construed." *Ky. Registry of Election Finance v. Blevins,* 57 S.W.3d 289 The Kentucky Supreme Court cited this statement to Justice Stephens' concurring opinion in *Caudill v. Judicial Ethics Committee,* 986 S.W.2d 435, 438 (1999). In his concurring opinion in *Caudill,* Justice Stephens wrote "Since anti-nepotism laws are penal in character, they are to be strictly construed." *Id.* at 438. For authority for this proposition, Justice Stephens cited an opinion from the District Court of Appeal of Florida, *Baillie v. Town of Medley,* 262 So.2d 693, 695 (Fla. App. Dist. 3d. 1972) ("First that [anti-nepotism] statute has been viewed as penal in character and therefore to be strictly construed. In *State ex rel Robinson v. Keefe,* [citation omitted] the court held the predecessor Florida antinepotism [sic] law as penal in character, and therefore further held it to be strictly construed.") Since the precedent cited by the Defendants in the case at bar is rooted in an interpretation of Florida law that conflicts with existing Kentucky statutory law, the Defendants argument is not well grounded.

Finally, the Defendants cite *Woods v. Commonwealth,*

[12] *See Commonwealth v. Pocket Kings Ltd.,* Franklin Circuit Court, Div. II, No. 10-CI-00505, *Opinion and Order,* pp. 5-20 (Dec. 23, 2015).

793 S.W.2d 809, 814 (Ky. 1990) for the proposition that "penal statutes are not to be extended by construction, but must be limited to cases clearly within the language used." *Woods,* at 814. However, the case at bar is clearly within the ambit of Chapter 372. The Plaintiff has standing to sue on behalf of the Kentucky players because the Commonwealth is a person; the Kentucky players have suffered losses of five dollars or more at one time or within twenty-four hours; the Kentucky players' losses occurred playing illegal games online; and finally the Defendants made their games available in Kentucky in violation of its laws. In sum, these Defendants are the precise target of Chapter 372. They operate the modem version of the "faro-banks" and pool balls of the Nineteenth Century with which the framers of Chapter 372 were well-acquainted. The only difference is that the operations of these Defendants' exist exclusively online and their offices are located in far-flung offshore tax havens. However, their online presence and off-shore base does not make them any less of a target of Chapter 372. Chapter 372 targets illegal gambling; for five years, these Defendants peddled illegal gambling in Kentucky. There is nothing expansive about this Court's interpretation of Chapter 372 in that regard.

C. *The Defendants are Winners Under Chapter 372 Because They Took a Percent of the Winnings.*

The Defendants next argue that the Court should enter judgment in their favor because the Court found that they were not "winners" under the statute. They argue that Chapter 372 only allows the "loser" to recover from the "winner." Indeed, both KRS 372.020 and KRS 372.040 target the "winner" of the money lost by the "loser." The Court found the Defendants liable for the full

extent of the Kentucky players' losses because they shared in the winnings with the actual winners, and pursuant to *Triplett,* the Defendants were jointly liable with the winners for the entire amount of the losses.[13] The Defendants make three points in support of their argument that they are not liable as "winners" under *Triplett:* (1) The section upon which the *Triplett* Court based its decision has since been repealed; (2) Even if *Triplett* were still good law, that case and the since-repealed statute upon which it relied only permitted first-party claims by gambling losers themselves, and did not permit trebling of damages; and (3) The principles of joint and several liability permitting recovery of the entire amount of the loss from the operator have also since been rejected.

1. *Triplett* is Still Good Law for the Proposition for which it was Cited by this Court.

The Court in Triplett was construing the meaning of the definition of "winner" as used in KRS 372.020, not the former "ninth section" which has since been repealed.[14] The selection below is taken from the *Triplett* opinion that immediately precedes the section quoted and discussed

[13] *See Commonwealth v. Pocket Kings Ltd.,* Franklin Circuit Court, Div. II, No. 10-CI-00505, *Opinion and Order,* pp. 15-17 (Dec. 23, 2015).

[14] The since-repealed Section 9 reads (as quoted by the *Triplett* Court), as follows: "Whoever shall invite, persuade, or otherwise induce another to visit any place where gaming is carried on, shall be fined from fifty to five hundred dollars; and moreover, be responsible to such other and his creditors for whatever he may lose in gaming at such place." Under a previous organization of the Kentucky Statutes, Chapter 372 had a different assignment. Under that assignment, the section known today as KRS 372.020 was the "second section," for example.

by the Court on page sixteen (16) of its December 23, 2015 *Opinion and Order:*

> So the question is, does the taking of this per cent. [sic] make the appellees jointly interested in the winnings as wrongdoers, so as to make them winners of the appellant's money in the sense of the statutes, supra?[15] We do not understand that the winner, in the sense of said statutes, must be one of the players with cards in his hands; but if he is to receive a per cent. [sic] of the winnings by the actual player, he is, in the sense of the statute, a winner.

Triplett v. Seelbach, 14 S.W. 948, 949 (Ky. 1890). [Footnote added]. Clearly, the *Triplett* Court was construing the meaning of "winner" which appears in both KRS 372.020 and KRS 372.040 and is not otherwise defined in the Chapter. The Court thoroughly reviewed the *Triplett* Court's reasoning in its previous December 23 *Opinion and Order.*[16]

The Defendants argue that the statute upon which the *Triplett* Court permitted recovery has since been repealed. However, the Court finds that the *Triplett* Court clearly quoted the "ninth section" at the beginning of the analysis of a legal issue entirely separate from the preceding legal issue concerning the definition of a winner. Thus, the *Triplett* Court's interpretation of the

[15] The statute referenced by the supra is the statute now found in KRS 372.020.

[16] *See Commonwealth v. Pocket Kings Ltd.,* Franklin Circuit Court, Div. II, No. 10-CI-00505, *Opinion and Order,* pp. 15-17 (Dec. 23, 2015).

ninth section did not inform its analysis of its definition of a "winner."

2. *Triplett* Applies Equally to Third Party Claims.

The Defendants also argue that even if *Triplett* were still good law (which, they maintain that it is not), its holding is nevertheless inapplicable in this case because the ninth section only permitted "first party" claims, or, in other words, claims brought by the loser, and not third party claims such as those brought by "any person" as allowed for in KRS 372.040. The Court disagrees with this reasoning for the reason stated above: The proposition for which this Court cited *Triplett* in its December 23, 2015 *Opinion and Order* is not based on the *Triplett* Court's interpretation of the former ninth section; rather, the proposition for which this Court cited *Triplett* is based on the *Triplett* Court's reasonable definition of "winner" found in both KRS 372.020 and KRS 372.040. Since this Court cited the *Triplett* Court's holding interpreting the definition of "winner," a term that appears in both KRS 372.020 and KRS 372.040, the *Triplett* Court's holding applies equally to both first party and third party claims.

3. The Principles of Joint and Several Liability Are Not at Issue in this Case.

The Defendants next argue that the *Triplett* Court's interpretation of "winner" in Chapter 372 amounts to a finding of joint and several liability which has been abolished in Kentucky. The Defendants cite *Hilen v. Hays,* 673 S.W.2d 713, 718 (Ky. 1984) for the proposition that Kentucky courts have soundly rejected the concept that one tortfeasor should be responsible for the entire amount of losses. Rather, Kentucky law, as codified in KRS 411.182 now requires the apportionment of damages

based on the relative fault of each defendant.

The Court disagrees with this argument for two reasons. First, the case at bar does not sound in tort; rather, the present action is based on the violation of a statute that prohibits unlawful gambling *contracts.* KRS 372.010.[17] Thus, to the extent that *Triplett* relies on a theory of joint and several liability, the *Triplett* Court's holding interpreting "winner" is not abrogated by KRS 411.182 or *Hilen v. Hays,* 673 S.W.2d 713, 718 (Ky. 1984). Second, as the Plaintiff stated during oral argument, KRS 411.182(1) only applies in an action "involving fault of more than one (1) party to the action." Here, even though the Plaintiff has sued multiple parties, all of the Defendants share the same fault for the same violation. This is not a tort case in which the separate actions (or inaction) of two defendants contributes to a plaintiff's harm.

Proving that the Defendants are "winners" under Chapter 372 is an essential element in the Plaintiff's case. Indeed, two weeks after the Plaintiff's filed their *Motion to Alter, Amend, or Vacate,* they filed a *Notice of Supplemental Authority* to which the Defendants attached a copy of *Sonnenberg v. Amaya,* a recent opinion from the United States Court of Appeals for the Seventh Circuit written by Judge Posner. In *Sonnenberg v.*

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[17] The statute reads as follows: "Every contract, conveyance, transfer or assurance for the consideration, in whole or in part, of money property or other thing won, lost or bet in any game, sport, pastime or wager, or for the consideration of money, property or other thing lent or advanced for the purpose of gaming, or lent or advanced at the time of any betting, gaming, or wagering to a person then actually engaged in betting, gaming, or wagering, is void."

Amaya, Judge Posner interpreted two Illinois statutes[18] that track KRS 372.020 and KRS 372.040. In the opinion, Judge Posner wrote,

> [The plaintiffs'] problem . . . is that the defendants are not the winners of any game that any of the plaintiffs (or their sons) played. The defendants are the gambling sites, not the persons who won from [the plaintiffs' sons] in a game hosted by the site . . . . A winner would be a person whom a player had played with and lost to. It's true that the sites rake off some of the money in the pot, and it is this that causes the plaintiffs to call the sites "winners." But charging a fee for engaging in gambling is not the same as winning a gamble . . . . The host takes a share of the pot to defray the expense of maintaining the gambling site but has no stake in the outcome of the games played on the site.

The Defendants in the case at bar urge the Court to follow the Seventh Circuit's lead. The Court declines to do so. First, a ruling from the Seventh Circuit is not binding authority on this Court. Second, while the

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[18] The statutes read as follows: "Any person who by gambling shall lose to any other person, any sum of money or thing of value, amounting to the sum of $50 or more and shall pay or deliver the same or any part thereof, may sue for and recover the money or other thing of value, so lost and paid or delivered, in a civil action against the winner . . . ." 720 ILCS 5/28-8(a). "If within 6 months, such person who under the terms of Subsection 28-8(a) is entitled to initiate action to recover his losses does not in fact pursue his remedy, any person may initiate a civil action against the winner." 720 ILCS 5/28-8(b).

statutes of Kentucky and Illinois may appear to be similar, it appears that Kentucky and Illinois have developed different case law interpreting those same statutes. In fact, the precise difference in case law between Kentucky and Illinois was the subject of the preceding discussion: *Triplett v. Seelbach,* in which the Court held that "winner" also includes the person or entity that takes a percent of the winnings, in other words, a rake. *Triplett v. Seelbach,* 14 S. W. 948, 949 (Ky. 1890). A case similar to *Triplett* may not exist in Illinois; nevertheless, it is within the legal tradition of this Commonwealth and the Court is bound by it.

D. The Damages Awarded by The Court Are Not Excessive, Are Within the Statute of Limitations, and Do Not Violate KRS 411.186.

The Defendants next make three arguments attacking the damage award. First, they argue that the damages are excessive because they exceed the Defendants' rake by $850 million. Second, the Defendants argue that the treble damages cannot be awarded absent a showing of oppression or fraud. And finally, the Defendants argue that some of the losses relied on by the Court in its damage assessment exceed the statute of limitations for these Defendants.

1. The Defendants' Rake is Not the Extent of the Loss Recoverable by the Plaintiff.

The Defendants first argue that the damage award is excessive because it grossly exceeds the amount of the rake (which they have stated is "in the range of $20 million"), or the percent of winnings that the Defendants actually received. However, as the Court has found before, the Defendants' rake is not the extent of the loss

measured by Chapter 372; rather, the loss described in Chapter 372 is measured by the losses of the Kentucky players, so long as each loss is greater than five dollars, lost at either one time or within twenty-four hours.[19]

2. The Damages Authorized Under Chapter 372 Are Not Purely Punitive and Thus Do Not Require a Showing of Fraud and Oppression.

Second, the Defendants argue that the Court cannot award punitive damages without first showing "oppression" and "fraud" as called for in KRS 411.184 and making the requisite findings of fact called for in KRS 411.186(2). However, the Court is unconvinced that the damages are purely punitive and thus subject to the requirements of Chapter 411. *See Salonen v. Farley,* 82 F.Supp. 25, 28 (E.D. Ky. Jan. 18, 1949). Instead, the treble damages authorized by KRS 372.040 are an automatic function of the statute to be awarded to "any person." The reasons for awarding treble damages are mixed and varied, and were thoroughly discussed by Judge Swinford in *Salonen v. Farley.*[20]

3. The Statute of Limitations Requires that the

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[19] *See Commonwealth v. Pocket Kings Ltd.,* Franklin Circuit Court, Div. II, No. 10-CI-00505, *Opinion and Order,* pp. 7, 8 (Dec. 23, 2015).

[20] In their *Motion,* the Defendants imply that the Court has based its ruling in part on an alleged statement made by an out-of-state attorney representing an internet gambling domain in *Commonwealth v. 140 Internet Domain Names,* Franklin Circuit Court, Div. II, No. 08-CI-1409. As Plaintiff's counsel recalled for the Court, the out-of-state attorney told the Court "everyone knows this is illegal, but there is nothing you can do about it." The Defendants argue that the record does not show that any such statement was ever made. To be clear, this Court has not based any of its decisions in this case on the alleged statement of the out-of-state attorney.

Plaintiff Look Back Five Years from the Time the Motion to Amend the Complaint is Filed, not when the Complaint is Served.

Finally, the Defendants argue that the damages period utilized by the Court includes losses from more than five years before the summonses were either served upon, or good faith efforts at service were made on the Defendants REEL and The Oldford Group Ltd n/k/a Amaya Group Holdings (IOM) Ltd. The Defendants argue that the damage assessment should only "look back" five years from the time at which each Defendant was served with summons pursuant to CRs 3 and 4.01(1).[21] REEL was not served with summons until November 11, 2012 and The Oldford Group Ltd. was not served until March 19, 2014. Thus, the Defendants maintain that damages should not be assessed for any time earlier than five years prior to the date on which the Defendants were served, that is, November 11, 2007 for REEL and March 19, 2009 for the Oldford Group Ltd n/k/a Amaya Group Holdings (IOM) Ltd. The Court and the Parties have long since used the date of October 12, 2006 as the starting point at which the Plaintiff can recover damages.

The Plaintiff argues that the Defendants have mistakenly applied the incorrect rule of civil procedure. Rather than following CRs 3 or 4.01 which describes when an action is commenced, the correct rule for amending a complaint once an action has already commenced is CR

[21] CR 3 provides, "A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith." CR 4.01(1) provides, "Upon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons . . . ."

