

IN THE SUPREME COURT OF OHIO

**STATE OF OHIO EX REL.
WILLIAM D. MASON, CUYAHOGA
COUNTY PROSECUTOR,**

Relator,

vs.

**HONORABLE NANCY MARGARET
RUSSO, JUDGE, CUYAHOGA
COUNTY COURT OF
COMMON PLEAS,**

Respondent.

Case No. 2012-1128

Original Action in Prohibition

**MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM
IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS
RELATOR'S PETITION FOR WRIT OF PROHIBITION**

Daniel F. Gourash (0032413)
(COUNSEL OF RECORD)
Eric D. Baker (0070025)
Seeley, Savidge, Ebert & Gourash Co., LPA
26600 Detroit Road, Suite 300
Cleveland, Ohio 44145
(216) 566-8200
(216) 566-0213 (Facsimile)
dfgourash@sseg-law.com
edbaker@sseg-law.com

Barton R. Keyes (0083979)
(COUNSEL OF RECORD)
Charles H. Cooper, Jr. (0037295)
Cooper & Elliott, LLC
2175 Riverside Drive
Columbus, Ohio 43221
(614) 481-6000
(614) 481-6001 (Facsimile)
bartk@cooperelliott.com
chipc@cooperelliott.com

Attorneys for Amici Curiae
J&C Marketing, LLC, Izdihar "Esther"
Najjar d/b/a Cyber Oasis, Page-Jaq, LLC
and New Heights Business Center, LLC

Attorneys for Amici Curiae
AI 123, Inc.; A J & N, Inc.; BG Broadway
320, Inc.; Cyber World Entertainment
Corp.; Gamers Club North Olmstead, Inc.;
Garth and Lindsey, LLC; JPAS, Inc.; Las
Palmas III, LLC; Le Royale; Ohio Internet
Café, LLC; and Royal Palms Sweeps LLC

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**MOTION FOR LEAVE TO FILE AMICUS CURIAE MEMORANDUM
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The Internet Sweepstakes Café amici respectfully request leave to file an Amicus Curiae memorandum in support of Respondent Nancy Margaret Russo’s Motion To Dismiss Relator William D. Mason's Petition for a writ of prohibition.¹ The Internet Sweepstakes Café amici are fifteen (15) small businesses that operate retail stores in Cuyahoga County. At their retail stores, the Internet Sweepstakes Café amici sell either internet time or prepaid domestic and international long distance phone cards. The Internet Sweepstakes Café amici use a sweepstakes to promote the sale of their internet time or phone cards, and to gain a competitive advantage over competitors such as Kinko’s, Federal Express, Giant Eagle or Speedway.

¹ The term “Internet Sweepstakes Café amici” refers collectively to: J&C Marketing, LLC; Izdihar “Esther” Najjar d/b/a Cyber Oasis; Page-Jaq, LLC; New Heights Business Center, LLC; AI 123, Inc.; A J & N, Inc.; BG Broadway 320, Inc.; Cyber World Entertainment Corp.; Gamers Club North Olmstead, Inc.; Garth and Lindsey, LLC; JPAS, Inc.; Las Palmas III, LLC; Le Royale; Ohio Internet Café, LLC; and Royal Palms Sweeps LLC.

The Internet Sweepstakes Café amici, along with dozens of other business in Cuyahoga County, were involuntarily shut down on May 30, 2012 when Relator sent them a cease and desist letter threatening them with prosecution if they continued operating their sweepstakes. After receiving Relator's letter, café owner J&C Marketing, LLC filed a declaratory judgment action in the Cuyahoga Court of Common Pleas against Relator, seeking injunctive relief allowing it to re-open and a declaration that its sweepstakes is not illegal gambling as asserted by Relator. The case caption is *J&C Marketing, LLC, et al. v. Mason*, Case No. 784234 (the "Underlying Litigation"). Soon after, the remaining Internet Sweepstakes Café amici moved to intervene in J&C Marketing's suit, and were eventually granted leave to do so. All of the Internet Sweepstakes Café amici have since been granted temporary restraining orders by Respondent allowing them to re-open their stores. Those orders have been extended until a preliminary injunction hearing is held upon dismissal of Relator's Petition. As a result, the outcome of this original action directly affects the business interests and livelihood of the Internet Sweepstakes Café amici, and they should be granted leave to file an amicus curiae memorandum as a result.

Under S.Ct.Prac.R. 10.8 and 6.6, an amicus curiae may file a merit brief in an original action without leave of court. See *State ex rel. Citizen Action for a Livable Montgomery v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437 (2007), ¶ 24. However, the Supreme Court Rules of Practice do not specifically authorize an amicus curiae to file a memorandum prior to the granting of an alternative writ, so leave must be sought. See *State ex rel. Vaughn Industries, L.L.C. v. Reece*, 116 Ohio St.3d 1212 (2007), ¶ 3 (granting motion of amicus curiae for leave to file a memorandum opposing respondents' motion to dismiss in prohibition case).

Here, the Internet Sweepstakes Café amici should be permitted to file an amicus curiae memorandum because they are the plaintiffs in the Underlying Litigation that Relator seeks to prohibit. Thus, the Internet Sweepstakes Café amici can assist this Court in making its determination under S.Ct.Prac.R. 10.5. This Court has granted leave to file an amicus brief in other original actions when the proposed amicus curiae is a plaintiff in the underlying action that the relator seeks to prohibit. *See, e.g., State ex rel. Duke Energy Ohio, Inc. v. Hamilton Cty. Ct. of Common Pleas*, 126 Ohio St.3d 41 (2010), at ¶ 12 (granting a motion of amicus curiae for leave to file a memorandum supporting the respondent's motion to dismiss in prohibition case because amicus curiae was the plaintiff in the underlying action and the memorandum would assist the Court in its determination). Further, as small business owners, the Internet Sweepstakes Café amici in the Underlying Litigation have a vested business interest in the outcome of Relator's petition, and they should be heard.

In short, the Internet Sweepstakes Café amici are plaintiffs in the case which Relator seeks to prohibit, and this Court's resolution of Relator's Petition will significantly affect their respective business interests. Accordingly, the Internet Sweepstakes Café amici respectfully request that the Court grant them leave to file an amicus curiae memorandum in support of Respondent's Motion to Dismiss on or before the deadline for Respondent's response to Relator's Petition. A copy of the amicus brief is attached to this Motion. For the sake of convenience, a proposed Order granting this Motion is also attached.

Respectfully submitted,

Daniel F. Gourash / per auth.

Daniel F. Gourash (0032413)
(COUNSEL OF RECORD)
Eric D. Baker (0070025)
Seeley, Savidge, Ebert & Gourash Co., LPA
26600 Detroit Road, Suite 300
Cleveland, Ohio 44145
(216) 566-8200
(216) 566-0213 (Facsimile)
dfgourash@sseg-law.com
edbaker@sseg-law.com

Attorneys for Amici Curiae
J&C Marketing, LLC, Izdihar "Esther" Najjar
d/b/a Cyber Oasis, Page-Jaq, LLC and New
Heights Business Center, LLC

Barton R. Keyes

Barton R. Keyes (0083979)
(COUNSEL OF RECORD)
Charles H. Cooper, Jr. (0037295)
Cooper & Elliott, LLC
2175 Riverside Drive
Columbus, Ohio 43221
(614) 481-6000
(614) 481-6001 (Facsimile)
bartk@cooperelliott.com
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Palmas III, LLC; Le Royale; Ohio Internet
Café, LLC; and Royal Palms Sweeps LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was sent to the following counsel of record, by regular U.S. mail, postage prepaid, this 27th day of July, 2012:

William D. Mason, Esq.
Cuyahoga County Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

Julia R. Bates, Esq.
Prosecuting Attorney Lucas County, Ohio
Lucas County Courthouse
Toledo, Ohio 43604

Relator

Attorney for Amicus Curiae
Ohio Prosecuting Attorneys Association

Robert P. Ducatman, Esq.
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114

Mike DeWine, Ohio Attorney General
Michael J. Schuler, Esq.
Assistant Attorney General
Ohio Attorney General's Office
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

Attorney for Respondent
The Honorable Nancy Margaret Russo

Brian Mooney, Esq.
Christopher A. Wagner, Esq.
Susan A. Choe, Esq.
Ohio Attorney General's Office
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215

Attorneys for Amicus Curiae
Ohio Attorney General Mike DeWine


Barton R. Keyes (0083979)

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ORDER AND ENTRY

Upon consideration and good cause shown, the Motion for Leave To File Amicus Curiae Memorandum In Support of Respondent Nancy Margaret Russo's Motion To Dismiss Relator William D. Mason's Petition For Writ of Prohibition of the Internet Sweepstakes Café amici is hereby **GRANTED**.