15.01, which provides in pertinent part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise, a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

In the case at bar, the Plaintiff served PokerStars' attorney, Jeff Ifrah, with its *Motion for Leave to Amend its Complaint* with the Plaintiff's *Third Amended Complaint* attached on October 12, 2011. The Court also finds that the Plaintiff made good faith efforts at attempting to find the Defendants' service agents. Indeed, the various agents who receive service for these Defendants are not easy to locate. Their registered addresses are all outside of the United States. Moreover, their service agents are not in obvious, easy-to-find locations. Rather, their offices are found in discreet territories and dependencies that also double as offshore tax havens such as Gibraltar, Malta, Aruba, the Isle of Man, and the British Virgin Islands. The agents for both the Defendants REEL and The Oldford Group Ltd. maintain their offices in the Isle of Man, a small self-governing dependency of the United Kingdom located on an island in the Irish Sea between Great Britain and Ireland.

The Plaintiff cites *Hill v. State Farm Ins. Co.,* 390

S.W.3d 153 (Ky. Ct. App. 2012) to support its proposition that the statute of limitations looks back from the time the motion to amend the complaint is filed. In *Hill*, an injured driver sued the tortfeasor; however, when the driver's medical expenses exceeded the tortfeasor's insurance policy, the driver sought to recover from her own insurance company through its underinsured motorist policy. *Id.* at 155. When the driver and her insurer could not agree, she moved to amend her complaint to add the insurer four days before the statute of limitations period ended. *Id.* Her complaint was not filed until after the statute of limitations period had run. *Id.* The Court of Appeals held that her action "commenced" as to her insurer when she moved for leave to file her complaint, not when the court granted her motion. *Id.* at 156. The Court also found that "the linchpin in determining when a party would be prejudiced if required to defend a case on its merits is notice, which [the insurer] received before the period expired. The record indicates that counsel for [the insurer] was served by mail with [the driver's] motion for leave to amend her complaint . . . ." *Id.*

Similarly, in the case at bar, the Plaintiff served its *Motion for Leave to Amend Complaint* on Counsel for The Oldford Group Ltd. and REEL on October 12, 2011. Thus, the "look-back" period is five years from that date until April 15, 2011. The Court also finds that the Plaintiff worked as diligently as it could to find the addresses for the service agents for all of the defendants that it added to its Third Amended Complaint. While the Plaintiff could easily find the illegal gambling websites, it could not as easily discover the owners of the websites, much less the location of their service agents. After all, a business chooses to locate its offices in the Isle of Man or Gibraltar

precisely so as to *not be easily found* by the authorities of the more visible, industrialized countries in which they often make their profits.

E. The Commonwealth's Enforcement of Chapter 372 Does Not Violate the Due Process Clauses of the Kentucky and U.S. Constitutions.

The Defendants next argue that the Plaintiff's enforcement of Chapter 372 violates the Due Process Clauses of the Kentucky and the U.S. Constitutions because the Defendants had no notice that the state purported to have a right to impose aggregated civil penalties upon them. Essentially, the Defendants argue that they did not know they would be liable for losses under Chapter 372. This cannot be.

The Defendants primarily rely on *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) to support their due process violation claim without discussing the facts of *BMW of N. Am.* Instead, the Defendants selectively quote various passages from the case without providing the proper context in which the decision was made. But the facts of *BMW of N. Am.* tell a tale very different from the case at bar. In *BMW of N. Am.*, the plaintiff sued BMW for $4,000 in actual damages because BMW sold him a new car that had been repainted pursuant to BMW's damage policy. *Id.* at 564. The plaintiff was not told that the car had been repainted pursuant to BMW's nondisclosure policy. *Id.* The plaintiff also sued BMW for $500,000 for punitive damages in the complaint; however, during the pendency of the litigation, the plaintiff sought punitive damages of $4,000,000 in order to deter deceptive trade practices. *Id.* at 564, 565. The punitive damage figure of $4,000,000 represented the number of refurbished vehicles sold by BMW in the United States

for the preceding seven years (approximately 1,000) multiplied by the loss of value for each car for the repainting job ($4,000). The jury agreed with the plaintiff and awarded $4,000,000 in punitive damages. *Id.* at 564. The jury's verdict was affirmed at the Alabama Supreme Court, however, it reduced the damage award to $2,000,000. *Id.* at 567.

The U.S. Supreme Court reviewed the case in order to "illuminate the character of the standard that will identify unconstitutionally excessive awards." *Id.* at 568. The Court began its review by acknowledging that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a state may impose." *Id.* at 575. The Court then listed three "guideposts" that it would use to determine whether adequate notice of the severity of the sanction existed: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive damage award to the actual harm inflicted on the plaintiff; and (3) the sanctions for similar misconduct. *Id.*

The Supreme Court ultimately determined that BMW's conduct was not "sufficiently egregious to justify a punitive sanction that is tantamount to a severe criminal penalty." *Id.* at 585. First, the Court found that BMW's conduct was not so reprehensible to justify the damage award because its conduct was not illegal, nor did it make any deliberate false statements, conceal evidence, or engage in any other affirmative misconduct. *Id.* 579. Second, the ratio of the punitive damage award to the actual harm was an astonishing 500 to 1. *Id.* at 583. Finally, the Court found that penalties for similar types of

alleged misconduct would be $2,000, or one thousand times less than the damage award assessed by the Alabama Supreme Court. *Id.* 584.

The alleged misconduct at issue in *BMW of N Am.* pales in comparison to the actual misconduct at issue in the case at bar. In fact, the Supreme Court distinguished *BMW of N. Am.* from a hypothetical case similar to the case now before this Court. It wrote,

> Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.

Id. at 576, 577. (Citations omitted). BMW's policy of nondisclosure of minor repainting of new cars had not violated any law in Alabama or any other jurisdiction in the United States. *Id.* at 577. By contrast, the Defendants' entire enterprise in Kentucky was illegal, and they knew it. Indeed, KRS 372.010 voids "every contract, conveyance, transfer or assurance for the consideration, in whole or in part, of money, property or other thing won, lost or bet in any game . . . to a person then actually engaged in betting . . . ." The Commonwealth has only authorized gambling in the limited circumstances described in Chapters 154A (state lottery), 230 (horse racing), and 238 (charitable gaming) of the Kentucky Revised Statutes. Internet gambling is

not authorized by any of the Revised Statutes. The Defendants are presumed to know the laws of Kentucky. They cannot claim ignorance of law. *See Walker v. Commonwealth,* 127 S.W.3d 596, 607 (Ky. 2004). Where BMW had not violated any law or engaged in any other type of affirmative misconduct, the Defendants here facilitated hundreds of millions of illegal gambling transactions for approximately five years resulting in the loss of$290 million by Kentucky players. The Defendants' systematic and deliberate violation of Kentucky's law is precisely the type of reprehensible conduct that justifies the damages awarded by this Court.

The Defendants in the case at bar had plenty of notice that they could be liable for a significant amount of money. This notice could be found in Chapter 372 and the case law developed by the Courts of Kentucky interpreting it. This Court has done nothing more than read the law. *See Marbury v. Madison,* 1 Cranch 137, 178 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."). As the Court wrote previously in its December 23 *Opinion and Order,* the Defendants could have obtained local counsel prior to reaching into Kentucky to understand the extent of the liability they would be exposing themselves to by operating in Kentucky. Moreover, the Defendants are not entitled to notice of the legal strategy to be used against them should they choose to violate the law. For instance, it is entirely possible that had the Commonwealth not sued the Defendants, "any person" could have sued on behalf of one or all of the Kentucky players. The Defendants are not being exposed to any greater liability by virtue of

being sued by the Commonwealth than they would be had any other private individual brought suit on behalf of all of the Kentucky players.

F. The Commonwealth Has Standing to Pursue This Claim.

The Defendants continue to experiment with new arguments challenging the Plaintiff's standing to bring this claim. This time the Defendants assert that the Commonwealth does not have Article III Constitutional standing. However, the Court is not inclined to revisit this matter since it is not properly before the Court on a CR 59.05 Motion. A CR 59.05 *Motion* is not the proper vehicle with which to raise new arguments on issues that have already been litigated, especially when those new arguments do not contain newly discovered evidence, address a manifest error of law or fact, or assert misconduct on the part of opposing counsel. *Gullion v. Gullion,* 163 S. W.3d 888, 893 (Ky. 2005) ("A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of judgment."); *see also Rogers v. Integrity Healthcare Servs.,* 358 S.W.3d 507, 512 (Ky. Ct. App. 2012). The Court has already ruled on the issue of the Plaintiff's standing in at least two previous *Opinions,* the most recent coming on November 20, 2015.[22] At that time, the Defendants' current Counsel had entered an appearance and raised the issue of the Plaintiffs standing in its *Motion for Reconsideration* filed on October 22, 2015.

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[22] The other *Opinion and Order* was *Commonwealth v. Pocket Kings Ltd.,* Franklin Circuit Court, Div. II, No. 10-CI-00505, *Order* (Nov. 2, 2011);

G. The Court Declines to Reduce the Interest Rate on the Judgment.

The Court declines the Defendants' invitation to reduce the twelve percent (12%) rate on the judgment to the federal court rate of 0.11%. KRS 360.040 provides that "A judgment shall bear twelve percent (12%) interest compounded annually from its date." The Defendants cite *Young v. Young*, 479 S.W.2d 20, 22 (Ky. 1972) for the proposition that "If there are factors making it inequitable to require payment of interest it may be disallowed." The Defendants argue chiefly that twelve percent (12%) interest on an $870 million judgment would be "an unwarranted windfall and would impermissibly chill Defendants' constitutional right to appeal." The Court disagrees. Whether the post-judgment interest is a windfall does not make it inequitable. The Defendants offer no proof that paying the interest would harm their "constitutional right to appeal." Rather, the Court finds that the Defendant, Amaya Group Holdings (IOM) Ltd., is well-positioned to tender the post-judgment interest. Amaya is the world's largest online poker company with over 70% market share and annual revenue topping one billion dollars in 2014 alone.[23] Indeed, in August 2014, Amaya paid $4.9 billion to acquire REEL and The Oldford Group Ltd. from Mark and Isai Scheinberg. Thus, the Court refuses to reduce the post-judgment interest rate below twelve percent.

CONCLUSION

The Defendants cannot escape the fact that they broke the law. It is beyond dispute that the Defendants'

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[23] Amaya Investor Presentation http://www.amaya.com/pdfl20151118 _aya-presentation_for-website.pdf, p.8 (Nov. 18, 2015).

business model, at least as it applied to Kentucky, was predicated on violating Kentucky's laws. It is equally beyond dispute that the precise activity that the Defendants were engaged in was and remains illegal in Kentucky. Furthermore, it is also beyond dispute that the illegal activity engaged in by the Defendants was the precise activity that the framers of Chapter 372 intended to stop – namely, illegal gambling. The Defendants' "death by a thousand cuts" argument fails because they cannot escape the fundamental fact that they profited from the violation of Kentucky's laws. Archaic or not, Chapter 372 is the law of Kentucky. As the Court wrote in its December 23 *Opinion and Order,* if the Defendants would like to have avoided such as harsh result, they would have been better served to have made themselves aware of Kentucky's law prior to reaching into Kentucky via their online gaming sites. They either made no effort to acquaint themselves with Kentucky's law, or, knowing the law, simply ignored it in the pursuit of profit believing that it would never be enforced.

WHEREFORE the Defendants' *Motion to Alter, Amend, or Vacate and Request to Make Required Findings of Fact* is **DENIED** except insofar as the Court's December 23, 2015 *Opinion and Order* is **AMENDED** to correctly identify the judgment debtors as Amaya Group Holdings (IOM) Ltd. and Rational Entertainment Enterprises Ltd.

SO ORDERED, this 11th day of February, 2016. This *Order* is final and appealable and there is no just cause for delay.

Thomas D. Wingate
THOMAS D. WINGATE
Judge, Franklin Circuit Court

APPENDIX D

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 10-CI-00505

COMMONWEALTH OF KENTUCKY *ex rel*. J. Michael Brown, Secretary, JUSTICE AND PUBLIC SAFETY CABINET **PLAINTIFF**

vs.

POCKET KINGS, LTD, *et al*. **DEFENDANTS**

OPINION AND ORDER

This matter is before the Court on the following three Motions: (1) the Defendants' *Motion to Vacate Award of Damages Due to Calculation Error and/or a CR 30.02(6) Deposition as to Plaintiff's Calculation of Damages* filed November 23, 2015; (2) the Defendants' *Motion for Partial Summary Judgment on Plaintiff's Demand for Treble Damages* filed on November 12, 2015; (3) and the Plaintiff's *Motion for Summary Judgment on Damages* filed on August 14, 2015. Counsel was heard in open court during the Court's regularly scheduled Motion Hours on Monday, October 26, 2015, Monday, November 23, 2015, and with brief argument on Wednesday, December 16, 2013. The Court being sufficiently advised, hereby

DENIES the Defendants' *Motion to Vacate,* however, the Court clarifies its interpretation of KRS 372.020 as described in its previous *Opinion and Order* entered November 20, 2015. The Court also **DENIES** the Defendants' *Motion for Partial Summary Judgment* and **GRANTS** the Plaintiff's *Motion for Summary Judgment on Damages* and hereby **AWARDS** the Plaintiff treble damages for a total amount of $870,690,233.82, plus any and all continuing costs of collection of this judgment, plus interest at the judicial rate of twelve percent (12%) per annum until paid in full.

STATEMENT OF FACTS

The facts in this case are well known and have been adequately stated in the Court's two most recent *Opinions and Orders* entered on August 12, 2015 and November 20, 2015. However, for the sake of convenience, the Court will recite certain pertinent facts. The Defendants, Amaya Holdings Limited and Rational Entertainment Enterprises Limited (REEL), are the current owners and operators of the PokerStars website. From October 12, 2006 until April 15, 2011, more than 34,000 Kentucky players lost five dollars or more at one time or within twenty-four hours playing poker on the PokerStars website. The Kentucky players placed over 246,000,000 bets on the PokerStars website during that time. The former owners and operators of PokerStars operated their website in violation of the laws of Kentucky. The Commonwealth brought this suit in 2010 seeking to recover the losses incurred by Kentucky players on the PokerStars website. On August 12, 2015, the Court granted the Commonwealth's *Motion for Partial Summary Judgment* and entered Default Judgment against the Defendants for failure to participate in

discovery.

ANALYSIS

A. Standard of Review for a Motion to Reconsider an Interlocutory Order.

While the Defendants styled their *Motion* as a CR 59.05 “Motion to alter, amend or vacate a judgment,” the Court finds instead that the Defendants’ *Motion* is more properly reviewed under the CR 54.02(1) standard for “Judgment upon multiple claims or involving multiple parties.” CR 54.02(1) provides in pertinent part:

> In the absence of [a recital that the judgment is final], any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The Court’s November 20, 2015 *Opinion and Order* was not marked as final and appealable; rather, it was interlocutory, and thus subject to revision at any time prior to the entry of the Court’s final judgment. Thus, pursuant to CR 60.02, either party may move the Court to revise an interlocutory order as follows:

> On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment,

> order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect . . . . The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Here, the Defendants have moved the Court to reconsider its November 20 *Opinion and Order* due to an inadvertent factual error which fits squarely within the text of CR 60.02.

B. Summary Judgment Standard of Review.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. Summary judgment is appropriate when the court concludes that there is no genuine issue of material fact for which the law provides relief. *Id.* Summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. *Id.*

The moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and the burden then shifts to the opposing party to show affirmatively that there is a genuine issue of material fact for trial. *Jones v. Abner,* 335 S.W.2d 471, 475 (Ky. Ct. App. 2011). The movant should not succeed unless it has shown "with such clarity that there is no room left for

controversy." *Steelvest, Inc. v. Scansteel Service Ctr.,* 807 S.W.2d 476, 482 (Ky. 1991). "The inquiry should be whether, from the evidence on record, facts exist which would make it possible for the nonmoving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch v. Am. Publ'g Co. of Kentucky,* 3 S.W.3d 724, 730 (Ky. 1999). In reviewing Motions for Summary Judgment, the Court views all facts in the light most favorable to the non-moving party and resolves all doubts in its favor, and summary judgment should only be granted when the facts indicate that the non-moving party cannot produce evidence at trial that would render a favorable judgment. *Steelvest,* 807 S.W.2d at 480.

The Court recognizes that summary judgment is a device that should be used with caution and is not a substitute for trial. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Jones,* 335 S.W.3d at 480. Thus, this Court finds that summary judgment will be proper when it is shown with clarity from the evidence on record that the adverse party cannot prevail, as a matter of law, under any circumstances.

DISCUSSION

A. The Court Denies the Defendants' Motion to Vacate its November 20, 2015 Order Awarding Plaintiff $290,230,077.94 in Damages

The Plaintiff is entitled to recover the entire amount of the Kentucky players' losses of five dollars or more, whether at one time or within twenty-four hours, incurred

while playing games on the PokerStars website from October 12, 2006, until April 15, 2011. After careful reconsideration and review of the parties' arguments, the pertinent case law, and the legislative purpose of Chapter 372, the Court finds that the Plaintiff is not required to offset the Kentucky players' losses with their winnings because the Plaintiff is not a "loser" within the meaning of KRS 372.020, but rather is suing as "any other person" under KRS 372.040. Since the Plaintiff is not a "loser" under KRS 372.020, the statute must be read in this case to give the fullest effect possible to the most significant purpose to be served by the statute, that is, the deterrence of illegal gaming. Thus, the Court hereby **AWARDS** the Plaintiff $290,230,077.94.

On November 20, 2015, the Court entered an *Opinion and Order* granting the Plaintiff's *Motion for Summary Judgment on Damages* in the amount of $290,230,077.94. On November 23, 2015, the Defendants filed their *Motion to Vacate* arguing that the amount of the Court's award did not follow from its reasoning, which the Defendants argue reflected their characterization of the only recoverable losses as "net" losses. The Defendants attached to their *Motion* as Exhibit 1 a spreadsheet provided to them by the Plaintiff (but never entered into the record in the form that it now appears) which listed four possible calculations for the damage award (before trebling):

1. $290,230,077.94 representing the Kentucky players losses of $5 or more within 24 hours;
2. $248,689,108.56 representing the Kentucky players losses of $5 or more at one time;
3. $68,099,816.27 representing the Kentucky players'

net losses of $5 or more within 24 hours; and

4. $26,195,308.20 representing the *net* losses of all players who lost more than they won.[1]

According to the Court's reasoning in its November 20 *Opinion and Order*, the Defendants argue, the Court should have awarded the Plaintiff the figure representing the *net* losses of all players who lost more than they won, or $26,195,308.20.

At the time of the entry of the Court's *Opinion and Order*, the Court understood the damage award to be a relatively straightforward choice between the only two figures advanced by the Plaintiff: (1) $290,230,077.94, representing the "losses of $5 or more at one time," and (2) $248,689,108.56, representing "losses of $5 or more within 24 hours." And at that time, the Court did not understand the amount of $290,230,077.94 to be anything other than the "net" loss argued for by the Defendants.

The Court's reasoning did not reflect the complexity of the parties' arguments because the Court did not at the time fully understand all of the possible calculations to determine the Plaintiff's losses. This was due, in part, to the language used by the parties to frame the issue of how to calculate the Plaintiff's losses. The Defendants frame the issue as whether the Plaintiff may recover "net

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[1] When the Plaintiff filed its initial *Motion for Summary Judgment on Damages*, the Plaintiff alleged that the damage figure was $535,951,020.00, that, when trebled, amounted to $1,607,853,060.00. The figure was generated by its expert witness relying on data from a previous defendant, PartyGaming, and other sources in lieu of not having received any data from the Defendants. The Plaintiff stipulated to withdraw its expert figure if the Defendants disclosed the gaming data, which they did on October 16, 2015. The Plaintiff filed the data under seal with the Court on October 21, 2015.

losses," which requires the Plaintiff to account for his winnings, or whether the Plaintiff may recover "gross losses," which does not require the Plaintiff to account for his winnings. The Defendants' characterization of losses as either "gross" or "net" derives from its analysis of the 1892 case of *Elias v. Gill,* 18 S.W. 454 (Ky. 1892) which the Court discussed in its previous *Opinion and Order.*

However, the Plaintiff does not frame the issue of its recovery as a choice between "gross" and "net" losses. Rather, the Plaintiff frames the issue as whether the Defendants are entitled to an offset, which, the Plaintiff argues the Defendants are not entitled to. The Plaintiff finds support for its argument from its reading of KRS 372.020, *Elias v. Gill,* and, importantly, *Caldwell v. Caldwell,* 2 Bush 446 (Ky. 1867) a case that the Court did not address in its previous *Opinion and Order.*

The Court's analysis must begin with KRS 372.040, the statute under which the Plaintiff is suing; which gives standing to "any other person" to "sue for the money or thing lost" if neither the loser nor the loser's creditor sues for the "money or thing lost" within six months.

> If the loser or his creditor does not, within six (6) months after its payment or delivery to the winner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, any other person may sue the winner, and recover treble the value of the money or thing lost, if suit is brought within five (5) years from the delivery or payment.

To determine what is meant by the "money or thing lost," it is necessary to refer to KRS 372.020. There, the statute begins,

> If any person loses to another at one time, or within twenty-four (24) hours, five dollars ($5) or more, or anything of that value, and pays, transfers or delivers it, the loser or any of his creditors may recover it, or its value, from the winner, or any transferee of the winner. . . .

The Court understands KRS 372.020 to mean that a "loss" includes either or both of the following: (1) losses of five dollars or more at one time, and (2) losses of five dollars or more within twenty-four hours. To illustrate, if on Monday a gambler places a single wager and loses ten dollars on that wager, then that gambler has lost ten dollars "at one time." If on Tuesday, that same gambler places five separate wagers, and loses two dollars on each wager, then that gambler has lost a total of ten dollars "within twenty-four hours." Were the gambler inclined to sue under KRS 372.020 to recover his losses for both Monday and Tuesday, he would be entitled to recover a total of twenty dollars, which represents his total losses for both Monday and Tuesday. The Court understands "within twenty-four hours" to be the General Assembly's attempt to permit recovery to those individuals who have lost less than five dollars at one time, but whose total losses within twenty-four hours may nevertheless exceed five dollars. This hypothetical situation serves only to illustrate the Court's understanding of the words "loses to another at one (1) time, or within twenty-four (24) hours, five dollars ($5) or more."

The foregoing example is quite simple because there is no indication that the gambler ever won a single wager on either of the two days. However, this example in no way represents the complexity of the case now before the

Court, which includes tens of thousands of Kentucky players who won money on some wagers while losing money on other wagers. Indeed, KRS 372.020 is completely silent about "netting" or "offsetting" or any other language regarding how to account for the loser's winnings. A strict reading of the statute may even lead one to believe that the framers of Chapter 372 were not concerned with the loser's winnings, and instead intended to hold the "winner" strictly liable for any of the loser's losses notwithstanding any winnings that could offset his losses. Thus, a complete understanding of the losses recoverable under Chapter 372 cannot be had without referring to the case law.

While Chapter 372 has its roots in the waning years of the Eighteenth Century, its immediate predecessor is the Act of 1833. *See McKinney v. Pope's Adm'r,* 3 B. Mon. 93 (Ky. 1842). Prior to the Act of 1833, neither courts of law nor courts of equity heard cases relating to losses at gaming insofar as a statute did not confer upon the loser a right to sue. Such rights, until 1833, were conferred only in very limited circumstances. The reason for not giving losers a right to sue in all circumstances of unlawful gambling was explained best by the Court in *Downs v. Quarles:*

> It is a general principle, applicable both in chancery and at law, that when two unite in making an illegal and immoral contract, neither shall have remedy to enforce it, and if either fulfill, the other shall not recover back the money paid on such a base and illegal consideration, according to the maxim, *in pari delicto potior est conditio defendens.* It is indubitably politic and wise,

> to give the statutes against gaming that construction which would best suppress the mischief. But the distresses of a ruined gamester, standing as a monument of his folly, may do as much to restrain the practice, as the vexation of his co-partner in guilt could, arising from his being compelled to disgorge his ill-gotten wealth. The former, by his success, might be encouraged to renew his excesses, while the latter would not be certainly reformed, by being compelled to restore what he had gotten without consideration. Where two, therefore, in equal guilt, have agreed to game, as the plaintiff and defendant appear to have done, the chancellor or court of common law, ought not to interfere between them, further than to allow the possessor of the iniquitious gains, to retain what he holds, and to inflict the appropriate penalties for violating the laws of society, provided by the statutes themselves.

Downs v. Quarles, 1 Litt. Sel. Cas. 489, 491 (Ky. 1821). The *Downs* Court thought the best way to combat illegal gaming, at least in this instance, was to leave the players as it found them – the loser with his losses and the winner with his ill-gotten gains. The Court did not believe that the loser would be "reformed" if the Courts were to simply return to him what he had lost, nor did it believe that the "winner" would be anymore deterred by merely being required to disgorge his winnings.

While statutes existed prior to 1833 under which a loser could sue to recover his losses, the particular

circumstances under which a suit could be brought were limited and the "[r]ecovery was allowed . . . on the ground of a forfeiture than of any recognized right in the loser, or from any favor to him." *McKinney,* 3 B.Mon. at 97. However, the Act of 1833 changed this arrangement. The *McKinney* Court distinguished the Act of 1833 from the preexisting statutes in this way:

> In none of [the statutes prior to 1833] does the Legislature seem decidedly to interpose in behalf of the loser, as one who, from the circumstance of being the loser, is presumed to have been oppressed, defrauded, or imposed on. In none of them is the policy of restoring to the loser his money decidedly asserted as a means of suppressing the mischief of gambling; and in these respects we think the act of 1833 has introduced new principles which have at once changed the attitude and rights of the parties, and determined in favor of the propriety of restoring the lost money to the loser.

Id. The Act of 1833 changed the previous order by vesting the loser with a right in the property that he had lost in illegal gaming. The *McKinney* Court explained the purpose of the right in this way:

> And the individual right being thus established by law as a means of suppressing an enormous public mischief, and of restoring to an individual that of which he has been illegally, if not fraudulently deprived, we feel bound, in construing the statute so as best to suppress the mischief, to construe it so as best to

support the right which it has established as a means of suppressing the mischief.

Whatever then may have been the case prior to the statute of 1833, we are of opinion that since that act, the prohibition against gaming itself, and the laws for its suppression, are to be understood as having for their object in part, the protection of the person who may lose; that the act of 1833 especially intends to protect and relieve the loser, upon the presumption generally true, in fact, and which is established by the statute, that he has been defrauded, oppressed, or imposed on; that it intends to relieve him by enabling him to reclaim that of which he has been illegally deprived, and that it looks to this right of reclamation, to the assertion of which he may be impelled by much stronger motives than any which might operate on the public at large, as a powerful means of suppressing a mischief necessarily ruinous to many individuals, and deeply injurious to the body of society. The statute then, has not only removed all the objections to the granting of relief, by restoring the loser to his money, which are stated by this Court in the case of *Downs vs Quarles*, *&c.*, and by Lord Talbot in *Bosanquen vs Dashwood,* but has placed the claim of restitution on the ground of relief from fraud and oppression, and on the still broader ground that the public itself is to be relieved from a great evil through the

> relief to be granted to the party.

Id. at 99, 100. Here, the *McKinney* Court viewed the purpose of the Act of 1833 as twofold: first, to return to the loser what is rightfully his, and second, "[to suppress] a mischief necessarily ruinous to many individuals, and deeply injurious to the body of society." *Id.* at 99.

Following the Act of 1833, the question remained open, however, of how to count the losses? An answer came in two subsequent cases: *Caldwell v. Caldwell,* 2 Bush 446 (Ky. 1867) in 1867 and then *Elias v. Gill,* 18 S.W. 454 (Ky. 1892) in 1892. In *Caldwell,* the creditor of a card player, one J.F. Caldwell, sued Mr. Waddell and others [the defendants] to recover Caldwell's losses. *Caldwell v. Caldwell,* 2 Bush 446, 447 (Ky. 1867). The defendants argued that Caldwell actually "quit the winner" of the games, that is, they alleged that Caldwell had won more than he had lost. *Id.* at 451. Indeed, the Court found as follows:

> Caldwell played at games of chance for money in which [Waddell] was interested, and that Caldwell at some times lost and at other times won; but the amounts won and lost at each or either time [Waddell] could not state positively; yet [Waddell] states that upon the termination of the games Caldwell quit winner, and since then [Waddell] had never been winner of him—which evidently means, that the games were played by the parties at various times, with intervals between, and with varied success; and upon a general summing up the different amounts won and lost by each up to and including the result of the last

> playing, Caldwell had won more than he lost, and they undertook to plead their losings with Caldwell at one time as an off-set against their winnings at a different time from him.

Id. Thus, where Caldwell's creditor sought to recover Caldwell's losses, the defendants argued that they were entitled to recover *their* own losses suffered to Caldwell – after all, Caldwell had "quit the winner" of the games.