ENTERED BY ORDER OF THE COURT:

Kristina D. Frost, Clerk

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AMICUS CURIAE'S MEMORANDUM IN SUPPORT OF RESPONDENT'S
MOTION TO DISMISS RELATOR'S PETITION FOR WRIT OF PROHIBITION

Daniel F. Gourash (0032413)
(COUNSEL OF RECORD)
Eric D. Baker (0070025)
Seeley, Savidge, Ebert & Gourash Co., LPA
26600 Detroit Road, Suite 300
Cleveland, Ohio 44145
(216) 566-8200
(216) 566-0213 (Facsimile)
dfgourash@sseg-law.com
edbaker@sseg-law.com

Attorneys for Amici Curiae
J&C Marketing, LLC, Izdihar "Esther"
Najjar d/b/a Cyber Oasis, Page-Jaq, LLC
and New Heights Business Center, LLC

Barton R. Keyes (0083979)
(COUNSEL OF RECORD)
Charles H. Cooper, Jr. (0037295)
Cooper & Elliott, LLC
2175 Riverside Drive
Columbus, Ohio 43221
(614) 481-6000
(614) 481-6001 (Facsimile)
bartk@cooperelliott.com
chipc@cooperelliott.com

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INTEREST OF AMICUS

Small businesses are the engine that drive Ohio's economy. They provide wealth to owners, they create jobs, and they benefit both the State and local communities with tax dollars and licensing fees. From Governor Kasich to local mayors and community officials, all recognize that the key to a healthy economic future in Ohio depends largely upon the success of small businesses.¹

This Amicus Brief is submitted on behalf of a group of fifteen small businesses that own and operate internet sweepstakes cafés in Cuyahoga County, Ohio. These cafés sell either time on the internet or phone cards, and compete with entities such as Kinkos, Fedex, Speedway and Giant Eagle. To market their services, these cafés offer sweepstakes in which customers may win prizes that are selected from a predetermined finite pool of prizes. While customers who enter the sweepstakes may play entertaining games on computer monitors provided by the cafés to reveal if they won a prize, they do not have to play the game to determine if they won. Most important, no purchase is necessary to play the sweepstakes, and the product purchased, *i.e.*, internet time or phone card time, is *never at risk* in the sweepstakes because the customer retains the full value of the internet/phone card regardless of whether a prize is won. Further, time spent viewing the entertaining games does not erode the full value of the internet or phone card time that is purchased.

The internet cafés submitting this Amicus Brief employ several hundred individuals, and all pay licensing fees and taxes to the cities or townships in which they are located. Some of the cafés have been operating for years in Cuyahoga County. Nonetheless, on May 30, 2012,

¹ Governor Kasich has said so in an executive order promoting common sense and transparency in regulating small businesses. *See* Executive Order 2011-01K, Establishing the Common Sense Initiative, *available at* <http://business.ohio.gov/docs/ExecutiveOrder2011-01K.pdf> (Jan. 10, 2011).

Cuyahoga County Prosecutor William D. Mason sent a letter to every internet sweepstakes café in Cuyahoga County ordering them to cease and desist their internet sweepstakes operations claiming they were in violation of Ohio gambling laws provided in Ohio Revised Code §§ 2915.02, 2915.03 and 2915.04. As a result, the internet cafés submitting this Amicus Brief shut down their operations for fear of criminal prosecution and forfeiture of their property.

Soon after, the parties to this Amicus Brief filed suit under the Ohio Declaratory Judgment Act in *J&C Marketing, LLC, et al. v. William D. Mason in his capacity as Cuyahoga County Prosecutor*, Cuyahoga County Court of Common Pleas, Case No. 784234 (the “Underlying Litigation”),² and sought temporary restraining orders allowing them to resume operations pending a preliminary injunction hearing, all of which were granted by Respondent. The temporary restraining orders were extended by agreement and remain in effect while Relator’s Petition is heard by this Court.

The internet sweepstakes cafés submitting this Amicus Brief have a direct interest in the outcome of this Petition because if the Writ of Prohibition is granted, these cafés will be left in legal limbo as they will be unable to operate for fear of prosecution, but will have no legal recourse to challenge Relator’s application of Ohio’s gambling laws to their operations under the Declaratory Judgment Act. Ultimately, this leaves the internet cafés with one option – to get arrested, have their property seized, and then defend themselves in a criminal case. This result is unacceptable. Relator cannot deprive the internet cafés from seeking relief under the Ohio Declaratory Judgment Act to test the application of the Ohio gambling laws to their operations as recognized by this Court in *Peltz v. City of South Euclid*, 11 Ohio St.2d 128 (1967). This is

² J&C Marketing, LLC was the original plaintiff in the Underlying Litigation. All other parties to this Amicus Brief later intervened in the Underlying Litigation. After that, a separately filed case, *AMA Ventures, Inc., et al. v. Mason*, Case No. 785188, was consolidated with the Underlying Litigation, and is pending before Respondent.

especially true in light of the new law that allows sweepstakes operators who were involuntarily shut down to seek a court order allowing them to re-open. In Ohio, small business owners should not be forced to submit to arrest and prosecution to find out if their operations violate Ohio law.

Accordingly, Amicus Curiae urge that Relator's petition be dismissed.

ARGUMENT

I. RELATOR'S PETITION FOR A WRIT OF PROHIBITION SHOULD BE DISMISSED BECAUSE RESPONDENT HAD AUTHORITY TO EXERCISE JURISDICTION UNDER OHIO LAW.

A. Respondent Has Jurisdiction Under Ohio Law To Adjudicate The Claims Against Relator.

It is well-established under Ohio law that the validity, construction or application of a criminal statute or ordinance are appropriate subjects for a declaratory judgment action under Ohio Revised Code §2721.03. In *Peltz v. City of South Euclid*, 11 Ohio St.2d 128 (1967), this Court held:

Where a statute or ordinance which imposes criminal penalties on a contemplated act will be enforced against a person if he proceeds to do that act, such person has standing to test the validity, structure or application of the statute or ordinance by action for declaratory judgment without having to demonstrate the existence of an actual controversy by commission of a violation of the statute or ordinance.

Peltz, syllabus at 1. (Emphasis added.)

In *Peltz*, the plaintiff filed suit against the City of South Euclid, Ohio seeking a declaration that the city's ordinance banning the placement of political signs was unconstitutional. The City argued that the plaintiff, who was never charged with violation of the ordinance, did not have standing to seek a declaration or injunctive relief as a result. The Ohio Supreme Court rejected

this argument, noting that the plaintiff had standing because he was threatened with prosecution under the ordinance:

It was not necessary for the plaintiff, in order to demonstrate the existence of an actual controversy, to place a political sign on his property in violation of the ordinance. *Plaintiff's intended action was not speculative nor was defendant's threat hypothetical. If plaintiff had acted, the ordinance would have been applied to his disadvantage. Thus, the record establishes the existence of an actual controversy* 'between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Id. at 131. (Emphasis added.)

The facts in *Peltz* that created jurisdiction are identical to the facts in the matter being challenged by Relator. In his letter dated May 30, 2012, Relator stated: "I direct that you cease any Internet Sweepstakes Café operations that are currently on-going and permanently close this aspect of your business. Any individual who continues to operate an Internet Sweepstakes Café *will* have their facts presented to a Grand Jury for criminal prosecution and forfeiture." (Emphasis added.) There is nothing hypothetical about Relator's threat to prosecute these cafés, nor are the intended actions of these cafés to operate speculative. Thus, there was an actual case and controversy between the parties that gave the internet sweepstakes cafés standing to seek declaratory and injunctive relief in Respondent's court under *Peltz*. As a result, Respondent's exercise of jurisdiction and her granting of the temporary restraining orders was authorized by law.

Fifteen years after *Peltz*, in *Pack v. City of Cleveland*, 1 Ohio St.3d 129 (1982), this Court reaffirmed the right to seek a declaratory judgment regarding the application of a criminal statute:

Any person whose rights, status or other legal relations are affected by a law may have determined any question of construction or validity arising under such law, where actual or

threatened prosecution under such law creates a justiciable controversy. Courts of record may declare rights, status and other legal relations, and the declaration may be either affirmative or negative in form and effect.

Pack, syllabus at 1. (Emphasis added.)

The Court in *Pack* also noted the declaration may be in the affirmative or negative, stating: “[t]he Ohio declaratory judgment sections are supportive of the claimant’s right to bring such an action claiming an affirmative position as to the statute or law. R.C. 2721.02, in pertinent part, states that: ‘The declaration may be either affirmative or negative in form and effect. Such declaration has the effect of a final judgment or decree.’” *Id.* at 131. The Court also noted that a court has broad general authority to test the construction of a law under R.C. 2721.03. *Id.* at 132.

Accordingly, in light of both *Peltz* and *Pack*, there is no question that the internet sweepstakes cafés submitting this Amicus Brief had standing to seek a declaration that the anti-gambling statutes cited by Relator in his May 30, 2012 cease and desist letter do not apply to their operations, and to ask Respondent to issue temporary injunction orders allowing them to re-open. Thus, Respondent’s exercise of jurisdiction over the underlying declaratory judgment action was authorized under Ohio law, and Relator’s Petition for a writ of prohibition should be dismissed.

Relator has cited several cases in his petition arguing that they support his contention that Respondent did not have jurisdiction to grant injunctive relief. *See, Troy Amusement Co. v. Attenweiler*, 137 Ohio St. 460 (1940), *Garano v. State*, 37 Ohio St.3d 171 (1988), and *Ensley v. City of Dayton*, WL 491116, App. No. 14487 (2nd Dist.1995), unreported. However, in each of these cases, the respective courts held that a trial court may not enjoin an ongoing prosecution or inhibit efforts to enforce the law, as the proper forum for a prosecution in a criminal case is the

criminal court. These cases are thus easily distinguishable and should be disregarded because in all of them, the party seeking injunctive relief either already had been prosecuted (*Troy Amusement* and *Ensley*), or had property seized in an investigation by the prosecutor (*Garano*). In the Underlying Litigation, there was no pending or ongoing prosecution or property seizure against any internet sweepstakes café when suit was filed, or when Respondent issued the temporary restraining orders.³ Thus, none of the cases relied upon by Relator in his petition support his petition that Respondent did not have jurisdiction to act as she did in the Underlying Litigation.