However, the Court found that the Defendants were not entitled to a setoff. It construed the statute that is now KRS 372.020 to confer unto the creditor a "contingent vested right" in the value of the property lost "as could not be divested by the loser winning at a game played at a subsequent and different time." Indeed, it wrote:

> The reasonable and legitimate construction of [KRS 372.020] is, that whenever five dollars or more in money or property shall have been won and lost at unlawful gaming within twenty-four hours, and the game or play at which the money or property was won and lost has terminated, and the parties shall have ceased to play, any creditor of the loser, who may choose to assert it in the mode prescribed, will have acquired such a contingent vested right to the sum or value of the property lost, in virtue of [KRS 372.020], as could not be divested by the loser winning at a game played at a subsequent and different time, from the winner at the previous game, any amount; and the money lost at a subsequent game cannot be set-off against what was

> previously won, in an action brought by a creditor of the one who first was loser. Whether it would be a good set-off in an action brought by the first loser himself, we need not decide in this case.

Id. at 451, 452. The *Caldwell* Court found that creditors were not required to offset Caldwell's losses with his winnings, and furthermore, that this case did not decide whether an offset would be appropriate if the loser himself had brought suit.

The issue of an offset for the loser was resolved twenty-five years later in the 1892 case of *Elias v. Gill.* There, the loser, Elias, brought suit against the owners of a pool hall (which included professional gamblers) with whom Elias had bet on horse races. *Elias v. Gill,* 18 S.W. 454, 455 (Ky. 1892). Elias alleged losses of $1,863 to the defendants. *Id.* The defendants counterclaimed, arguing that they had lost $1,800 to Elias and that they were entitled to recover their losses from Elias. *Id.* The Court began its analysis by rejecting the defendants counterclaim, finding that

> [a] person who sets up or is interested in setting up a farobank cannot, under the statute in question, recover back money lost to one betting against the bank; the rule being there applied, that 'a case within the letter but not within the spirit of a remedial statute is not embraced by it.' And looking to the evil of gaming, suppression of which was the object of the statute, it is obvious that persons who engage in gaming by means of selling pools on horse-races are no more within protection of that statute than

> those who set up or keep faro-banks; for in each case gaming is carried on, and made a business. Indeed, the contrivance known as "French pool," which is used to make wagers on horseraces, and not essentially different in its use or effects from the contrivance alleged to be used by the appellants, has been distinctly held gaming, in the meaning of the statute, and consequently not protected, but rather denounced, by it.

Id. at 455, 456 (citations omitted). The *Elias* Court maintained the same focus as the *Caldwell* Court on each parties' obligation under Chapter 372 as it related to the amount of the recoverable loss. In *Elias,* the Court found that the defendant poolroom operators were not entitled to offset their own losses because their counterclaim was not "embraced" by the "spirit of the remedial statute." The statute was meant in part to suppress the evil of gaming after all, and this could not be achieved (as the *Downs* Court had found seventy years earlier) if the winners or the operators of an illegal gambling establishment simply had to disgorge their winnings. After the Court completed its analysis of whether the defendants could recover their losses, it then discussed what the "loser" Elias was entitled to recover. The Court found that the loser could not recover his losses without first accounting for his winnings. Indeed, the Court wrote:

> But while it is true [the defendants] could not, by an original action, have recovered any part of the amount lost in their own pool-rooms to appellee, nor are entitled to judgment over on their counter-claim, still,

> whatever amount or amounts they lost to him on account of wagers between them on horse-races at the dates or within the period mentioned in the petition should be set off against, or deducted from, what he may be entitled to recover in this action; for certainly it was not the intention of the legislature to afford to a party voluntarily buying pools on horse-races, or betting at a faro-bank, the undue advantage of recovering back what he may have lost to the seller or dealer, without disgorging and accounting for what he won from him. The purpose of this statute was to afford to such party remedy to the extent of his actual loss, not to enable to recover back what he lost, while keeping and profiting by what he won from the defendants. It therefore seems to us clear that the criterion of the amount appellee is entitled to recover, if any at all, is the excess of what he lost to appellants above what he won from them during the period mentioned; and at the trial the burden should be on him to show the amount of his losses to appellants, subject to reduction or set-off by the amount he won from them.

Id. at 456. While the defendants could not assert a claim to recover their losses, the loser must account for what he has won from the defendants in order to avoid receiving a windfall. After all, not accounting for the loser's winnings would simply give the loser an incentive to use the law to eliminate the risk from an already illegal activity in order

to make a profit. Such a perversion of the law could not be tolerated.

At first blush, *Caldwell* and *Elias* appear to be in tension with one another because each Court extracts a separate calculation from the same words in KRS 372.020. Under *Caldwell,* the Court did not require the creditor to offset Caldwell's losses with his winnings, while the *Elias* Court did require the loser to offset his losses with his winnings. *Elias* did not overrule *Caldwell,* and neither case has since been overruled by any other case. Therefore, it must be that KRS 372.020 countenances two separate calculations of a loss. The calculation to be used in a particular case turns on the presence of the following three factors: (1) the identity of the parties, (2) the relationship of the parties to the illegal gaming, and (3) the purpose or purposes to be served by the statute. After careful consideration of the parties' arguments, the pertinent case law, and the legislative purpose to be served by Chapter 372, the Court finds that the Plaintiff's stature in this case is more akin to that of the creditor in *Caldwell* than it is to that of the loser in *Elias,* and thus, the Plaintiff is entitled to recover the Kentucky players' losses without accounting for any of the Kentucky players' winnings.

The identity of the parties and their relationship to the actual gambling at issue helps determine the calculation of the loss. In the case at bar, the parties include the Commonwealth of Kentucky for the Plaintiff and, for the Defendants, Amaya Holdings Limited and REEL, the owners and operators of the PokerStars website. None of the parties have actually bet on poker games on the PokerStars website themselves, and thus, neither party can be said to have actually "won" or "lost" money betting

on poker games. Rather, the loss at issue in this case was incurred by the Kentucky players in whose place the Commonwealth has brought suit pursuant to KRS 372.040 which gives "any other person" standing to sue for the money or thing lost. Nor can it be said that the Defendants "won" money from the Kentucky players, much less from the Commonwealth. Instead, the "winners" of the Kentucky players were other players, some of whom may have been in Kentucky, with many others in locations across the country and even around the world. The Defendants, however, are nevertheless liable under Chapter 372 for the extent of the Kentucky players' losses because they took a rake, that is, a certain percentage of the money at stake in each poker game played by the Kentucky players. As the Court in *Triplett v. Seelbach* found, the "winner" provided for in Chapter 372 does not need to "be one of the players with cards in his hands; but if he is to receive a percent of the winnings by the actual player, he is, in the sense of the statute, a winner." *Triplett v. Seelbach,* 14 S.W. 948, 949 (Ky. 1890). The *Triplett* Court continued, stating

> [the defendant] is jointly interested with the winner in the loser's losses, which makes him responsible for them as a wrong-doer. It is not the extent, but the community, of interest that makes wrong-doers responsible for the whole wrong. If each is to receive a certain amount of the result of the unlawful enterprise, this gives them such a community of interest as to render each responsible for the whole amount received.

Id. at 949. The Defendants in the case at bar need not have

won a single dollar from the Kentucky players playing poker games on their website in order to be liable under Chapter 372 as "winners." Rather, it is the Defendants' "community of interest" with the actual winners of the Kentucky players that makes them jointly liable with the winners for the entire amount of the Kentucky players' losses.

Just as the Defendants have not "won" money playing against the Kentucky players in poker games on its website, the Plaintiff has not "lost" any money playing in those same games. Where a plaintiff other than the loser sues under Chapter 372, whether it is the creditor or "any other person," that plaintiff need not account for the loser's winnings. Only where the loser himself sues under KRS 372.020 is the plaintiff required to account for his winnings. Were the loser suing under KRS 372.020 *not* required to account for his winnings, the loser would be able to use the statute and the courts to eliminate the risk from gambling, receive a windfall, and thereby never have an incentive to quit gambling in unlawful establishments or on illegal websites. Indeed, were the loser able to recover his losses without accounting for his winnings, the statute may have the effect of promoting or even encouraging illegal gambling, thereby subverting one of its intended purposes. Such a misuse of Chapter 372 is not a concern when either the creditor or "any other person" sues to recover the losses.

To read and apply Chapter 372 then is to weigh competing policies. On one hand, the General Assembly intended Chapter 372 to suppress the evil of illegal gaming. Chapter 372 deters illegal gaming by holding the operators liable for the loser's losses. On the other hand, the General Assembly also intended to return to the loser

his losses from illegal gambling, but without doing so in a way that would encourage the loser to continue gambling, and by doing so, subvert one of the intended purposes of the Chapter. This requires the loser to account for his winnings in a suit to reclaim his losses. However, it is not the language of Chapter 372 itself, but the case law that instructs that when the "loser" sues under KRS 372.020, he may only recover his losses after accounting for his winnings. *Elias,* 18 S.W. 455, 456. Similarly, it is the case law but not the text of the statute that instructs that when the creditor sues, it does not have to account for the loser's winnings. *Caldwell,* 2 Bush 451, 452. But what may "any other person" suing under KRS 372.040 recover?

The answer lies in the policy to be served in the case, which in turn depends on the relationship of the Plaintiff to the gambling at issue. The deterrent effect of Chapter 372 must necessarily be restrained when the loser, as plaintiff, sues to recover his losses, and thus the deterrent effect of Chapter 372 cannot be meted out against the illegal gaming operator to its fullest measure. The reason is to avoid granting the "loser" an incentive to continue doing the very thing that the General Assembly intended for Chapter 372 to suppress: illegal gaming. After all, one who holds himself out as the receiver of unlawful bets must have bettors. Therefore, the "loser" described in KRS 372.020 is a participant in an unlawful enterprise; nevertheless, the framers of Chapter 372 decided that illegal gaming operators, or those receiving the unlawful bets, were more culpable considering their position as an unregulated entity to "defraud" and "oppress" many players and to potentially do so many times over. *McKinney,* 3 B. Mon. 99.

A plaintiff suing under Chapter 372, whether it is a

creditor or "any other person," is unlikely to be a gambler, or, at least is unlikely to have participated in the illegal gaming at issue. When the plaintiff suing has not participated in the illegal gaming, the risk of giving the deterrent effect of Chapter 372 its fullest effect is not present because it is not the loser himself suing. Thus, the deterrent effect of Chapter 372 need not be so restrained when the creditor or "any other person" sues, and the creditor or "any other person" need not account for the loser's winnings when calculating the "loss" described in KRS 372.020. This is the only logical explanation for the different outcomes in *Elias* and *Caldwell.*

As Kentucky Courts have acknowledged, the language of Chapter 372 is broad and should be construed liberally in order to suppress the evil of unlawful gaming. *See McKinney,* 3 B. Mon. 99 ("we feel bound, in construing the statute so as best to suppress the mischief, to construe it so as best to support the right which it has established as a means of suppressing the mischief."). Where the encouragement of strategic behavior by individual gamblers is not a risk, Chapter 372 should be read to give effect as much as possible to the deterrence of unlawful gaming. As the *Downs* Court recognized almost two hundred years ago, simply unwinding the unlawful transaction would not be sufficient to deter illegal gambling operators. *Downs,* 1 Litt. Sel. Cas., 490. They would simply return to business after the suit and wait for the next "poor sucker" to enter. Rather, the illegal gambling operators must know that they could be liable for all of a loser's losses notwithstanding any winnings should a creditor or "any other person" bring suit.

While the antecedents of Chapter 372 are almost as ancient as the Commonwealth itself, its primary purpose

survives the changing times. The media through which illegal gambling operators lure their clients may change, but the intent of the statute, that is, to deter illegal gambling, does not. The Plaintiff is entitled to recover the entire amount of the Kentucky players' losses of five dollars or more, whether at one time or within twenty-four hours, incurred while playing games on the PokerStars website from October 12, 2006, until April 15, 2011. The Plaintiff is not required to offset the Kentucky players' losses with their winnings during that time period because the Plaintiff is not a "loser" within the meaning of KRS 372.020, but rather is suing as "any other person" under KRS 372.040 to recover the Kentucky players' losses. Since the Plaintiff is not a "loser" under KRS 372.020, Chapter 372 must be read to give the fullest effect possible to the most significant purpose to be served by the chapter in this case, that is, the deterrence of illegal gaming. Thus, the Court hereby **AWARDS** the Plaintiff $290,230,077.94.

B. The Defendants' Motion for Summary Judgment on the Plaintiff's Demand for Treble Damages is Denied, the Plaintiff's Motion is Granted, and the Plaintiff is Awarded $870,690,233.82.

The Defendants' *Motion for Summary Judgment on the Plaintiff's Demand for Treble Damages* is **DENIED,** while the Plaintiff's *Motion for Summary Judgment* is **GRANTED,** and thus the Plaintiff is **AWARDED** $870,690,233.82. Three requirements must be met in order for the Plaintiff to receive treble damages under KRS 372.040: (1) standing as "any other person"; (2) timing, meaning that the plaintiff must bring suit no sooner than six months after the loss occurred (but no later than five years), and only if the loser or the loser's creditor has not already brought suit; and (3) there must

have been some "money or thing lost" within the meaning of KRS 372.020. Here, the Plaintiff has met all three requirements and is entitled to receive treble damages as a matter of right under KRS 372.040.

The Plaintiff filed its *Motion for Summary Judgment on Damages* on August 14, 2015, immediately after the Court granted its *Motion for Partial Summary Judgment* and entered Default Judgment in its favor. The Court spilt the Plaintiffs *Motion* into two parts. First, the Court heard argument on extent of the Kentucky players' loss and withheld judgment on the treble damage award pending further briefing and argument. Then, on November 20, 2015, the Court entered the *Opinion and Order* on the extent of the loss.

The second part of the Plaintiff's *Motion for Summary Judgment on Damages* concerns whether the loss *should* be trebled under KRS 372.040. On November 12, 2015, the Defendants' filed their *Motion for Partial Summary Judgment on the Plaintiff's Demand for Treble Damages* arguing that an award of treble damages is discretionary and that such an award would be "improperly punitive." The Plaintiff responded the same day, arguing that treble damages are not discretionary per the language of the statute, and that even if they were, the Plaintiff argues, the Court ought to award treble damages due to the Defendants' refusal to stop operating in Kentucky. The Defendants responded on November 17 and again on November 23 disputing the Plaintiff's claims. Finally on November 30, the Defendants filed one last brief arguing that trebling would violate the Excessive Fines Clause of the U.S. Constitution, and that if the Court were to award treble damages, then it ought to make findings of fact in order to support its award.

The treble damage award is a feature of KRS 372.040, the statute under which the Plaintiff has brought suit. The statute provides:

> If the loser or his creditor does not, within six (6) months after its payment or delivery to the winner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, any other person may sue the winner, and recover treble the value of the money or thing lost, if suit is brought within five (5) years from the delivery of payment.