Also, *Troy Amusement* was decided in 1940, which was 13 years prior to the enactment of Ohio's Declaratory Judgment Act in 1953. *Troy Amusement* should therefore be disregarded since the law under which Amicus Curiae brought suit was not in existence when *Troy Amusement* was decided. The *Garano* and *Ensley* cases also should be disregarded because they rely heavily upon *Troy Amusement*, *supra*.

B. The Declaratory Judgment Act Provides Amicus Curiae Access To The Courts To Determine Whether The Ohio Gambling Laws Apply To Sweepstakes Operations.

³ Relator cites one other case in support of his petition, *Quality Care Transport v. Ohio Dept. of Job & Family Servs.*, 2d Dist. Nos. 2009 CA 113, 2009 CA 121, 2010-Ohio-4763, in which the appellate court affirmed the trial court's refusal to accept the plaintiff's action seeking a declaration as to whether the plaintiff had violated Medicaid law via its contracts with private firms by charging the private firms less than that which Plaintiff was charging the ODJFS. There is nothing in *Quality Care* that supports Relator's claim that Respondent had no jurisdiction to issue the temporary restraining orders. To the contrary, *Quality Care* actually supports Respondent's position as the court held that the trial court should have determined whether or not the terms of the plaintiff's contract with the ODJFS were violated by the plaintiff's contract with the private entities. *Id.* at ¶ 25. This clarification would have necessarily determined whether any basis existed for any prosecution. Similarly, the internet cafés seek clarification as to the gambling statutes and their applicability to their sweepstakes operations. Respondent has provided that clarification, and nothing in *Quality Care* suggests she lacked jurisdiction to do so. Thus, *Quality Care* should be disregarded.

Despite his decision not to exercise his prosecutorial powers against the internet sweepstakes café owners, as set forth more fully in Section II, below, Relator has taken the position that the café owners and operators are in violation of Ohio gambling laws:

MR. LAMBERT: A sweepstakes enterprise is not gambling under Ohio law... a sweepstakes under House Bill 386 specifically requires that there is no price to play. Now, the operations run by the plaintiffs, you have to pay to play. That is the critical factual dispute that needs to be determined in any litigation regarding whether there is gambling going on by them...

(Transcript of Proceedings, June 13, 2012, pp. 22-23).

At the June 22, 2012 temporary restraining order hearing before Judge Russo, Mr. Lambert also stated:

MR. LAMBERT: Mr. Gourash says that the inability to offer sweepstakes is a competitive disadvantage. Again, if we assume that these were bona fide sweepstakes, he would be right.

(Transcript of Proceedings, June 22 and June 25, 2012, p. 49.)

Relator has taken the position (incorrectly) that the internet sweepstakes cafés are not offering valid sweepstakes, but rather, illegal gambling under the false belief that customers have to “pay to play.” On the other hand, the internet sweepstakes cafés take the position that a customer does not have to pay to enter the sweepstakes. They contend that customers can obtain a free sweepstakes entry immediately, which, by admission of Relator, would render them valid sweepstakes under H.B. 386. Indeed, Relator has conceded on the record that if the cafés can establish they are offering sweepstakes as provided in H.B. 386, they are legitimate operations and not in violation of the Ohio gambling laws cited in his cease and desist letters.

Given these contrary positions, the internet sweepstakes cafés must be given access to the court under the Ohio Declaratory Judgment Act to prove they are not charging customers to play the sweepstakes (as wrongly asserted by Relator), and are in fact valid operations under H.B. 386, without first having to get arrested and forfeit their property. This is the holding in *Peltz* and the law in Ohio upon which Amicus Curiae rely to gain access to the courts.

Accordingly, the fact that Relator intentionally has chosen not to prosecute these café owners, yet has told them to close their respective businesses or face criminal prosecution and forfeiture, has created a justiciable issue for adjudication under the Ohio Declaratory Judgment Act. Even Mr. Lambert stated “that is the critical factual dispute that needs to be determined in any litigation regarding whether there is gambling going on”. (Transcript, June 13, 2012, p. 39). Consequently, this Court should affirm Respondent’s exercise of jurisdiction by dismissing Relator’s petition.

C. Respondent Has Jurisdiction Under House Bill 386 To Issue The Temporary Restraining Orders Allowing The Internet Sweepstakes Cafés Of Amicus Curiae To Re-open.

1. Ohio’s new sweepstakes law, House Bill 386, authorizes a common pleas court to issue an order allowing an internet sweepstakes café closed by law enforcement to re-open.

Ohio's new sweepstakes law, House Bill 386, disposes of Relator’s claims because it authorizes courts to grant orders allowing sweepstakes operators who have been closed to re-open. The General Assembly passed the new law in May 2012. Governor Kasich signed the bill on June 11, and it took immediate effect.

House Bill 386 imposed a "moratorium" preventing new sweepstakes establishments from opening. At the same time, the law allows already existing sweepstakes establishments to continue operating at their current locations. Section 12(C)(3) of the law generally requires that

already existing sweepstakes operators file an affidavit of existence with the Attorney General within thirty days of the law's effective date.

Before the new law took effect, however, law enforcement officials had shut down a number of sweepstakes establishments. To put these establishments on the same footing as those that had not been shut down, the new law specifically allows cafés that were shut down to seek a court order allowing them to re-open, and extends the deadline for the affidavit to thirty days after the court order:

If a sweepstakes establishment was in existence and operating before the effective date of this section, but was involuntarily shut down by law enforcement before that date, solely for the purposes of this moratorium those sweepstakes establishments shall be considered to be in existence and operating before the effective date of this section. **If the sweepstakes establishment is permitted to resume operations pursuant to court order**, the sweepstakes establishment shall have thirty days from the date of resuming operations to file the required affidavit.

H.B. 386 § 12(C)(3) (Emphasis added).

Thus, House Bill 386 explicitly contemplates court orders like the ones Respondent issued in the Underlying Litigation.

2. Respondent had jurisdiction to issue the temporary restraining orders under the Ohio Constitution and House Bill 386.

Article IV of the Ohio Constitution grants courts of common pleas jurisdiction over all justiciable controversies provided by law. Article IV, Section 4(B) provides that “[t]he courts of common pleas . . . shall have such original jurisdiction over all justiciable matters . . . as may be provided by law.” Similarly, Article IV, Section 18 provides that “[t]he several judges of the Supreme Court, of the common pleas, and of such other courts as may be created, shall, respectively, have and exercise such power and jurisdiction, at chambers, or otherwise, as may be directed by law.” In light of these broad provisions, a court of common pleas in Ohio “is a

court of general jurisdiction. It embraces all matters at law and in equity that are not denied to it.” *BCL Enterprises, Inc. v. Ohio Dept. of Liquor Control*, 77 Ohio St.3d 467, 469 (1997).

While Respondent’s jurisdiction is already broad under the Ohio Constitution, Ohio’s new sweepstakes law further grants Respondent the necessary jurisdiction to proceed in the Underlying Litigation. Respondent has found that, as a result of Relator’s May 30th letter, the plaintiffs in the Underlying Litigation “were involuntarily closed by law enforcement”. (Transcript of Proceedings, June 13, 2012, p. 42). In these circumstances, House Bill 386 allows a court to permit the plaintiffs “to resume operations pursuant to court order.” H.B. 386 §12(C)(3). Further, where a law grants a court the authority to perform an act, the court does not overreach its jurisdiction by performing that act. This is the case with the Declaratory Judgment Act, for example. *See BCL Enterprises*, 77 Ohio St.3d at 469 (affirming denial of writ of prohibition in part because the Declaratory Judgment Act grants “courts of common pleas...jurisdiction to grant injunctive relief”). Like the Declaratory Judgment Act, House Bill 386 explicitly recognizes a court’s authority to act – here, to issue orders permitting sweepstakes establishments closed by law enforcement to re-open.

Furthermore, Governor Kasich’s signing of House Bill 386 undercuts Relator’s separation of powers argument because **Respondent’s authority was authorized by the head of the executive branch himself**. Indeed, this case is not really about the judicial branch infringing on the executive branch’s realm. To the contrary, this case is about one member of the executive branch, Relator, disagreeing with the policy decisions of the chief of the executive branch, Governor Kasich. But a policy disagreement among executive branch officials is no reason for this Court to grant a writ of prohibition.

In summary, the legislative and executive branches already have spoken. In addition to the Ohio Constitution’s broad grant of jurisdiction to courts of common pleas, the General

Assembly and Governor Kasich specifically provided in House Bill 386 that courts may issue orders permitting sweepstakes establishments closed by law enforcement to re-open. Thus, under both the Ohio Constitution and House Bill 386, Respondent had jurisdiction to proceed in the Underlying Litigation. And, far from infringing on the executive branch's authority, Respondent has exercised the jurisdiction specifically authorized by House Bill 386 that was signed into law by Governor Kasich, the chief of the executive branch. Relator might disagree with Governor Kasich's decision to sign the new law, but that disagreement does not justify a writ of prohibition. As a result, Relator's petition should be dismissed.

II. RESPONDENT DID NOT INTERFERE WITH RELATOR'S PROSECUTORIAL POWERS BECAUSE RELATOR INTENTIONALLY HAD CHOSEN NOT TO PROSECUTE ANY AMICUS CURIAE FOR VIOLATION OF OHIO GAMBLING LAWS.