Thus, by the terms of the statute, all that is required for the Plaintiff to receive treble damages are the following: (1) standing as "any other person; (2) timing, meaning that neither the loser nor the loser's creditor has already brought suit to recover the losses and that the Plaintiff has brought suit no sooner than six months after the losses were incurred and no later than five years; and (3) the loss of money or thing within the meaning of KRS 372.020. Here, all three conditions have been met. The Court has long ago ruled that the Plaintiff has standing as any other person; the Plaintiff has timely brought this suit; and the Plaintiff has established that money was lost within the meaning of KRS 372.020.

The Defendants argue that there is more to the statute than meets the eye, and they accordingly raise several objections. The Defendants argue first that treble damages are discretionary by the terms of the statute. To the Defendants, the General Assembly's decision to use "may" rather than "shall" shows that the General Assembly intended for treble damages to be discretionary. However, the Court finds that the use of the word "may" does not refer to the award of treble

damages, but rather to the ability of "any other person" to sue to recover the losses. Indeed, the General Assembly's intent would be disconcerting if it had elected to write, "any other person [shall] sue the winner. . . . " While grammatically possible, the semantic construction of the sentence would be cause for worry. Such a provision would mean that some unknown person other than the loser or the loser's creditor would be statutorily obligated to sue to recover the loser's losses in the event neither the loser nor the loser's creditor brings suit. This is not logical. The General Assembly's use of the word "may" adequately expresses the idea that the decision to sue belongs entirely to "any other person." Unquestionably then, the presence of "may" in that part of the sentence does not refer to the award of treble damages.

Next the Defendants argue, somewhat more persuasively, that a 1950 case from the U.S. District Court for the Eastern District of Kentucky holds that treble damages are discretionary. Indeed, in *Hartlieb v. Carr,* Judge Swinford wrote in a short opinion that "treble damages are not compulsory, but left solely to the discretion of the court or jury." *Hartlieb v. Carr,* 94 F.Supp. 279, 280 (E.D. Ky. Jan. 13, 1950). The Plaintiff responds, arguing that Judge Swinford's statement is merely dictum. The Defendants maintain that, far from being dictum, it is in fact the holding of the case.

While at first blush Judge Swinford's statement appears to carry the weight of a holding, a closer inspection reveals that it is not. The issue in *Hartlieb* was whether the authorization of treble damages in KRS 372.040 made it a penal statute. *Id.* at 280. The defendants in *Hartlieb* argued that the treble damage feature was penal in nature. *Id.* Therefore, if KRS 372.040 was penal,

went the defendants' argument, then the Federal Court lacked jurisdiction to hear the case because of the principle that "one sovereign will not enforce the penal laws of another.[2] *Id.* However, Judge Swinford found that the statute serves a dual purpose, that it is both remedial and only incidentally penal. *Id; see also Salonen v. Farley,* 82 F.Supp. 25, 28 (D.Ky. Jan. 18, 1949). The actual holding of *Hartlieb* is the following statement: "The statute in question in the instant case is similarly both remedial and penal and therefore enforceable." *Hartlieb,* 94 F.Supp. 280. Nowhere else in the opinion does Judge Swinford explain his statement that treble damages are discretionary, nor is it quite clear how the statement supports his conclusion. Thus, this Court finds that Judge Swinford's statement that treble damages are discretionary is dictum, and as such, is not binding on this Court.

Next, the Defendants argue that the treble damage award as authorized by the statute would violate the Excessive Fines and Due Process Clauses of the federal and state constitutions. However, the Court finds that such an award would only violate the Excessive Fines clause insofar as it is "grossly disproportionate to the gravity of the Defendant's offense." *United States v. Bajakajian,* 524 U.S. 321, 337 (1998). Considering the numerous violations of law for operating an illegal gambling website, the damage award is not grossly disproportionate to the gravity of the offense.

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[2] The issue of whether the statute is penal or remedial is more fully addressed in another opinion by Judge Swinford from a year earlier in *Salonen v. Farley,* 82 F.Supp. 25 (D.Ky. Jan. 18, 1949). Judge Swinford's opinion in *Hartlieb* adopted in full his opinion *Salonen. Hartlieb,* 94 F.Supp. 281.

Here, the Defendants reached into Kentucky in willful violation of its laws, and for over four and a half years, invited over 34,000 Kentucky players to place over 246,000,000 bets, at least ten million of which resulted in losses of five dollars or more. In part due to the profit earned during that four and a half year period, PokerStars grew to the point that by 2014, it could be sold to Amaya for $4.9 billion dollars. While part of the Defendants' profits came at the expense of Kentucky players' calculable losses incurred while playing the Defendants illegal online games, another part of their profits came at the incalculable expense of the violation of Kentucky's laws. For even when Kentucky players won, the Defendants still took a rake. And with the money that the Defendants took from Kentucky's players, it was able to invest and expand its illicit operations making themselves all the more profitable. Without a doubt, the Defendants made a business calculation that took into account the violation of Kentucky's laws. However, the law is more than some ordinary itemized expense on a balance sheet, and its value is not as easily accounted for as the Defendants may have thought as they executed their illicit business plan. The treble damage award goes some length toward repairing not just the damage inflicted on the integrity of the rule of law, but also the harm caused to the families and communities across Kentucky by the harmful behaviors and financial despair associated with illegal online gambling.

Finally, the Defendants request that the Court make detailed findings of fact in support of a treble damage award. Finding no authority requiring it to do so, the Court declines the Defendants' invitation to make any further findings of fact beyond those that the Court has

recited in the foregoing paragraph.

Three requirements must be met in order for the Plaintiff to receive treble damages under KRS 372.040: (1) standing as "any other person"; (2) timing, meaning the plaintiff must bring suit no sooner than six months after the loss occurred, and only if neither the loser nor the loser's creditor has already brought suit; and (3) there must be "money or thing lost" within the meaning of KRS 372.020. Here, the Plaintiff has met all three requirements and is entitled to receive treble damages as a matter of right under KRS 372.040. Thus, the final amount to be awarded to the Plaintiff is $870,690,233.82.

CONCLUSION

The Defendants may find the final damage award to be harsh medicine. Such is the consequence for violating the laws of Kentucky. As far back as two centuries ago, the General Assembly recognized that illegal gaming was an evil so great that it endowed virtually any person in the Commonwealth with a right of action to be accompanied by an extraordinary remedy in order to promote its suppression. These laws are not new, nor are they novel, as the Defendants have pointed out. But what is new and novel is the scale of the violation of Kentucky's gambling laws by the Defendants. While the framers of Chapter 372 may never have envisaged the size of the award entered today, they also could not have envisaged the scale of illegal gambling enabled by online platforms with the power to take millions of illegal bets from offshore sites worth hundreds of millions of dollars while state authorities sat helpless to suppress the evil.

The Defendants had at least several opportunities to avoid today's harsh medicine. First, they could have

retained counsel in order to better understand the scope of liability to which they were exposing themselves by operating in Kentucky. After all, those who conduct business in the Commonwealth are expected to be aware of its laws. Second, litigation concerning this matter actually began as far back as 2008. Even though this Court's cease and desist *Order* issued in 2008 was stayed by the Court of Appeals, the Defendants were put on alert at that time that their continued operation may be exposing them to further liability. However, the Defendants chose to continue their illicit operations in Kentucky. In spite of these options, the Defendants made a calculation that breaking the law was good for business. Today's decision affirms the integrity of the rule of law and goes some distance toward repairing the damage inflicted by the Defendants upon the families and communities of the Commonwealth that have been banned by illegal online gaming.

WHEREFORE the Defendants' *Motion to Vacate* and *Motion for Partial Summary Judgment as to the Plaintiff's Demand for Treble Damages* are **DENIED** and the Plaintiff's *Motion for Summary Judgment on Damages* is **GRANTED.** The Plaintiff is hereby **AWARDED** $870,690,233.82, plus any and all continuing costs of collection of this judgment, plus interest at the judicial rate of twelve percent (12%) per annum until paid in full.

SO ORDERED, this 23 day of December, 2015. This *Order* is final and appealable and there is no just cause for delay.

Thomas D. Wingate
THOMAS D. WINGATE
Judge, Franklin Circuit Court

APPENDIX E

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 10-CI-00505

COMMONWEALTH OF KENTUCKY ex rel. J. Michael Brown, Secretary, JUSTICE AND PUBLIC SAFETY CABINET	**PLAINTIFF**

vs.

POCKET KINGS, LTD, et al.	**DEFENDANTS**

OPINION AND ORDER

This matter is before the Court on the Commonwealth's *Motion for Summary Judgment on Damages as to Amaya Group Holdings limited* filed August 14, 2015 and Amaya and REEL's *Motion for Reconsideration of Order Granting Sanction of Default Judgment* filed October 19, 2015 and Amaya and REEL's *Motion for Reconsideration of Interlocutory Order Granting Partial Summary Judgment* filed October 21, 2015. Counsel was heard in open court on October 26, 2015. The Court being sufficiently advised, hereby **DENIES** both of Amaya and REEL's *Motions* and **GRANTS** partial summary judgment in favor of the Commonwealth and **AWARDS** the Commonwealth

$290,230,077.94 in damages.

INTRODUCTION

The Court must address two main issues. First, the Defendants, Amaya and REEL, ask this Court to revisit and reconsider two decisions: one, the Commonwealth's standing and two, its grant of default judgment against Oldford (now Amaya) and REEL for failure to comply with its discovery orders. The second issue follows directly from its grant of partial summary judgment in favor of the Commonwealth, and requires this Court to determine the amount of damages.

STATEMENT OF FACTS

This case has a lengthy history and while a detailed description of the parties[1] and an exhaustive recitation of past filings, hearings, and orders is unnecessary, some detail is nonetheless required in the Court's review of the relevant procedural history. The present matter began in 2010, though its roots extend as far back as 2006 when President Bush signed the Unlawful Internet Gambling Enforcement Act into law. Late in 2010, the Defendants, PartyGaming PLC and Pocket Kings Ltd., filed *Motions to Dismiss* citing a number of grounds, including that the Secretary lacked standing to bring this suit. On November 2, 2011, the Court found that the Secretary did in fact have standing because the language of KRS 372.040

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[1] The Court's *Opinion and Order* entered August 12, 2015 contains a thorough description of the parties. What is important to note here is that all of the companies mentioned – PYR, REEL, RIHL, and Oldford – are interrelated and, until their sale to Amaya in August 2014, were under the direct or indirect control of Mark Scheinberg and Pinhas Schapira. Indeed, these companies have been represented for the duration of this litigation by Mr. Ifrah from Washington, D.C.

was sufficiently broad to allow for the Secretary to sue on behalf of the Commonwealth to recover losses incurred by Kentucky players betting via illegal internet gambling websites operated by Oldford and REEL.[2]

On March 10 2014, the Court ordered PYR[3] to respond completely to the Commonwealth's discovery request within thirty days. Included in the discovery request from the Commonwealth was a request that PYR produce Messrs. Scheinberg and Schapira for deposition. In the same *Order*, the Court also referred to an agreement between the parties to produce Messrs. Scheinberg and Schapira before April 30, 2014.

However, on April 10, the date that written discovery from PYR was due,[4] the Defendant Oldford,[5] freshly served with an amended complaint, removed the case to federal court. No further action was taken in this matter

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[2] KRS 372.040 reads "If the loser or his creditor does not, within six (6) months after its payment or delivery to the winner, sue for the money or thing lost, and prosecute the suit to recovery with due diligence, *any other person may sue* the winner, and recover treble the value of the money or thing lost, if suit is brought within five (5) years from the delivery or payment." (Emphasis added). In its November 2, 2011 *Opinion and Order,* the Court wrote "While this statute is generally used to protect a gambler's family from becoming destitute, the broad language of KRS 372.040 fails to strictly limit recovery to such persons. Because the legislative intent is unclear and no definition of 'person' is provided in the statute, the Commonwealth could prove a set of facts under which it could recover."

[3] PYR is the software company behind websites such as PokerStars and was founded by the Scheinberg.

[4] The Court note that PYR did provide answers on April 9, but the Commonwealth objected claiming that the answers were incomplete and evasive.

[5] Oldford was the holding company who owned PokerStars, among other Defendants, and was purchased by Amaya in August 2014.

until the federal court rejected Oldford's arguments for removal and remanded the case to the Franklin Circuit Court on March 31, 2015. In August 2014, while the matter was still pending in federal court, Amaya completed its purchase of Oldford, REEL, and PYR.[6] This sale, Amaya and REEL now argue, effectively severed Messrs. Scheinberg and Schapira's interest in the suit, and thus Amaya and REEL's ability to require them to appear for depositions.

On April 15, 2015 the Court ordered the Defendant REEL to respond to the Commonwealth's discovery requests by May 31. Then, on May 22, this Court ordered REEL to produce Messrs. Scheinberg and Schapira by May 31, and that if they failed to do so, the Commonwealth was to move the Court for default judgment. We also found in the same *Order* that the Court's March 10, 2014 *Order* did in fact require PYR to produce Messrs. Scheinberg and Schapira. The Court continued in the May 22 *Order,* finding that REEL's argument that they could not produce Messrs. Scheinberg and Schapira due to the buyout to be nothing more than a delay tactic. While REEL was unable to secure Mr. Scheinberg for deposition prior to the May 31 deadline,[7] it did obtain leave from the Court to depose him remotely from London on June 3. However, Mr. Scheinberg did not appear.

On August 12, 2015, the Court granted partial

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[6] While various orders refer sometimes to PYR, or REEL, or Oldford, it should be noted that Messrs. Scheinberg and Schapira were the sole directors of all the PokerStars entities, and that they were the principle shareholders of the Defendant Oldford, the holding company that owned all of the PokerStars entities.

[7] Mr. Schapira was not able to be deposed within this timeframe due to an alleged illness.

summary judgment in favor of the Commonwealth on the issue of Oldford and REEL's liability under KRS Chapter 372. We also granted default judgment as a sanction for failure of Oldford and REEL to comply with discovery orders.

The Commonwealth then submitted a *Motion for Partial Summary Judgment* in which it estimated damages to be $535,951,020 (before trebling) based on information it had obtained from a previous litigant, PartyGaming, and also from publically available data. On October 8, the Court again ordered Amaya and REEL to produce, within two weeks, the requested gaming data from PokerStars. Amaya and REEL produced the data and the Commonwealth revised its damage assessment to $290,230,077.94 to account for the actual losses incurred by Kentucky players of five dollars ($5.00) or more over the course of each twenty-four hour period from October 12, 2006 to April 15, 2011. The revised figure represents the combined losses of Kentucky players participating in both PokerStars' cash/ring games ($225,186,134.93) and its tournament games ($65,043,943.01). Around the time Amaya and REEL produced the gaming data, they also filed *Motions to Reconsider* both the Court's grant of default judgment and partial summary judgment as to Chapter 372 liability. For the reasons stated below, the Court **DENIES** Amaya and REEL's *Motions to Reconsider* and it **GRANTS** the Commonwealth's *Motion for Partial Summary Judgment as to Damages* in the amount of $290,230,077.94.