Relator admitted during oral argument on the motions for a temporary restraining order that he made the conscious decision not to prosecute the owners of the internet sweepstakes cafés. As a result, Relator cannot seriously contend that Respondent impermissibly has interfered with his prosecutorial discretion since Relator already declined to exercise his powers prior to Respondent's exercise of jurisdiction in the Underlying Litigation.⁴

On June 5, 2012, during the initial proceeding before Respondent on the issue of whether a temporary restraining order should be granted, Relator stated several times that the Cuyahoga County Prosecutors Office purposely excluded the café owners from any criminal proceedings:

⁴ Although Relator has indicted the owners and wholesale distributors of VS2 software, Respondent eventually granted intervention in the underlying lawsuit to internet café operators that use VS2 software because none of the internet café owners themselves were indicted and Relator stated in open court that there was nothing about the software itself that distinguished a VS2 operator from internet café operators that do not use VS2 software. (Transcript of Proceedings, June 22 and June 25, 2012, pp. 90-92). Thus, Respondent did not interfere with Relator's prosecutorial discretion by allowing VS2 operators to intervene. However, to the extent that it makes a difference to this Court, it must be noted that the Amicus Curiae internet sweepstakes cafés submitting this brief do not use the VS2 software in their operations in Cuyahoga County.

THE COURT: ...their argument is that by you shutting them down – meaning your office shutting them down – that by not indicting them and shutting them down, you – you are trying to prohibit them from having any access to the court, thus their reliance on this case [*Peltz*] to get access to the court. So I'm clarifying because you keep referring to defendants in criminal cases, but there is no criminal case pending against this business.

MR. LAMBERT: That's absolutely right, Your Honor.
(Transcript of Proceedings, June 5, 2012, p. 17).

* * *

MR. LAMBERT: Let me say this. A cease and desist letter is – is not a criminal prosecution.
(Transcript of Proceedings, June 5, 2012, p. 22).

* * *

MR. LAMBERT: No one is seeking to prosecute any owner.
(Transcript of Proceedings, June 5, 2012, p. 14).

Further, at the hearing before Respondent on June 13, 2012, Assistant Prosecutor David Lambert explained to the court as follows:

MR. LAMBERT: Let me clarify, your Honor. Mr. Mason has indicted no retail operators; he indicted people at the wholesale level, people who promote and sell the system.

THE COURT: I understand.

MR. LAMBERT: When you say –

THE COURT: He made a decision, for whatever his decision is, in his judgment, which he is obligated to do and I trust he does well. He made a decision to charge some and not others. I don't read anything nefarious into that. What I read into that is he made a cogent review and he made decisions to treat different people different ways. The way he chose to deal with these particular plaintiffs does not preclude them from seeking a civil remedy. That's where we disagree. We're going to have to agree to disagree.

(Transcript of Proceedings, June 13, 2012, p. 39).

It is clear from the transcript above that Respondent relied upon *Peltz* and accepted jurisdiction of the Underlying Litigation because Relator had chosen not to prosecute the internet café owners and, as a result, they were not "preclude[d] ... from seeking a civil remedy". (Transcript, June 13, 2012, p. 39). In other words, Respondent found that she had jurisdiction because there was a decision not to prosecute these owners. The fact that Relator issued the cease and desist letter indicating that the owners *will* be prosecuted and their property subject to forfeiture created the actual and justiciable case and controversy over which she properly exercised jurisdiction. Thus, in light of Relator's comments that he intentionally chose not to prosecute the retail operators of the cafés, Relator has no basis to claim that Respondent's exercise of jurisdiction over the Underlying Lawsuit and her granting of the temporary restraining orders interfered with his prosecutorial discretion.

CONCLUSION

Ohio law ensures that small businesses like the amici have access to the courts. The actions of Respondent in (1) exercising jurisdiction in the Underlying Litigation, and (2) granting temporary restraining orders to permit the internet cafés to re-open without fear of prosecution until such time as the motion for a preliminary injunction is resolved, were clearly authorized by the Declaratory Judgment Act and the *Peltz* and *Pack* cases. Further, the General Assembly and Governor Kasich have specifically authorized jurisdiction in House Bill 386 which specifically contemplates judicial action in re-opening internet cafés that have been closed by law enforcement. Finally, Relator, by his own admission, has not had any prosecutorial powers interfered with by Respondent due to his decision not to prosecute the internet sweepstakes cafés.

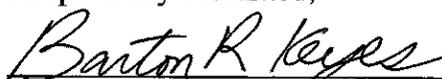
For these reasons, Amicus Curiae respectfully request that this Court dismiss Relator's petition for a writ of prohibition against Respondent, the Honorable Nancy Margaret Russo.

 Daniel F. Gourash / per auth.

Daniel F. Gourash (0032413)
(COUNSEL OF RECORD)
Eric D. Baker (0070025)
Seeley, Savidge, Ebert & Gourash Co., LPA
26600 Detroit Road, Suite 300
Cleveland, Ohio 44145
(216) 566-8200
(216) 566-0213 (Facsimile)
dfgourash@sseg-law.com
edbaker@sseg-law.com

Attorneys for Amici Curiae
J&C Marketing, LLC, Izdihar "Esther" Najjar
d/b/a Cyber Oasis, Page-Jaq, LLC and New
Heights Business Center, LLC

Respectfully submitted,

 Barton R. Keyes

Barton R. Keyes (0083979)
(COUNSEL OF RECORD)
Charles H. Cooper, Jr. (0037295)
Cooper & Elliott, LLC
2175 Riverside Drive
Columbus, Ohio 43221
(614) 481-6000
(614) 481-6001 (Facsimile)
bartk@cooperelliott.com
chipc@cooperelliott.com

Attorneys for Amici Curiae
AI 123, Inc.; A J & N, Inc.; BG Broadway
320, Inc.; Cyber World Entertainment
Corp.; Gamers Club North Olmstead, Inc.;
Garth and Lindsey, LLC; JPAS, Inc.; Las
Palmas III, LLC; Le Royale; Ohio Internet
Café, LLC; and Royal Palms Sweeps LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was sent to the following counsel of record, by regular U.S. mail, postage prepaid, this 27th day of July, 2012:

William D. Mason, Esq.
Cuyahoga County Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113

Julia R. Bates, Esq.
Prosecuting Attorney Lucas County, Ohio
Lucas County Courthouse
Toledo, Ohio 43604

Relator

Attorney for Amicus Curiae
Ohio Prosecuting Attorneys Association

Robert P. Ducatman, Esq.
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114

Mike DeWine, Ohio Attorney General
Michael J. Schuler, Esq.
Assistant Attorney General
Ohio Attorney General's Office
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

Attorney for Respondent
The Honorable Nancy Margaret Russo

Brian Mooney, Esq.
Christopher A. Wagner, Esq.
Susan A. Choe, Esq.
Ohio Attorney General's Office
150 East Gay Street, 23rd Floor
Columbus, Ohio 43215

Attorneys for Amicus Curiae
Ohio Attorney General Mike DeWine



Barton R. Keyes (0083979)

APPENDIX - A

THE STATE OF OHIO,)
) SS: NANCY MARGARET RUSSO, J.
COUNTY OF CUYAHOGA.)

IN THE COURT OF COMMON PLEAS

CIVIL DIVISION

J&C MARKETING, LLC,)
)
Plaintiff,)

-v-

) Case No. 784234
) C/A: N/A
)

WILLIAM D. MASON,)
)
Defendant.)

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that at the May
A.D., 2012 term of said Court, to-wit,
commencing on Tuesday, June 5th, 2012, this
cause came on to be heard before the Honorable
Nancy Margaret Russo, in Courtroom No. 18C,
Courts Tower, Justice Center, Cleveland, Ohio,
upon the indictment filed heretofore.

OFFICIAL COURT REPORTERS

A-000003

1 opportunity to respond in writing. We've had
2 some informal discussions in the jury room,
3 but I'd like to have you put your arguments on
4 the record. So for the plaintiff.

5 And, remember, I -- I want to confine
6 it. This is only the TRO. This is not the
7 permanent injunction. There are a lot of
8 issues here. I don't expect us to get to the
9 merits of anything today other than discussion
10 of whether or not a TRO is warranted.

11 Go ahead, sir.

12 MR. GOURASH: Thank you, Your
13 Honor. My name is Dan Gourash. I represent
14 the plaintiff, J&C Marketing, LLC.

15 We're here before you this morning
16 seeking to enjoin the prosecutor from
17 enforcing two cease and desist letters that it
18 sent the plaintiff's internet cafes in Brook
19 Park and Parma Heights, Ohio.

20 By shutting down these operations,
21 the prosecutor has prohibited plaintiff's
22 constitutional rights of free speech to
23 disseminate all content-based internet
24 communications including protected commercial
25 marketing speech to locations.

1 four minutes of time. It is competitive with
2 other entities that also sells internet access
3 such as Kinko's and Federal Express.

4 It markets its internet access and
5 related services with the sweepstakes
6 promotion. Like the situation in Dabish, the
7 internet access time purchased is never at
8 risk of being lost in the sweepstakes. This
9 breaks the union necessary to find that
10 gambling as held in Dabish.

11 Also, the sweepstakes prizes are
12 predetermined from a finite pool and the odds
13 of receiving each of the prizes are set and
14 posted at each of plaintiff's locations and on
15 the computer screens in the locations.

16 Because the sweepstakes marketing is
17 not gambling under the Ohio Revised Code
18 plaintiff is likely to succeed on its
19 declaratory judgment count.

20 With regard to the Section 1983 count
21 it is likely to succeed on the merits because
22 by shutting down plaintiff's internet cafes
23 the prosecutor has prohibited the
24 dissemination of all content-based and
25 protected marketing speech in violation of

1 narrowly drawn. It's like bringing a
2 sledgehammer to do brain surgery.

3 THE COURT: Let me interrupt
4 for just one second.

5 MR. GOURASH: Yes, Your Honor.

6 THE COURT: I note in your
7 exhibits that you have from August of 2011,
8 the judgment entry from Judge Friedland where
9 a temporary restraining order was sought by
10 the same plaintiff who is here against the
11 City of Parma Heights. The City of Parma
12 Heights did not appear, and the Judge did
13 grant the TRO to prohibit the city from
14 shutting down the internet cafe. Is it the
15 same reason?

16 MR. GOURASH: No. It's a
17 different reason, Your Honor.

18 THE COURT: Okay.

19 MR. GOURASH: In that context,
20 what was happening is that the City of Parma
21 Heights had sought a licensing fee of a
22 certain amount -- and I wasn't directly
23 involved with it, but my understanding is that
24 there was a challenge to the amount of that
25 licensing fee. As a result of what is, in

1 than shutting down businesses.

2 Also, there's no compelling or
3 substantial government interest in prohibiting
4 the legitimate content-based and commercial
5 marketing speech, thus it's likely that
6 plaintiff will succeed on the merits of its
7 Section 1983 count as well.

8 The second factor to consider is
9 whether the TRO will prevent irreparable harm.
10 There's no doubt the plaintiff has suffered
11 and will continue to suffer irreparable harm
12 if the cease and desist letters are not
13 enjoined. The businesses are shut down.

14 It is clear that by shutting down the
15 internet cafes the prosecutor has violated
16 plaintiff's free speech rights to disseminate
17 all content-based communications and protected
18 commercial marketing speech.

19 Such violations of plaintiff's
20 constitutional rights alone have been
21 recognized by courts as irreparable harm. In
22 *Bookfriends, Inc., versus Taft*, which is at
23 223 F Supp 2d 932, the Court recognized that
24 the loss of first amendment rights constitutes
25 an irreparable harm.

1 versus Scott case that is cited in our brief.

2 The third factor to consider is the
3 balancing of the harms. Here there is no harm
4 to any other person by allowing plaintiff to
5 reopen its two locations. Also, the
6 irreparable injury to the plaintiff's first
7 amendment rights, the loss of customer good
8 will and the competitive disadvantage far
9 outweighs any possible harm to others.

10 The fourth factor to consider is the
11 public interest. Here the public interest
12 will be served by the issuance of a TRO. The
13 protection of free speech is a vital public
14 interest. Also, plaintiff's customers will
15 have access to all content-based
16 communications on the internet and can
17 participate in plaintiff's legal marketing
18 sweepstakes promotion.

19 Because plaintiff can satisfy the
20 four factors the Court must consider, it's
21 respectfully requested that the Court issue a
22 TRO in the form that has been submitted.

23 We request that no bond be set in
24 connection with the TRO because there will be
25 no harm to the prosecutor from its issuance of

1 authority and seek a determination that our
2 conduct is not violative of any statute
3 without having to subject ourselves to
4 criminal prosecution.

5 THE COURT: Thank you.

6 For the defense.

7 MR. LAMBERT: Thank you, Your
8 Honor.

9 Let me repeat. The case Mr. Gourash
10 just cited, Peltz versus City of Euclid, is a
11 first amendment case. The first amendment is
12 a gigantic exception to the general rule about
13 the equitable power of a court to interfere
14 with a criminal prosecution. So all -- none
15 of that law, in my humble opinion, is
16 applicable to this case.

17 No one is seeking to prosecute any
18 owner. No one is threatening to prosecute any
19 owner of a sweepstakes club for engaging in
20 first amendment activity, speech. Gambling is
21 not first amendment activity.

22 Now, what the plaintiffs are doing
23 here is they are conflating gambling, which is
24 not -- it's not speech, not expressive
25 conduct, with the ability to go out and

1 prosecution when the moving party has an
2 adequate remedy at law and will not suffer
3 irreparable injury if denied equitable relief.

4 THE COURT: Although, as I
5 pointed out in the back, this plaintiff is not
6 part of a criminal indictment. And, so, by
7 you arguing that you're implying somehow they
8 are indicted, which is where they could have
9 their day in court, but you have not indicted
10 them. Instead, you have told them to cease
11 and desist the business, which is exactly what
12 they are arguing.

13 So this distinction needs to be made
14 that this plaintiff is not an indicted
15 defendant. This is a business that your
16 office chose not to charge. And I want that
17 distinction to be very clear. Because I would
18 agree with you if this person was charged in a
19 criminal case, we wouldn't even be having this
20 discussion, but their argument is different.

21 Their argument is that by you
22 shutting them down -- meaning your office
23 shutting them down -- that by not indicting
24 them and shutting them down, you -- you are
25 trying to prohibit them from having any access

1 threatened criminal defendant. You're either
2 one or the other or you're not -- or you have
3 no fear whatsoever. And then if you have no
4 fear whatsoever, why are you in -- in court?

5 I mean, let me say this, too. The
6 cease or desist letter is merely a statement
7 of fact that goes out to an owner that gives
8 them fair notice that if you continue to
9 engage in this activity you will be
10 prosecuted. Now, you know, it's really, You
11 may be prosecuted, but even if it says You
12 will be prosecuted, that's a perfectly
13 appropriate exercise of discretion by a
14 prosecuting attorney.

15 Let me say -- quote some more law,
16 and this is the Ohio Supreme Court. Troy
17 Amusement versus Attenweiler, a court of
18 equity will not interfere by injunction to
19 prevent the enforcement of criminal statutes
20 at the instance of an alleged law violator --
21 alleged law violator. Now, that's what
22 this -- that's what these guys, the plaintiffs
23 are.

24 THE COURT: Which case?

25 MR. LAMBERT: J&C.

1 that the law that I just quoted, there is no
2 irreparable injury. If they are indicted,
3 they will be able to make the exact same
4 arguments they are making here. They will be
5 able to say that this is not gambling. They
6 will be able to say -- however farfetched --
7 that this is first amendment speech.

8 Balancing the harm and the public
9 interest. You know, the General Assembly has
10 outlawed gambling. You know, you can quibble
11 with the wisdom of that decision, but that's
12 the General Assembly's to make.

13 They have decided that internet
14 sweepstakes gambling is illegal, and the
15 prosecutor is charged with enforcing that law.

16 And again, I -- I can't stress enough
17 conflation of illegal conduct with advertising
18 for illegal conduct and trying to turn this
19 case into a first amendment case. It's not a
20 first amendment case.

21 THE COURT: Let me ask you
22 this. What about their argument that this is
23 only going on in Cuyahoga County?

24 If truly the State believes that this
25 is illegal, this action by one prosecutor has

1 don't. I'm not -- I have to say --

2 THE COURT: Let's assume for
3 sake of argument that none of the others have
4 sent it, which is their argument, that they
5 can cross a line and have a business, but they
6 -- but a business is only being prohibited in
7 one county, that the form of commerce is being
8 restricted in only one of 88 counties.

9 MR. LAMBERT: Well, I don't
10 believe that that affords them any rights.
11 You can jaywalk in the City of Cleveland and
12 never get arrested. You can jaywalk in the
13 city --

14 THE COURT: No, no. That's
15 different. That's different. That's
16 different. We're talking about cease and
17 desist letters. We're talking about a state
18 action that affects commerce in one of 88
19 counties. This is part of their argument.
20 This is one of their prongs.

21 MR. LAMBERT: Let me say this.
22 A cease and desist letter is -- is not a
23 criminal prosecution. All it is is a letter
24 by the prosecutor telling someone I may
25 prosecute you in the future if you keep doing

1 indicated that this is still illegal gambling.

2 Now for me --

3 THE COURT: I'm going to

4 interrupt you. Have a seat.

5 Here's my suggestion.

6 Go ahead, have a seat.

7 This is obviously a big issue because
8 it affects your business, but it potentially
9 affects a lot of other businesses.

10 Here's what I am comfortable with.

11 I'm not comfortable making a decision today
12 either way. I would like to see a written
13 response from defense so that I have more in
14 front of me, because I have quite a lot from
15 the plaintiff.

16 And I would suggest this. You know,
17 Charlie won't be surprised to hear this. I
18 don't care about writs. You know, to me writs
19 are a legal means for people to determine
20 whether jurisdiction is proper. And one thing
21 I never want to do is exercise jurisdiction
22 that I don't really have. I am a judge who
23 tries to be very conservative in my
24 jurisdiction.

25 So my suggestion would be that we set

1 parties. But if I don't have the jurisdiction
2 to do it, I don't want to do it.

3 So I'm going to take the most
4 conservative route that I can, which is I want
5 the Court of Appeals to determine whether or
6 not I have jurisdiction.

7 Now, if the State chooses not to file
8 a writ, then -- the State being the defense --
9 then I'm going to proceed next Monday. So
10 basically what I'm telling you is I'm setting
11 an event for Monday. You need to make a
12 decision about whether or not you're going to
13 challenge my jurisdiction. And if you are,
14 certainly that's fine, I respect that. And if
15 you're not, then just be prepared to go
16 forward, and I would want your brief by
17 Monday.