ANALYSIS

A. Standard of Review for Reconsideration of an Interlocutory Order.

A trial court has plenary power to reconsider any interlocutory order while it retains jurisdiction over the case. *JPMorgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902, 909 (Ky. 2014) ("Until a final judgment is entered, all rulings by a court are interlocutory, and subject to revision."). Indeed, Kentucky Rules of Civil Procedure 54.02(1) provides that "any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

B. Standard of Review for Summary Judgment.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03. Summary judgment is appropriate when the court concludes that there is no genuine issue of material fact for which the law provides relief. *Id.* Summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. *Id.*

The moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and

the burden then shifts to the opposing party to show affirmatively that there is a genuine issue of material fact for trial. *Jones v. Abner*, 335 S.W.2d 471, 475 (Ky. Ct. App. 2011). The movant should not succeed unless it has shown "with such clarity that there is no room left for controversy." *Steelvest Inc. v. Scansteel Service Ctr.*, 807 S.W.2d 476,482 (Ky. 1991). "The inquiry should be whether, from the evidence on record, facts exist which would make it possible for the nonmoving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." *Welch v. Am. Publ'g Co. of Kentucky,* 3 S.W.3d 724, 730 (Ky. 1999). In reviewing Motions for Summary Judgment, the Court views all facts in the light most favorable to the non-moving party and resolves all doubts in its favor, and summary judgment should only be granted when the facts indicate that the non-moving party cannot produce evidence at trial that would render a favorable judgment. *Steelvest*, 807 S.W.2d at 480.

The Court recognizes that summary judgment is a device that should be used with caution and is not a substitute for trial. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor: *Jones,* 335 S.W.3d at 480. Thus, this Court finds that summary judgment will be proper when it is shown with clarity from the evidence on record that the adverse party cannot prevail, as a matter of law, under any circumstances.

C. Amaya and REEL's *Motions for Reconsideration* Are Denied.

1. Amaya and REEL's Motion for Reconsideration

Concerning Default Judgment.

A review of the record in its entirety shows that the Defendants have engaged in what can only be characterized as a pattern of delay and obfuscation throughout the course of this litigation. The rules of civil procedure and judicial discretion are not tools ripe for the manipulation of the fair and efficient administration of justice. First the Defendants refused to satisfactorily comply with discovery orders despite the Court's continued patience. Then, the Defendants attempted to remove the case to federal court, during the pendency of which they completed the sale of their respective companies to Amaya.

For the reasons stated above, it is difficult to separate Amaya and REEL's arguments in support of reconsideration from the context or the Defendants past behavior; however, the Court will attempt to do so. Amaya and REEL make two arguments challenging the Court's sanction of default judgment. First, they argue that the process by which the Court granted default judgment was disjointed. Specifically, Amaya and REEL argue that the Court never issued a *Vanderbilt* warning to REEL when REEL had the power to produce Messrs. Scheinberg and Schapira early in 2014; and that by the time the Court did issue a *Vanderbilt* warning to REEL in May 2015, REEL's new owner, Amaya, no longer had the power to produce the witnesses. Second, Amaya and REEL argue that default judgment was inappropriate because the Court did not permit them an opportunity to produce the gaming data after it overruled their objections since the grant of default judgment appeared in the same August 12, 2015 *Opinion and Order.*

Amaya and REEL cite *R.T. Vanderbilt Co. Inc., v.*

Franklin in support of their argument that the Court did not properly warn them in advance of granting the sanction or default judgment. In *Vanderbilt,* a woman who contracted mesothelioma from exposure to asbestos-laden talc sued the supplier. *Vanderbilt Co. Inc., v. Franklin*, 290 S.W.3d 654, 657 (Ky. Ct. App. 2009). The woman moved the trial court on four different occasions to compel the talc supplier to produce certain documents and admissions, and each time the trial court granted her motions, but the talc supplier never produced the requested documents and admissions. *Id.* at 660. With only three weeks remaining before trial, the court struck the talc supplier's defenses related to the documents it refused to produce as a sanction; however, it declined to grant default judgment against the talc supplier. *Id.* On appeal, the talc supplier argued that the trial court improperly sanctioned it for its failure to comply with discovery orders. *Id.* The Court of Appeals disagreed with the talc supplier and affirmed the trial court's sanction pursuant to CR 37.02. *Id.* at 663.

The Court of Appeals applied a five-factor test to for determine the severity or the sanction to be imposed pursuant to CR 37.02. The factors are:

(1) Whether the non-compliance was willful or in bad faith;

(2) Whether the party seeking discovery was prejudiced by the failure to comply with the discovery orders;

(3) Whether the Court issued a warning that failure to cooperate could lead to dismissal;

(4) Whether less drastic sanctions were imposed or considered;

(5) Whether the sanction imposed bears some reasonable relationship to the seriousness of the non-compliance. *Vanderbilt,* at 662.

The Court notes briefly that it has already (and it believes satisfactorily) applied the factors to the facts of this matter in its *Opinion and Order* pages 10-14 entered August 12, 2015. However, the Court will address several of the arguments that Amaya and REEL raise in their *Motion for Reconsideration.*

Amaya and REEL first argue that default judgment is an extreme sanction and that the Appellate Court in *Vanderbilt* only authorizes the sanction of default judgment upon a showing of five factors. Moreover, Amaya and REEL argue that the facts of this case can readily be distinguished with the facts of *Vanderbilt.* For instance, they argue that the Court of Appeals found that the talc supplier failed to comply with *four* discovery orders, not just one. Additionally, Amaya and REEL argue that the *Vanderbilt* plaintiff suffered a high degree of prejudice since the trial date was soon approaching. Finally, even considering the number of discovery order violations and the high degree of prejudice, the trial court in *Vanderbilt* still did not grant a sanction as severe as default judgment, but instead, it merely struck the number of defenses available to the talc supplier during the trial.

What Amaya and REEL miss though, is that that the Court of Appeals applied a factor test – which, by its very nature is a fact-intensive inquiry. While it is true that the case at bar has different facts from *Vanderbilt,* it is also true that our facts are still every bit as outrageous as those in *Vanderbilt,* but in their own peculiar way. For instance, while the Commonwealth does not have a looming trial

date by which to be prejudiced, it has had over five years of litigation containing almost every type of delay imaginable. Truly, it can be said that the Defendants have pulled out every possible stop for the last several years – failure to reply to discovery requests, non-compliance with discovery orders, last-minute and arguably frivolous objections, and even a year-long federal court removal. The delay generated from these types of actions prejudices litigants by increasing costs and making it more likely that important evidence may disappear.[8]

Next, Amaya and REEL argue that this case does not have nearly as many violations of discovery orders as *Vanderbilt* which saw four violations. However, this Court finds that a violation of a discovery order, even just one, is just that – a violation of a discovery order, and a single violation is enough to trigger a possible CR 37.02(c) sanction. Indeed, the Court of Appeals in *Vanderbilt* found that the trial court exhibited "inordinate patience" with the talc supplier. *Vanderbilt,* at 663. The Court does not believe that the Court of Appeals' decision requires it, or any other trial court in the Commonwealth, to exhibit similar patience with such uncooperative litigants. To do so would be to make a mockery of the authority of this Court's orders. This Court agrees with the Court of Appeals when it wrote,

> [o]ur discovery rules are designed to promote efficiency, order, and expediency within the judicial system, and the sanction for their violation is within the discretion of

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[8] Here, for instance, the federal court removal action bought the Defendants time to complete the sale of their respective companies to Amaya, which in turn allowed Messrs. Scheinberg and Schapira to, among other things, escape appearing for deposition.

> the trial court subject to the restriction that CR 37.02 envisions willfulness or bad faith on behalf of the party to be sanctioned. The basis for the rule is that **a party who intentionally seeks to delay or thwart the judicial process should not benefit from the defiant conduct.**

Vanderbilt, at 661, 662. (Citations omitted, emphasis added).

The Defendants in this case have willfully engaged in a clear and obvious pattern of delay, and they should not be able to benefit from it. Indeed, Amaya and REEL did eventually produce the gaming data last month, within two weeks of being ordered to do so, but only after the Court granted default judgment *and* after the Commonwealth moved to assess damages against Amaya and REEL in excess of $1.6 billion. Much litigation and expense of time, money, and judicial resources could have been avoided had the Defendants complied with the Commonwealth's discovery requests earlier in this litigation. Indeed, there is nothing in the record to indicate that they could not have produced the requested gaming data in early 2014 as readily as they did in October 2015.

Finally, Amaya and REEL argue that they did not have the opportunity to produce the documents because the Court had not first ruled on their objections prior to granting default judgment. Rather, they argue, the Court overruled their objections and granted default judgment in the same August 12, 2015 *Opinion and Order* thereby denying them the opportunity to produce the data. The Court will briefly make three findings before dispensing with this argument. First, the Commonwealth made its request for discovery on REEL almost two years ago.

Oldford and REEL had ample opportunity to object or produce the data, notwithstanding the lime the case spent removed to federal court. However, REEL did not object until May 2015. Second, as the Court found in its August 12, 2015 *Opinion and Order,* it did not direct Oldford and REEL in its previous *Orders* to simply respond, and thereby, interpose objections; rather, the Court instructed Oldford and REEL to produce documents and answers. Moreover, at the May 20 hearing in which Oldford and REEL indicated that they may object to written discovery, the Court stated that it would have to look at their objections once submitted and determine "whether they're legitimate or not." This leads to the Court's third and final finding that Oldford and REEL's objection to written discovery – specifically, that the privilege against self incrimination should be extended to corporations – can barely be characterized as legitimate. Indeed, the Court wrote in its August 12 *Opinion and Order:*

> Oldford and REEL concede that there is no authority holding that the Fifth Amendment's self-incrimination protection applies to companies or company documents. Instead, they offer two persuasive cases interpreting Illinois state law. Unable to support their objection with precedential legal authority, Oldford and REEL invite this Court to extend the Fifth Amendment right against self-incrimination to corporations. Oldford and REEL offer no authority that such an "extension" would be proper or even permissible, so this Court declines their invitation. The Court finds

> that REEL and Oldford have failed to satisfy their burden of proving that their claimed right against self-incrimination applies. (Citations omitted).

The Court declines to entertain the motion to reconsider further and accordingly **DENIES** the motion.

2. *Amaya and REEL's* Motion for Reconsideration *Concerning Standing.*

Amaya and REEL's next *Motion for Reconsideration* consists of a rehash of several arguments that attack the Commonwealth's standing to bring this suit and its ability to do so in the manner that it has chosen. First, Amaya and REEL argue that the Secretary of the Justice and Public Safety Cabinet cannot act as a *relator* in order to sue on behalf of the Commonwealth. Second, Amaya and REEL argue that the statute under which the Commonwealth has sued Amaya and REEL, KRS 372.040, must be brought as a criminal forfeiture action, not a civil action.[9]

First, it is beyond cavil that the Governor, acting through his appointees, can sue individuals and entities in order to ensure that the laws of the Commonwealth are faithfully executed. KY. CONST. § 81. Here, the Secretary of the Justice and Public Safety Cabinet, appointed by the Governor, and acting through counsel lawfully retained, is suing on behalf of the Commonwealth to guarantee the

[9] Amaya and REEL's third argument is one that the Court has already addressed in previous *Opinions and Orders* entered February 21, 2013 and August 12, 2015. The argument is that Amaya and REEL cannot be considered "winners" under KRS 372.040 under a theory of joint liability with the other poker players because poker players no longer have liability to begin with.

safety of our citizens, from whom PokerStars has fleeced hundreds of millions of dollars, all the while flaunting both the laws of the Commonwealth and the United States. *See* KRS 12.210; KRS 12.220. Moreover, KRS 372.040 authorizes a third person to bring the suit on behalf of the loser. The Commonwealth, as a body politic, is a person for purposes of this statute. *See e.g., Commonwealth ex rel. Keck, Commissioner of Highways v. Shouse,* 245 S.W.2d 441 (Ky. 1952). This issue has also been thoroughly litigated, and the Court finds as it has found before, that the Secretary has properly brought this suit in the name of the Commonwealth.

Next, Amaya and REEL argue that KRS 372.040 is a penal statute and that as a result, the Commonwealth is required to bring a criminal forfeiture action in order to recover damages. However, KRS 372.040 is not penal. *See Hartlieb v. Carr,* 94 F.Supp. 279, 281 (E.D. Ky. 1950). That punitive damages are present in a civil action does not make the statute penal in nature. Here, the statute allows for treble damages in part to deter illegal gambling. Moreover, the General Assembly intended for Chapter 372 to be broadly construed in order to achieve this purpose. *Gilley v. Commonwealth,* 229 S.W.2d 60 (Ky. 1950); *Meader v. Commonwealth,* 363 S.W.2d 219 (Ky. 1963). The Court finds that the Secretary has properly brought this suit for the purpose intended by the General Assembly.

D. The Commonwealth is Awarded Damages in the Amount of $290,235,077.94.

The Court shifts now from Amaya and REEL's *Motions for Reconsideration* to consider the Commonwealth's *Motion for Partial Summary Judgment on Damages.* In its initial *Motion,* filed

immediately after the Court entered its August 12 *Opinion and Order,* the Commonwealth argued that Amaya and REEL ought to be assessed damages in the amount of $535,951,020 before trebling.[10] The Commonwealth based its figure on data provided by a former Defendant, PartyGaming, and other publically available data compiled by its expert analyst. The Commonwealth agreed to withdraw this figure if Amaya and REEL produced the requested gaming data from which the Commonwealth could draw a more accurate damage assessment. On October 16, Amaya and REEL produced the gaming data. Based on the gaming data provided by Amaya and REEL, the Commonwealth generated a revised figure of $290,230,077.94.

The only issue remaining is whether the formula by which the Commonwealth arrived at its revised figure satisfies the requirements of KRS 372.020. The Court finds that for the reasons stated below, it does. Amaya and REEL, citing *Elias v. Gill,* argue that the Commonwealth is only entitled to recover the "actual loss" rather than the "gross loss," the latter of which is how Amaya and REEL characterize the Commonwealth's $290 million figure. The actual loss would presumably result in a lower figure.[11] The Commonwealth disputes Amaya and REEL's argument, claiming that by arguing for an

[10] Trebling would generate the $ 1.6 billion dollar figure ($1,607,853.060 to be precise) that the Court referred to earlier. This *Opinion and Order* does not address the appropriateness of trebling the Commonwealth's damages. That issue is reserved for future ruling after the Court hears oral argument on pending motions.

[11] Amaya and REEL have not provided this Court with an alternative figure, except that, during the October 26 hearing, counsel for Amaya and REEL indicated that the figure is probably "in the range of twenty million dollars."