18 All right, any questions?

19 MR. LAMBERT: Well, there's
20 one -- Your Honor, with your permission,
21 there's one issue that I -- I want to be
22 forthright with the Court on. And -- and,
23 again, I'm hitting onto this case since
24 yesterday at 3:00. There is a bill apparently
25 that's been passed by the legislature, House

1 it, and I only read theirs. So I don't know.

2 Maybe Monday is the magic day overall.

3 But I just feel, you know, aside from
4 that issue -- and I do appreciate you telling
5 me about it -- I really think the
6 jurisdictional issue is something that you
7 both have good arguments about. You both have
8 good arguments about.

9 But, you know, if I grant the TRO or
10 I don't grant the TRO without clarification on
11 the jurisdictional issue, then, you know, I
12 think that nobody can have confidence in the
13 proceedings, and I don't want to do that.

14 I think it's a big enough question.
15 And as I said, I -- you know, nobody -- I
16 don't know how to say this correctly. I mean,
17 it's -- writs don't bother me. They're --
18 like I said, they're a legal process for
19 people to get an answer to a question. I
20 don't consider them an insult. I don't
21 consider them a challenge. I just consider
22 them a legal question. And, so, I invite you
23 to do it if you want to do it, but I am just
24 saying you're going to have to do it by
25 Monday. Because if you don't do it by Monday,

1 back to doing the sweepstakes until we clarify
2 the jurisdictional issue, but they certainly
3 can do the other things.

4 MR. GOURASH: Can we -- can we
5 ask the prosecutor's office, not to
6 necessarily file it before Monday, but let us
7 know, say, by Friday whether they are going to
8 do that?

9 THE COURT: Well, I think
10 anything that you as parties want to work out
11 on your own you're welcome to do.

12 MR. GOURASH: Okay, thank you,
13 Your Honor.

14 THE COURT: They know that
15 they are under a deadline as far as doing a
16 brief for me. I can't force them to file a
17 writ by a certain date, but I'm asking them
18 professional to professional, if you're going
19 to do it, could we do it soon so we can get
20 this thing moving one way or the other and get
21 it resolved. If not, I'm going to expect
22 their pleading, and I do have a pretrial set
23 for Monday which they would have to attend if
24 they don't file the writ.

25 MR. GOURASH: Okay.

1 pretrial and the brief are due.

2 Okay. And then the only other thing
3 I would say though is somebody -- and if you
4 do file the writ, as you know, somebody is
5 going to have to contact me about getting me a
6 lawyer since you obviously can't represent me
7 on the writ.

8 MR. LAMBERT: Yes, Your Honor.

9 THE COURT: Okay. All
10 right. Thanks, everybody.

11 (Thereupon, Court was adjourned.)

12 - - - -

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STATE OF OHIO)

) SS: NANCY MARGARET RUSSO, J.

COUNTY OF CUYAHOGA)

IN THE COURT OF COMMON PLEAS

CIVIL BRANCH

J & C MARKETING LLC, et al.)

Plaintiffs,)

vs.) CV-12-784234

WILLIAM D. MASON,)

Defendant.)

- - - o0o - - -

TRANSCRIPT OF PROCEEDINGS

- - - o0o - - -

APPEARANCES:

On behalf of the Plaintiffs:

Daniel Gourash, Esq., and Eric D. Baker, Esq.,

Angelo F. Lonardo, Esq. & Mitchell Yelsky, Esq.,

Barton R. Keyes, Esq.

On behalf of the Defendant:

William D. Mason, Prosecuting Attorney,

by David G. Lambert, Esq., Charles E. Hannan, Esq., and

Steven Ritz, Esq., assistant prosecuting attorneys.

JuliAnn M. Adams, RPR
Official Court Reporter
Cuyahoga County, Ohio

1 WEDNESDAY MORNING SESSION, JUNE 13, 2012

2 PROCEEDINGS

3 - - - oOo - - -

4 THE COURT: We're here today
5 in the matter of J & C Marketing, LLC versus William
6 Mason, in his capacity as prosecutor. Case Number
7 784234.

8 We had a meeting last week, we had a brief
9 hearing on the record, then the case was removed to
10 Federal Court; sent back by Judge Boyko to our
11 Court. We had a pretrial this morning and that was
12 what was said on the docket.

13 Discussing everything, I gave you options
14 about setting the hearing. You said you were here
15 and not presenting witnesses and no conflicts and
16 everybody prepared to go forward today and conduct
17 the hearing. So is that true on behalf of the --
18 fair statement on behalf of the interveners and
19 original plaintiffs?

20 MR. LONARDO: Yes.

21 MR. GOURASH: Yes, your Honor

22 THE COURT: Fair on behalf of
23 the defense?

24 MR. LAMBERT: Yes, your
25 Honor --

1 In addition, I made it clear to everybody
2 that regardless of how I rule today, the ruling
3 could change after a full hearing after everybody
4 has taken discovery and we have additional evidence.
5 So any decision today on the TRO is not dispositive
6 of the preliminary injunction; it's a separate
7 issue. We're going to enter into an expedited
8 discovery schedule, which I expect you to work with
9 each other on.

10 I've also indicated to everybody in the
11 back that there has been some discussion, and I know
12 there was at least one more filing today, it was
13 assigned to Judge Sheehan, that I will not
14 consolidate and I will not permit intervention of
15 any plaintiffs who are using the software program
16 that is the subject of the criminal action that is
17 pending in Judge Calabrese's room.

18 So I expect anybody who is seeking to
19 intervene, or anybody who seeks to consolidate, to
20 disclose that to me. If it's not disclosed to me
21 and somebody knows that, I want to you tell me that
22 because that's not appropriate, I don't believe,
23 for this case. And this Court will not entertain
24 any plaintiff that is using the software system that
25 is the subject of the criminal case.

1 to put us in legal limbo to issue cease and desist
2 orders and not give us the rights that we're
3 entitled to under Ohio Supreme Court authority to
4 seek a declaratory judgment regarding application of
5 Ohio's gambling laws to the sweepstakes operation of
6 my clients.

7 The declaratory judgment action is proper
8 because neither the threat of prosecution, or our
9 operations are speculative; which is unlike the
10 situation of the nude or semi-nude dancing in the
11 RAS case they cite.

12 We're also asking the Court to declare
13 that the Ohio Gambling Laws are not applicable,
14 which is specifically contemplated under the
15 Declaratory Judgment Act. We're not asking for
16 conduct-based evaluation, we're asking for an
17 application; a declaration regarding the application
18 of that law to our operations.

19 And we believe that it is specifically
20 stated in the Declaratory Judgment Act; and the
21 cases that we cited in our supplemental paper today
22 also support that proposition.

23 It's also important to note that the
24 prosecutor is interfering with our permitted
25 businesses. And that is interfering with a vested

1 to succeed on the merits because a sweepstakes
2 marketing of the sale of internet access is not
3 gambling under the Ohio Gambling Statutes, nor is
4 operation of the cafes the operation of a gambling
5 house under the Ohio Revised Code.

6 The court in City of Toledo, State of Ohio
7 versus Dabish held that the sweepstakes marketing of
8 a sale of phone cards was not illegal gambling. And
9 in that case the Court applied the United States
10 Supreme Court's definition of gambling as the union
11 of chance, prize, and consideration. It recognized
12 that without all three elements, there is no
13 gambling. The fact that the consideration paid for
14 the phone cards was never at risk, was determinative
15 in that case in breaking the union of chance, prize
16 and consideration.

17 Here it plaintiff sells internet access to
18 its customers at rate of one dollar for every four
19 minutes of access time. It's in competition with
20 FedEx and Kinco's and other entities that provide
21 internet access in computer terminals. It markets
22 its internet access and the related service with a
23 sweepstakes promotion. Like the situation in
24 Dabish, the internet access time purchased is never
25 at risk of being lost in the sweepstakes. Also the

1 operate at only their current locations after the
2 effective date of the section. That provision
3 specifically contemplates that existing and
4 operating sweepstakes establishments can continue to
5 operate.

6 Now, your Honor has put on the record your
7 view of the 30 day provision. We respectfully
8 disagree with that interpretation and want to put on
9 the record that we believe that what that provision
10 states is that the 30 day original time period
11 within which an existing operator has to file their
12 affidavit is extended in the event that there is a
13 court order that has shut down an operation. And
14 it's extended for an additional 30 day period
15 following the lifting of an order by a court
16 allowing another operator to reopen. We believe
17 that it's merely an extension of the 30 day time
18 period, as opposed to a 30 day waiting period to
19 determine whether or not you can begin to operate
20 after you register with the State of Ohio.

21 THE COURT: I don't know that
22 I disagree. Just to be clear about my position. My
23 position is that I don't believe you can begin the
24 process. I'm not talking about the time period, I'm
25 talking about I don't believe you can begin the

1 was no shut down, entities in other counties now
2 that House Bill 386 has been passed, have 30 days
3 within which to file the affidavit. The affidavit
4 is on line. We printed it, not that extensive,
5 we can do it in a matter of five minutes. Those
6 people have 30 days to file that affidavit. But
7 they are continuing to operate.

8 THE COURT: Thirty days from
9 what date are you talking about?

10 MR. GOURASH: The date the
11 House Bill was signed.

12 THE COURT: What I'm saying
13 is I don't believe your 30 days begins to run until
14 you have a court order that says that you can apply.