"actual loss" figure, Amaya and REEL are essentially requesting an impermissible set off of the gambling losses.

The Court in *Elias* sought to determine the appropriate assessment of damages for a plaintiff seeking to recover under the Loss Recovery Act. In *Elias*, the appellee had wagered on horse races with the appellants. The appellee sued to recover his losses. Before determining the amount the appellee could recover, the Court wrote,

> whatever amount or amounts they lost to him on account of wagers between them on horse-races at the dates or within the period mentioned in the petition should be set off against, or deducted from, what he may be entitled to recover in this action; for certainly it was not the intention of the legislature to afford to a party voluntarily buying pools on horse-races, or betting at a faro-bank, the undue advantage of recovering back what he may have lost to the seller or dealer, without disgorging and accounting for what he won from him. The purpose of this statute was to afford to such party remedy to the extent of his actual loss, not to enable to recover back what he lost. while keeping and profiting by what he won from the defendants. It therefore seems to us clear that the criterion of the amount appellee is entitled to recover, if any at all, is the excess of what he lost to appellants above what he won from them during the period mentioned . . . .

Elias v. Gill, 18 S.W. 454, 456 (Ky. 1892). Quite simply,

the *Elias* Court was trying to avoid generating a windfall to the loser. If the player placed multiple bets over the course of a twenty-four hour period, the player's losses should be offset by his winnings. To allow for the player to recover for each hand lost without offsetting it by his winnings would be to allow the player to receive a windfall.

While the *Elias* Court's reasoning is sound, it is inapplicable to the case at bar for the simple reason that the figure provided by the Commonwealth *is* already the actual loss figure demanded by Amaya and REEL. Indeed, the statute already accounts for the *Elias* calculation by its express language: "If any person loses to another . . . within twenty-four (24) hours, five dollars ($5) or more . . . the loser or any of his creditors may recover it . . . ." KRS 372.020. Moreover, this is the calculation that the Commonwealth has followed in generating its revised figure ("Losses of $5 or more incurred within twenty-four (24) hours").[12] The Court understands both this statute and the Commonwealth's calculations to mean, that if a player ended the day five dollars or more poorer than he was when he began the day, then the recoverable amount is the difference between the amount the player started with and the amount he ended with. So, for example, if the player played five hands of poker within a twenty-four hour

[12] In addition to providing the Court with this figure, the Commonwealth also provided the Court with another set of figures which it described as "instances where a Kentucky player lost $5 or more on a single hand – at one time – playing PokerStars' real-money 'ring/cash' poker games." The Commonwealth also provided the Court with a similarly calculated figure for the tournament games. The Court understands that these figures, taken together, represent the "gross losses" that Amaya and REEL argue against and the windfall that the *Elias* Court sought to avoid.

period, and won five dollars on each of the first two hands (for a total gain of ten dollars ($10.00)), but lost five dollars on each of the last three hands (for a total loss of fifteen dollars ($15.00)), then the player's recoverable amount, or actual loss under KRS 372.020, would be a net of five dollars ($5.00), not fifteen dollars ($15.00). The Court agrees that fifteen dollar ($15.00) amount would be the player's gross loss, the precise windfall that the *Elias* Court sought to avoid. This Court does not believe that the revised figure advanced by the Commonwealth represents the gross loss; rather, the Commonwealth's revised figure corresponds with the calculation called for in KRS 372.020 and already accurately represents the actual or net loss of Kentucky players with losses of five dollars ($5.00) or more during a twenty-four hour period.

CONCLUSION

The Defendants violated state and federal laws by operating illegal gambling websites in Kentucky for approximately five years, over which time Kentucky players lost hundreds of millions of dollars. Their disregard for the order of law continued into this litigation by delaying and obfuscating the legal proceedings. Amaya and REEL have failed to introduce a single new argument in either of their *Motions* that would cause the Court to reconsider either its grant of default judgment or the ability of the Commonwealth to bring this suit and to do so in the manner that it has chosen. Thus, the Court is left but to assess damages and it finds that the Commonwealth's figure of $290,230,077.94 accurately represents the amount of the actual losses of Kentucky players who lost five dollars or more over the course of each twenty-four hour period from October 12, 2006 until April 15, 2011, and that this amount satisfies the

requirements of KRS 372.020.

This is not a final judgment. It is an interlocutory partial summary judgment only on the issue of damages. The only issue remaining for the Court regarding Amaya and REEL is whether the Court should award the Commonwealth treble damages. A hearing on the issue is scheduled for Monday, November 23, 2015 during the Court's regularly scheduled Motion Hour. The Court will enter a final and appealable judgment thereafter.

WHEREFORE Amaya and REEL's *Motions for Reconsideration* are **DENIED,** the Commonwealth's *Motion for Partial Summary Judgment* is **GRANTED,** and the Commonwealth is hereby **AWARDED** $290,230,077.94 in damages.

SO ORDERED, this 20th day of November, 2015.

Thomas D. Wingate
THOMAS D. WINGATE
Judge, Franklin Circuit Court

APPENDIX F

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II

CIVIL ACTION No. 10-CI-00505

COMMONWEALTH OF KENTUCKY Ex rel. J. Michael Brown, Secretary, Justice and Public Safety Cabinet	**PLAINTIFF**
vs.	
POCKET KINGS, LTD., et al.	**DEFENDANTS**

OPINION AND ORDER

This matter is before the Court upon Plaintiff's Motion for Partial Summary Judgment against Defendants Oldford Group Ltd (hereinafter "Oldford") and Rational Entertainment Enterprise Limited (hereinafter "REEL") and Plaintiffs Motion for Sanctions against REEL and Oldford, as well as PYR Software Ltd (hereinafter "PYR"), Rational Intellectual Holdings Ltd. (hereinafter "RIHL"), and Stelekram Ltd (hereinafter "Stelekram"), collectively PokerStars or the PokerStars Defendants.

The case was called before the Court during its regular civil motion hour on Monday, June 22, 2015. Both parties were represented by counsel, and Defendants objected to

both of Plaintiffs Motions. Upon review of the parties' briefs and papers, and after being sufficiently advised, the Court hereby **GRANTS** Plaintiffs Motion for Partial Summary Judgment. Further, the Court **GRANTS** Plaintiffs Motion for Sanctions in part and **ENTERS** a Default Judgment against the PokerStars Defendants as sought by Plaintiff for Defendants' failure to participate in discovery in this case throughout the pendency of the matter.

STATEMENT OF FACTS

Plaintiff, Commonwealth of Kentucky *ex rel* J. Michael Brown, Secretary, Justice and Public Safety Cabinet (hereinafter "Commonwealth"), brought this action to recover money that players located in Kentucky lost to other players playing real-money poker on PokerStars, between October 12, 2006 and April 15, 2011.

PokerStars is the world's largest online poker site. Mark Scheinberg and his father, Isai Scheinberg, founded PYR in 2000 to develop an internet poker software platform, and eventually the two set up their own online poker operator, PokerStars, in 2001. PokerStars does not participate as a player in the real-money poker games played on PokerStars, instead it charges a "rake" comprised of a portion of the amounts wagered during the poker game whether the players win or lose. Between October 12, 2006 and April 15, 2011, Plaintiff posits that individuals located in Kentucky lost money to other players playing real-money poker on PokerStars. Plaintiff maintains that PokerStars charged a rake on some, or all, of those hands and that Oldford and REEL received part, or all, of the rake. PokerStars did not have a license from the Commonwealth to operate its online poker business in Kentucky.

Oldford was incorporated in 2001 under the laws of the Territory of the British Virgin Islands. It is the holding company that owns PokerStars and the group of subsidiaries that perform various roles in the PokerStars business. In 2013, Oldford continued under the laws of the Isle of Man, and in 2014, Oldford changed its name to Amaya Group Holdings (IOM) Limited. REEL was incorporated in 2004 under the laws of the Isle of Man and is wholly owned by Oldford. REEL operates PokerStars. Until August 2014, Oldford was principally owned by Mark Scheinberg and Pinhas Schapira. Collectively, they owned approximately 90% of Oldford's outstanding shares, and were its directors and managing agents, with Mark Scheinberg serving as CEO. They were also director and managing agents for REEL. In August 2014, Mark Scheinberg and Pinhas Schapira, along with the other shareholders, sold Oldford to Amaya Gaming Group Inc. (Amaya) for a purchase price of $4.9 billion dollars.

Throughout this litigation, PokerStars has refused to participate in discovery, and is in violation of Orders of this Court requiring it to answer interrogatories, produce documents, and to produce individuals for deposition that would provide the Plaintiff the necessary information to bring this matter to conclusion.

ANALYSIS

I. Standards of Review

a. Summary Judgment

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law." CR 56.03. Summary judgment is appropriate when the court concludes that there is no genuine issue of material fact for which the law provides relief. Id. Summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Id.

The moving party bears the initial burden of showing the non-existence of a genuine issue of material fact, and the burden then shifts to the opposing party to show affirmatively that there is a genuine issue of material fact for trial. Jones v. Abner, 335 S.W.2d 471, 475 (Ky. Ct. App. 2011). The movant should not succeed unless it has shown "with such clarity that there is no room left for controversy." Steelvest, Inc. v. Scansteel Service Ctr., 807 S.W.2d 476, 482 (Ky. 1991). "The inquiry should be whether, from the evidence on record, facts exist which would make it possible for the non-moving party to prevail. In the analysis, the focus should be on what is of record rather than what might be presented at trial." Welch v. Am. Publ'g Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999). In reviewing Motions for Summary Judgment, the Court views all facts in the light most favorable to the non-moving party and resolves all doubts in its favor, and summary judgment should only be granted when the facts indicate that the non-moving party cannot produce evidence at trial that would render a favorable judgment. Steelvest, 807 S.W.2d at 480.

The Court recognizes that summary judgment is a device that should be used with caution and is not a substitute for trial. "[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a

judgment in his favor." Jones, 335 S.W.3d at 480. Thus, this Court finds that summary judgment will be proper when it is shown with clarity from the evidence on record that the adverse party cannot prevail, as a matter of law, under any circumstances.

b. Sanctions

Furthermore, CR 37 authorizes this Court to sanction parties for failure to abide by its Orders. The rule authorizes this Court to "make such orders . . . as are just" and provides a non-exclusive list of possible sanctions. See CR 37.02(2); 37.04(l)(b). A party's failure to participate in the discovery process, and refusal to comply with the court's discovery orders, can result in default judgment. See National Resources & Environmental Protection Cabinet v. Williams, 768 S.W.2d 47 (Ky. 1989). In determining discovery sanctions, the trial court is to consider: 1) whether the noncompliance was willful or in bad faith; 2) was the other party prejudiced by the noncompliance; 3) was the non-compliant party warned that failure to cooperate could lead to sanctions including default judgment; 4) were less drastic sanctions considered before the non-compliant party was precluded from presenting its defenses and evidence; and 5) do the sanctions bear a reasonable relationship to the seriousness of the non-compliance. See R.T. Vanderbilt Co. v. Franklin, 290 S.W.3d 654,662 (Ky. Ct. App. 2009).

II. Argument

a. Introduction

KRS 372.010[1] voids all gambling contracts and

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[1] KRS 372.010 provides that:

transactions not otherwise licensed, authorized or permitted.[2] KRS 372.020[3] provides the losing gambler with a first-party cause of action to recover any losses suffered. KRS 372.040[4] provides for a third-party cause

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> Every contract, conveyance, transfer or assurance for the consideration, in whole or in part, of money, property or other thing won, lost or bet in any game, sport, pastime or wager, or for the consideration of money, property or other things lent or advanced for the purpose of gaming, or lent or advanced at the time of any betting, gaming, or wagering to a person then actually engaged in betting, gaming, or wagering, is void.

[2] KRS 372.005 provides that "[t]he terms and provisions of this chapter do not apply to betting, gaming, or wagering that has been authorized, permitted, or legalized, including, but not limited to, all activities and transactions permitted under KRS Chapters 154A.230, and 238."

[3] KRS 372.020 states that:

> If any person loses to another at one (1) time, or within twenty-four (24) hours, five dollars ($5) or more, or anything of that value, and pays, transfers or delivers it, the loser or any of his creditors may recover it, or its value, from the winner, or any transferee of the winner, having notice of the consideration, by action brought within five (5) years after the payment, transfer or delivery. Recovery may be had against the winner, although the payment, transfer or delivery was made to the endorsee, assignee, or transferee of the winner. If the conveyance or transfer was of real estate, or the right thereto, in violation of KRS 372.010, the heirs of the loser may recover it back by action brought within two (2) years after his death, unless it has passed to a purchaser in good faith for valuable consideration without notice.

[4] KRS 372.040 provides that "[i]f the loser or his creditor does not, within six (6) months after its payment or delivery to the winner, sue

of action to any person if the losing gambler fails to bring a recovery action under KRS 372.020 within six months. Pursuant to KRS 372.040, the Commonwealth brought this third-party action against PokerStars to recover money that players located in Kentucky lost to other players playing real-money poker on PokerStars between October 12, 2006 and April 15, 2011. In order to establish liability, the Commonwealth must show that PokerStars is a "winner" within the meaning of KRS 372.020, that there are "losers" who have lost five (5) or more dollars within a twenty-four hour period of time and that the losers did not sue within six months to recover the lost bets. Moreover, any recoverable losses must be gambling losses that resulted from gaming and payment transactions which occurred within the Commonwealth.

b. Liability under KRS Chapter 372

Based on Olford's *Responses to the Plaintiff's First Request for Admissions*, Plaintiff insists that Oldford admits the following: individuals located in Kentucky lost $5 or more to other players at one time playing real-money poker on PokerStars; individuals located in Kentucky lost five dollars ($5) within twenty-four (24) hours to other players playing real-money poker on PokerStars; PokerStars charged a "rake" on some or all of these poker hands; Oldford and REEL received part or all of the rake; and, none of the Kentucky players who lost sued within six months to recover their lost bets. Oldford also admits that all statements contained in the documents Amaya filed in the System for Electronic Document Analysis and

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for the money or thing lost, and prosecute the suit to recovery with due diligence, any other person may sue the winner, and recover treble the value of the money or thing lost, if suit is brought within five (5) years from the delivery or payment."

Retrieval ("SEDAR") system bearing bates stamp numbers OLDFORD 000001-001836 are true. Id. REEL has offered no affidavit or other evidence tending to show that Oldford's admissions are false.

Oldford responds that there are numerous issues of material fact as to which there are genuine disputes. In particular, Oldford argues that Plaintiff has failed to identify a singular or specific "loser" as contemplated under the statute. Additionally, Oldford disputes the degree to which the outcome of the poker games at issue were based upon an element of chance as that phrase is used in the statute. Also, Defendants argue that, even if Plaintiff is entitled to judgment against Oldford, that Oldford's admissions cannot be used to obtain partial summary judgment against REEL. Lastly, Oldford contests Plaintiff's authority to bring the instant suit. For these reasons, Oldford urges the Court to deny Plaintiff's Motion for Partial Summary Judgment.

With these positions in mind, the Court concludes as a matter of law that Plaintiff is entitled to summary judgment on the issue of the PokerStars Defendants' liability under KRS Chapter 372. Under KRS Chapter 372, any party who takes a portion of money lost in gambling is a "winner" within the meaning of the Chapter. Kentucky's highest court has held that one who takes rake from a poker game is liable under KRS Chapter 372. See Triplett v. Seelbach, 14 S.W. 948, 949 (Ky. 1890); White v. Wilson's Adm'rs, 38 S.W. 495, 496-97 (Ky. 1897); Cartwright v. McElwain, 16 S.W. 297, 299 (Ky. 1909). These undisputed facts are sufficient to establish that Oldford and REEL are "winners" as contemplated by KRS 372.020. It is not relevant that PokerStars did not stand any chance of losing.

PokerStars complains that the Commonwealth has not offered an affidavit from an individual Kentucky player who lost money as it did in support of the motion for partial summary judgment on liability against Partygaming. Oldford's admissions are on file and are sufficient to establish its liability. REEL has offered no affidavit or other evidence tending to show that Oldford admissions are false, so REEL has not sustained its burden to show affirmatively that there is a genuine issue of material fact for trial. Jones v. Abner, 335 S.W.2d 471, 475 (Ky. Ct. App. 2011). These undisputed facts are sufficient to establish the existence of losing gamblers in Kentucky at the requisite wager increments between October 12, 2006 and April 15, 2011.

Next, it is undisputed that none of the Kentucky players sued PokerStars to recover the money lost playing online poker offered by PokerStars. PokerStars also contends that the Commonwealth is not a proper party to bring this claim under KRS 372.040. This issue has been contested several times in this action, so the record is substantial. The Court finds that the Commonwealth is a proper party to bring this claim. Therefore, the Commonwealth is entitled to seek recovery on behalf of PokerStars' losing Kentucky gamblers pursuant to KRS 372.040.

Oldford and REEL contend that skill predominates over chance in poker, so poker is not gambling for purposes of KRS 372.040, yet they offer no persuasive legal authority to support that position. Rather, the Court refers to KRS 528.010 for the definition of "gambling." KRS 528.010(3)(a) defines gambling as "staking or risking something of value upon the outcome of a contest, game, gaming scheme, or gaming device which is based upon an

element of chance, in accord with an agreement or understanding that someone will receive something of value in the event of a certain outcome." The Kentucky Court of Appeals in Fall v. Commonwealth, 245 S.W.3d 812 (Ky. Ct. App. 2008) held that the statutory definition of "gambling" requires only an element of chance. "Regardless of how much skill may precede [...], it is the chance or luck that an underdog may prevail that encourages the betting public." Fall, 245 S.W.3d at 814. While PokerStars does not contest the definition or construction of the term "gambling" in Kentucky, PokerStars insists that the games it offered on its internet websites were not games of chance. Rather, PokerStars maintains that its games require a high degree of skill. This Court is not persuaded that the degree of skill in poker games is relevant. The singular inquiry for this Court is whether PokerStars' internet poker games involved an element of chance, and Oldford and REEL do not dispute that there is an element of chance. The element of chance, while certainly not the only element involved in playing PokerStars' internet games, makes the games fall squarely within the definition of gambling in Kentucky regardless of the degree of skill involved.

Plaintiff has established all of the necessary elements to obtain partial summary judgment on the issue of the PokerStars Defendants' KRS Chapter 372 liability. Oldford and REEL are undeniably winners to the gambling debts of Kentucky poker playing losers. The evidence and admissions establish that the PokerStars Defendants took a rake on some, or all, of the real-money poker games on PokerStars, with Oldford and REEL receiving part, or all, of the rake. Moreover, the evidence establishes that individuals located in Kentucky lost $5 or

more within twenty-four (24) hours to other players at one time playing real-money poker on PokerStars. Lastly, the evidence is clear that none of the Kentucky players who lost sued within six months to recover their lost bets, entitling the Commonwealth as Plaintiff to maintain this action and collect damages. There being no material facts in dispute, the Court hereby **GRANTS** Plaintiffs Motion for Partial Summary Judgment against the PokerStars Defendants.

c. Sanctions Pursuant to CR 37.02 and 37.04

In Plaintiff's Motion for Sanctions, Plaintiff sets out the ongoing violations of this Court's Discovery Orders by PokerStars Defendants REEL, Oldford and PYR. REEL has refused to produce Mark Scheinberg and Pinhas Schapira for depositions, as the Court ordered on March 10, 2014. Mr. Scheinberg and Mr. Schapira were REEL's directors and managing agents[5] (i) when REEL agreed to produce them for deposition, (ii) when the Court ordered REEL to produce them, and (iii) when REEL initially violated the Court's Order by refusing to produce them. REEL has been allowed additional opportunities to cure its violation, but the depositions have not yet occurred. REEL claims that Mr. Scheinberg recently refused to appear, and that Mr. Schapira is now ill and unable to appear. Accepting REEL's contentions as true, these situations are both recent, occurring more than a year after the Court ordered REEL to produce them, and more than a year after REEL violated that Order. The Record also shows that Mr. Scheinberg and Mr. Schapira sold

[5] Mr. Scheinberg and Mr. Schapira were also directors and managing agents for RIHL. Both companies were under common control and Oldford was the shareholder of both. See, e.g., REEL and RIHL Answer to Sixth Amended Complaint, p. 3, January 24, 2014.

their stock in Oldford to Amaya in August 2014, and that as part of that sale they agreed to indemnify REEL (and Oldford) for this Action, to assist in this Action, and to assume the defense of this Action. REEL did not seek relief from the Order prior to the sale to Amaya, or even notify the Court or the Commonwealth of the sale. REEL's refusal to produce Mr. Scheinberg and Mr. Schapira when they were directors and managing agents (before it was sold to Amaya, and long before they recently became unavailable) is part of a pattern of refusing to comply with discovery and this Court's discovery Orders. As directors and managing agents of the PokerStars Defendants prior to the sale to Amaya, it appears that Mr. Scheinberg and Mr. Schapira were ultimately responsible for that abusive pattern of misconduct.

Considering the Record as a whole, the Court finds that REEL willfully refused to comply with the Court's Discovery Order to produce Mr. Scheinberg and Mr. Schapira. The Court also finds that REEL's refusal caused substantial prejudice to the Commonwealth by depriving it of substantial material evidence. REEL and Oldford have refused to produce answers to several of the Commonwealth's interrogatories and documents responsive to its requests for production of documents, and have simply defied this Court by not producing the relevant gaming data, claiming that the data is incriminatory, and that producing it would violate REEL's and Oldford's claimed right against self-incrimination under the Fifth Amendment of the U.S. Constitution.

"CR 26.02 provides that the parties may obtain discovery of any matter not privileged which is relevant to

the subject matter in the pending action. . . . The rule exempts privileged matters as a subject of an examination. *Such privileged matters should be limited to communications and other matters which are excluded by the constitution, the statute or our rules.*" Ewing v. May, 705 S.W.2d 910, 912 (Ky. 1986)(emphasis added). REEL and Oldford have the burden of proving that a privilege applies, since they are claiming the privilege. Sisters of Charity Health Sys. v. Raikes, 984 S.W.2d 464, 468 (Ky. 1998). REEL and Oldford cannot do this. It is well settled that the Fifth Amendment does not provide a right against self-incrimination to companies, such as Oldford and REEL. Braswell v. United States, 487 U.S. 99, 110 (1988) ("it is well established that such artificial entities are not protected by the Fifth Amendment.").

"Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation." United States v. White, 322 U.S. 694, 698 (1944); United States v. Lockhart, 2013 U.S. Dist. LEXIS 48824 (E.D. Ky. Apr. 4, 2013). The Supreme Court of Kentucky has held that the self-incrimination protection in *Section Eleven of the Kentucky Constitution* is identical to that in the *Fifth Amendment of the U.S. Constitution;* therefore, separate analysis of the two provisions is unnecessary. Newman v. Stinson, 489 S.W.2d 826, 829 (Ky. 1972) ("We conclude therefore that the protection against self-incrimination given by the *Fifth Amendment to the United States Constitution* is identical with that afforded by *Section Eleven of the Kentucky Constitution*").

Likewise, the privilege against self-incrimination does not protect company documents, such as the gaming data. Lee v. Ryan, 2003 Ky. Unpub. LEXIS 118, *9 (Ky. 2003)

(the right against self-incrimination does not extend to records of corporate entities); Braswell v. United States, 487 U.S. 99, 115 (1988) ("There is no question but that the contents of the subpoenaed business records are not privileged."); Doe v. United States, 487 U.S. 201, 206 (1988) ("There also is no question that the foreign bank cannot invoke the Fifth Amendment in declining to produce the documents; the privilege does not extend to such artificial entities."); Bellis v. United States, 417 U.S. 85, 89-90 (1974) ("No artificial organization may utilize the personal privilege against compulsory self-incrimination.").

Oldford and REEL concede that there is no authority holding that the Fifth Amendment's self-incrimination protection applies to companies or company documents. Instead, they offer two persuasive cases interpreting Illinois state law. Unable to support their objection with precedential legal authority, Oldford and REEL invite this Court to extend the Fifth Amendment right against self-incrimination to corporations. Oldford and REEL offer no authority that such an "extension" would be proper or even permissible, so this Court declines their invitation. The Court finds that REEL and Oldford have failed to satisfy their burden of proving that their claimed right against self-incrimination applies. Sisters of Charity Health Sys. v. Raikes, 984 S.W.2d 464, 468 (Ky. 1998). The Court overrules the objection.

Oldford and REEL suggest that their objections are sufficient *responses* under CR 33.01 and 34.02. Had the Court ordered REEL and Oldford to *respond* to the Commonwealth's interrogatories and requests for production of documents by the May 31, 2015 deadline, the Court might agree. However, the Court ordered Oldford

and REEL to produce answers and documents by May 31, 2015. Neither Oldford nor REEL objected to any of the Commonwealth's interrogatories or request for production of documents in response to the Commonwealth's motions to compel. The Court granted the Commonwealth's motions to compel Oldford and REEL based on the Record and the arguments presented, clearly setting May 31, 2015 as the deadline to produce answers and documents. Oldford and REEL had ample time to seek relief from the Orders if they intended to object instead of produce answers and documents, yet they did not. Moving the Court for relief would have allowed the Court to consider and rule on the objections before the May 31, 2015 deadline, yet neither Oldford nor REEL sought relief from the Orders. Instead, Oldford and REEL refused to comply. The Court finds that Oldford and REEL willfully refused to comply with the Court's discovery Orders by refusing to produce the answers and documents, and thus has caused substantial prejudice to the Commonwealth. Additionally, PYR has provided incomplete and evasive answers to the Commonwealth's interrogatories, thus refusing to comply with the Court's discovery Order. The Court finds that the Commonwealth's complaints about PYR deficiencies are well taken, and that PYR has refused to cure those deficiencies despite the Court's order that PYR produce answers to the interrogatories and documents for the request for admissions, and that its refusal has caused substantial prejudice to the Commonwealth.

CR 37.02 authorizes the imposition of sanctions up to and including default judgment against a defendant for their refusal to comply with discovery orders. CR 37.04 addresses the failure of a party to attend a deposition or

otherwise response to interrogatories of request for inspection. R.T. Vanderbilt Co. v. Franklin, 290 S.W.3d 654, 662 (Ky. Ct. App. 2009) sets out five factors for the trial court to review to consider on the imposition of sanctions under CR 37.02. In this instance, the Court finds specifically that: PokerStars non-compliance with this Court's Orders was willful or in bad faith, that the Plaintiff is prejudiced by PokerStars' failure to comply with this Court's Orders, that PokerStars was repeatedly warned that failure to cooperate could lead to sanctions including default judgment, less drastic sanctions than precluding PokerStars defendants from presenting defenses and presenting evidences were considered, and that the sanctions of default bear a reasonable relationship to the seriousness of the non-compliance with this Court's Orders.

III. Conclusion

The Commonwealth has satisfied its burden of showing that no genuine issues of material fact exist. Summary judgment is proper on the issue of liability. Accordingly, this Court finds that Oldford and REEL are liable under KRS 372.040 and enters **PARTIAL SUMMARY JUDGMENT** on liability.

Because of the degree to which the REEL, Oldford and PYR have defied and refused to obey this Court's discovery Orders, and having considered the factors set out in R.T. Vanderbilt Co. v. Franklin, 290 S.W.3d 654, 662 (Ky. Ct. App. 2009), the Court **GRANTS** Plaintiff's Motion for Sanctions and enters a **DEFAULT JUDGMENT** against Oldford, REEL, and PYR.

This is not a final judgment. It is an interlocutory partial summary judgment only on the issues of liability,

not the existence and extent of damages. The only issue remaining for the Court regarding Oldford and REEL is a determination of damages based on the amount of money that Kentucky residents lost playing online poker on PokerStars' internet gambling games. The Court **ORDERS** that a hearing on the issue of damages shall be scheduled at a mutually agreeable date in the future, with the expectation that the Court will enter a final and appealable judgment thereafter.

WHEREFORE, the Plaintiff's *Motion for Partial Summary Judgment* is **GRANTED.** The Plaintiff's *Motion for Sanctions* is **GRANTED** and default Judgment against the PokerStars Defendants is hereby **GRANTED.**

SO ORDERED, this 11th day of August, 2015.

Thomas D. Wingate
THOMAS D. WINGATE
Judge, Franklin Circuit Court

APPENDIX G

Supreme Court of Kentucky

2019-SC-0058-DG
2019-SC-0209-DG

COMMONWEALTH OF KENTUCKY, EX REL. J. MICHAEL BROWN, SECRETARY OF THE GOVERNOR'S EXECUTIVE CABINET	APPELLANT/ CROSS-APPELLEE

V.

ON REVIEW FROM COURT OF APPEALS
NO. 2016-CA-0221
FRANKLIN CIRCUIT COURT NO. 10-CI-00505

STARS INTERACTIVE HOLDINGS (IOM) LTD., F/K/A AMAYA GROUP HOLDINGS (IOM) LTD. AND RATIONAL ENTERTAINMENT ENTERPRISES, LTD.	APPELLEES/CROSS-APPELLANTS

ORDER DENYING PETITION FOR REHEARING

The Petition for Rehearing, filed by the Appellees/Cross-Appellants of the Opinion of the Court, rendered December 17, 2020, is DENIED.

All sitting. All concur.

ENTERED: March 25, 2021.

John D. Minton
CHIEF JUSTICE