15 MR. GOURASH: Okay. I agree
16 with that. But while -- I don't think you have to
17 stay shut down before you apply. You have 30 days
18 to apply. If you issue a court order today, issuing
19 a TRO allowing these entitles to open, they should
20 be able to open immediately, and then they have 30
21 days to file their affidavit. But they shouldn't
22 have to stay shut down during that period.

23 THE COURT: I see your
24 disagreement. Well, this is a new statute, there
25 has been no interpretation on it, so I'm happy -- I

1 shut down completely. We are at a competitive
2 disadvantage with the other operators in our
3 counties and we are losing customer good will, all
4 of which has been found, and we cite cases to this
5 in our brief, to be irreparable harm.

6 There will be no harm to others, which is
7 the third factor to consider, by allowing these
8 operators to open their doors and continue to
9 operate their sweepstakes promotions.

10 And it's in the public interest, which is
11 the fourth factor, to allow these operators to
12 reopen. Our operators will be able to conduct a
13 legitimate business, and customers seeking internet
14 time and services, resume help, and everything that
15 they do at the cafes, will benefit as a result.

16 Because we meet the four factors
17 necessary, your Honor, I submit that we're entitled
18 to a temporary restraining order against the
19 enforcement of the cease and desist letters in the
20 form that we submitted. And we would request that
21 if it's issued, that the operator specifically be
22 permitted to open; subject, of course, to the
23 registration requirement of House Bill 386.

24 Thank you, your Honor.

25 THE COURT: Who is arguing

1 distance cards. Our international rates vary by
2 country, like a lot of other international long
3 distance cards, but they are competitive with other
4 international cards.

5 I do want to point out that the Dabish
6 case that Mr. Gourash mentioned in his presentation
7 dealt with the exact same sweepstakes promotion that
8 Cyber World and AJ & N use. So to the extent that
9 the Dabish case provides some guidance to your
10 Honor, I want to make clear that was our very system
11 that was at issue in that case. The sweepstakes
12 that our clients use is a promotional device and
13 it's free to enter. Customers get entries when they
14 purchase a telephone card, or they can get them, no
15 purchase necessary by completing a form. In other
16 words, they don't have to pay any consideration to
17 get sweepstakes points. If a customer decides to
18 buy a phone card, he or she does not have to
19 participate in the sweepstakes; he can just take the
20 card and leave. And they can use that card from any
21 phone; it's not as if they have to use it in the
22 store. The only way that minutes are deducted from
23 a customer's phone card is if the customer makes a
24 phone call, just like any other phone card that you
25 could buy at at Giant Eagle or Walmart or Speedway

1 That's not a very inviting environment for small
2 businesses in Cuyahoga County. And considering that
3 small businesses are not facing the same issues in
4 neighboring countries, it's going to drive both
5 businesses and consumers to neighboring counties.

6 The temporary restraining order that we're
7 requesting, again, Mr. Gourash addressed many of the
8 main legal arguments as to the likelihood of success
9 on the merits. Again, I'll just add to the
10 discussion that the Dabish case was our very system,
11 so I think that certainly increases our likelihood
12 of success on the merits.

13 House Bill 386, which the governor signed
14 on Monday, as the Court is aware, specifically
15 allows sweepstakes operators who were in existence
16 before the effective date to continue operating at
17 their current locations. And your Honor is right
18 that they do have to file an affidavit and then the
19 statute -- or, I'm sorry, the law allows the
20 attorney general or a county prosecutor to seek an
21 injunction if they believe there is an issue with an
22 operator.

23 So I would submit to your Honor, that that
24 portion of the statute would allow our clients to
25 reopen their doors immediately because they were

1 or to some other county around Cuyahoga County.

2 The prosecutor cannot point to one public
3 interest that would be harmed by granting the TRO
4 that we're seeking.

5 So in closing, your Honor, I would just
6 suggest that we've been shut down long enough, it's
7 time to put our employees back to work. It's time
8 to let these stores reopen their doors and continue
9 to derive their lawful remedy.

10 THE COURT: Mr. Lambert.

11 MR. LAMBERT: David Lambert.

12 Your Honor, may it please the Court.

13 The first issue I'd like to address is
14 propriety of doing what the plaintiff asks in a TRO
15 context. This is not a preliminary injunction
16 hearing. It is a temporary restraining order
17 hearing. A temporary restraining order, the
18 function of a temporary restraining order is to
19 preserve the status quo ante. The status quo when
20 the plaintiffs came into this Court was that they
21 had shut down their businesses. If they want to
22 have you order that those businesses may reopen,
23 that would be done by means of a mandatory
24 injunction against Prosecutor Mason. It would not
25 be a proper subject of a temporary restraining order

1 on by them, or in any prosecution of a charge of
2 gambling based upon the business model that they
3 use.

4 So to even entertain a discussion of House
5 Bill 386 as if it automatically applies to them
6 because it's called sweepstakes, and they call
7 themselves sweepstakes Internet cafes is misguided
8 because the very term defined in the statute
9 requires that they don't pay for play.

10 Now, I know that the plaintiffs are
11 claiming that you don't have to pay to play the
12 sweepstakes. We're happy to prove that that is a
13 fraud and a subterfuge. Nobody is going into these
14 cafes paying for Internet cards, paying for Internet
15 time; they are going in here and they are paying to
16 play gambling games. So when they do that, they fit
17 the definition of gambling, a price to pay to play.
18 It's a game of chance, not skill. And they get a
19 prize. We'll be glad to prove that in the
20 appropriate forum.

21 We believe the appropriate forum is in a
22 criminal prosecution. There is Ohio case law and
23 some of it is binding on this Court. The Eighth
24 District Court of Appeals decision I'm referring to
25 RAS Entertainment versus City of Cleveland. And

1 Desist Letter of Mr. Mason. That is precisely the
2 kind of adjudication in a dec action that the case
3 of RAS Entertainment versus City of Cleveland says
4 that is this Court should not engage in.

5 We cited another case, Quality Care
6 Transport, which is another case that holds the
7 exact same thing. And I want to make sure that I
8 answer the charge that the plaintiffs have some --
9 the plaintiffs have withdrawn their constitutional
10 claim. They do not have a due process claim. They
11 do not have a First Amendment claim. Nonetheless,
12 on Page 12 of our brief I cite the law from the
13 Supreme Court of Ohio. It's Carano versus State
14 which instructs lower courts to exercise great
15 caution regarding an injunction which would
16 interfere with a potential criminal prosecution.
17 And it says: "Unless the police seek to enforce an
18 unconstitutional or a void law, we will not inhibit
19 the efforts to enforce the law."

20 The plaintiffs have given up any effort to
21 prove that this law is unconstitutional.

22 And the other one is the case of -- the
23 same case, Carano says that an operator's rights are
24 adequately protected through the criminal process.
25 If the appellee has not violated gambling laws, he

1 Browns' tickets, I'm not scalping, I'm merely using
2 those Browns' tickets as an incentive for you to buy
3 a bobblehead. Nobody is buying Tim Couch
4 bobbleheads. Nobody is going into these facilities
5 to do anything else but gamble.

6 Again, we're happy to prove that in a
7 criminal case. Nobody is buying internet phone
8 cards. The evidence will show that they don't even
9 know they are internet phone cards. And nobody
10 needs to go to a facility to buy internet time; they
11 are going there to gamble. So that's the price
12 being paid to play, which renders the conduct
13 illegal. Which renders activity of the plaintiffs
14 not sweepstakes gambling as defined in House Bill
15 386. And so their behavior is illegal.

16 We would like to be able to prosecute the
17 laws against -- the argument has been made it's not
18 in the public interest. It's in the public interest
19 to grant this. The Legislature has made a
20 determination it's illegal to gamble. It's up to
21 them to determine the public interest, not the
22 plaintiffs. It's up to Mr. Mason, the prosecutor,
23 to prosecute the criminal laws on the books. And so
24 to say there is no public interest in prosecuting
25 laws to protect the health, safety and morals of the

1 is using internet time; we have put in our
2 affidavits and in our verified complaint, in fact,
3 that is not a true assertion.

4 In fact, we've put in our evidence in
5 support of the TRO that internet time is being used
6 for such things as e-mail, for such things as
7 FaceBook, excluding pornography, and that we provide
8 services to a lot of folks, typically older folks
9 that don't have computers, helping them set up
10 e-mails, and helping them set up their FaceBook
11 pages. The evidence we put in overcomes that.

12 In addition, we put into evidence already
13 about the no purchase necessary. We've talked
14 about it in the original presentation. And the fact
15 that you might get more sweepstakes entries by
16 virtue of buying more internet time is the same
17 thing as buying ten cheeseburgers and getting ten
18 Monopoly cards at McDonald's, as opposed to buying
19 one cheeseburger and getting one Monopoly card at
20 McDonald's.

21 Again, I can't emphasize enough that the
22 Internet time is never at risk in the sweepstakes.
23 You don't have to play the sweepstakes; you can go
24 right to the internet usage and you can avoid the
25 games. You can reveal it and not play the games and

1 allege that the sweepstakes that Cyber World and AJ
2 & N operate is no purchase necessary. And that fact
3 is true, it's not just an allegation. At the TRO
4 stage, that allegation in the verified complaint is
5 not. I just want to point that out that we have
6 specifically alleged that.

7 And to go a little further on Mr.
8 Gourash's comparison to the McDonald's sweepstakes;
9 what the defendants are arguing is similar to saying
10 if somebody who likes Wendy's goes to McDonald's
11 because they see that McDonald's has the Monopoly
12 promotion going on and they want the chance to win
13 that million dollars and so they pay 89 cents for
14 the hamburgers. Some people may eat half of it or
15 eat none of it and throw it away and keep the game
16 piece. But that doesn't make that sweepstakes
17 illegal gambling. We have the same situation here,
18 your Honor.

19 But I will point out, your Honor, that our
20 product, the prepaid phone cards is not worthless
21 like the defendant says. There was a study about a
22 year ago that reported only 25 percent of American
23 households have eliminated their land line. Only 25
24 percent of American households now have a cellular
25 telephone as their only phone. That means 75

1 to address is that the defendant suggested that they
2 are -- excuse me, that the Court is not able to
3 grant a declaratory judgment in the requested TRO in
4 this case because of the notion that were not
5 seeking -- excuse me, that the police are not
6 seeking to enforce an unconstitutional or void law.

7 Your Honor, we think that the passage of
8 House Bill 386 actually rises this issue to that
9 level. Because the passage of House Bill 386 voided
10 the prosecutor's application and interpretation of
11 the gambling statutes. And so I don't think that
12 they can use that statement of law to avoid the
13 propriety of a TRO here because we really are asking
14 the Court to interpret a statute that has
15 effectively eliminated the prosecutor's application
16 of a different statute.

17 THE COURT: But you would
18 agree, wouldn't you, that in the event a TRO is
19 granted and discovery takes place, the prosecutor
20 could very well learn through the process of
21 discovery that your operation isn't gambling. You
22 may not agree that that may be the finding, but you
23 agree there is a possibility that they will be able
24 to present evidence at a later time that might
25 refute your interpretation of gambling. You agree?

1 Mr. Lambert?

2 MR. LAMBERT: Just responding,
3 your Honor. The Peltz case keeps coming up. This
4 is the body of law which I believe may have stated
5 in the last hearing, these are First Amendment
6 cases, they do not apply to this
7 proceeding. The law regarding prior restraint
8 chilling effect of regulation in the First Amendment
9 area create a unique body of law that permits a
10 Court to enjoin criminal prosecutions in a much
11 broader venue than --

12 THE COURT: I'm not being
13 asked to enjoin a criminal prosecution. I'm not
14 being asked to enjoin a criminal prosecution. Let's
15 be clear; that's not what I'm being asked to do.

16 This has nothing to do with the pending
17 criminal cases. So I don't -- I understand your
18 point, but I want the record to be clear; I'm not
19 not being asked to do that.

20 This case has absolutely nothing to do
21 with the people charged in the criminal case. And
22 I'm not being asked in their TRO to in any way
23 enjoin the actions of the prosecutor in that case.

24 MR. LAMBERT: I guess I'm using
25 it as a potential criminal cases against these

1 guilty; and if not proven, result in not guilty
2 verdicts. But none of those people are involved in
3 this case.

4 So, no, I don't agree with you that they
5 are asking me to enjoin criminal conduct. This is a
6 civil proceeding with a specific civil remedy being
7 sought that has to do with the definition of
8 gambling.

9 And quite frankly, I believe that there is
10 the possibility that even in the event this Court
11 finds these particular plaintiffs are sweepstakes
12 cafes for purposes of compliance with the statute,
13 that that does not preclude your office from
14 prosecuting others, or presenting evidence perhaps
15 at a later date that would contradict the evidence
16 presented here that said that they were gambling.

17 So I don't agree with you that this in any
18 way precludes criminal activity, if your office is
19 able to charge a crime and prove the elements. I
20 see them as two separate things.

21 MR. LAMBERT: Let me
22 respectfully suggest, your Honor, the point that you
23 are making is one of the reasons articulated by Ohio
24 courts why a Court in your position should not issue
25 an injunction because it won't do anyone anyone any

1 to happen here.

2 MR. LAMBERT: Let me clarify,
3 your Honor. Mr. Mason has indicted no retail
4 operators; he indicted people at the wholesale
5 level, people who promote and sell the system.

6 THE COURT: I understand.

7 MR. LAMBERT: When you say --

8 THE COURT: He made a
9 decision, for whatever his decision is, in his
10 judgment, which he is obligated to do and I trust he
11 does well. He made a decision to charge some and
12 not charge others. I don't read anything nefarious
13 into that. What I read into that is he made a
14 cogent review and he made decisions to treat
15 different people different ways. The way he chose
16 to deal with these particular plaintiffs does not
17 preclude them from seeking a civil remedy. That's
18 where we disagree. We're going to have to agree to
19 disagree.

20 MR. LAMBERT: I'm not saying we
21 agree to disagree, I'm urging on the Court that it
22 is, it would be ill advised under Ohio law to grant
23 a remedy when the facts of each case would be
24 unique; facts of each case will be different. Those
25 facts are gonna' make the difference between whether

1 Marketing LLC versus William Mason in his capacity
2 as prosecutor. Case 784234. All the parties are
3 here.

4 I have taken this break to review your
5 arguments and look at all of the pleadings that have
6 been filed. I also reread the statute.

7 I am going to grant the temporary
8 restraining order, and I will give you my reasoning.
9 And I do want to say at the outset that I don't want
10 anybody to misconstrue, particularly observers, I
11 know the lawyers won't, but particularly the
12 observers. The granting of this TRO is not in any
13 way a statement about the propriety or impropriety
14 on the actions of the prosecutor in sending the
15 letter or in bringing a separate criminal case.
16 This is a very narrow issue that these plaintiffs'
17 facts have presented and the finding is based solely
18 on the arguments and the pleadings at this stage.

19 Now, at a later date I may find that the
20 findings I make today are not the same after
21 evidence. We've had that discussion. But for
22 purposes of today, these are the findings of the
23 Court.

24 That the plaintiffs herein are not
25 utilizing the VS-2 software; that they are

1 cafes that open.

2 It states: "That on and after the
3 effective date of this Section and through June 30,
4 2013," which is moratorium period, "the Attorney
5 General, or appropriate county prosecuting attorney,
6 may bring an action for injunction against a person
7 that conducts a sweepstakes through the use of a
8 terminal device that was not conducting a
9 sweepstakes before the effective date."

10 This would be people in violation of the
11 current 386. It appears to be limiting to a civil
12 remedy.

13 It also states: "That if such a person
14 continues to conduct such a sweepstakes after an
15 injunction is granted," again, a civil remedy, "a
16 contempt action may be brought by any means
17 necessary."

18 Contempt is also, it should be known, a
19 civil action. Clearly, the statute, as we know
20 courts are here to interpret statutes, but there are
21 things that are in this statute that I'm sure we'll
22 have to discuss at length.

23 So the Court has also found within the
24 context of the pleadings, the affidavits, and the
25 arguments today, that the plaintiffs do demonstrate

1 local municipalities have considered the issues and
2 agreed that sweepstakes enterprises are permissible
3 businesses in Ohio. No bond is required for the
4 TRO.

5 We will set the hearing on the
6 temporary -- I'm sorry, the preliminary injunction
7 for June 27th at 11:00. As you know, if the parties
8 do not agree to an extension, then that will be the
9 preliminary injunction hearing. If you agree to an
10 extension, then I'm happy to docket that for you and
11 we can discuss an expedited discovery schedule. I
12 need you all to go back to the jury room so we can
13 figure out what that schedule is and get it on the
14 docket.

15 And we'll also reduce the temporary
16 restraining order to writing for you before you
17 leave today.

18 Any questions from the plaintiffs?

19 MR. GOURASH: No, your Honor

20 MR. KEYES: No, your Honor.

21 THE COURT: Any questions
22 from the defense?

23 MR. LAMBERT: No, your Honor.

24 THE COURT: Okay. If you
25 could take some time to go in the back.

1 we'll get your pleadings done and dockets done.

2 (Thereupon, the proceedings were concluded.)

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APPENDIX - C

1 sweepstakes. Consideration is paid for
 2 internet access time and is never at risk in
 3 the event a customer chooses to participate in
 4 this sweepstakes. Also neither Page-Jaq nor
 5 NHBC used the VS2 software like existing
 6 plaintiffs. They use DSS and Gateway
 7 software. The addition of these two parties
 8 as plaintiffs will not add any new software to
 9 the litigation.

10 Neither party is part of any criminal
 11 proceedings, but both were shut down
 12 involuntarily by the prosecutor's cease and
 13 desist letters and remain closed. As such,
 14 similarly situated to the facts that were
 15 plead and supported for the TRO, from the
 16 existing plaintiffs. In addition, both of the
 17 new parties meet the definition of House Bill
 18 386, which was signed by Governor Kasich on
 19 June 11, 2012. They operate pursuant to valid
 20 permits issued by Brooklyn Heights, Newburg
 21 Heights respectively. They were in business
 22 before June 11, 2012, and are grandfathered in
 23 by the legislation.

24 They were shut down involuntarily.
 25 As I indicated earlier, their

1 demonstrate all four factors necessary for the
 2 TRO, we request that the court grant the TRO
 3 in their favor and immediately allow them to
 4 reopen and no bond be required for the TRO.

5 If there are no questions, your
 6 Honor, I will rest.

7 THE COURT: Mr. Lambert, I
 8 forgot to ask. Do you want to respond to each
 9 one? Do you want to wait and respond en mass?
 10 It's entirely up to you.

11 MR. LAMBERT: I would rather do
 12 the latter, your Honor.

13 THE COURT: Just to be clear,
 14 we are incorporating all the arguments from
 15 the prior proceedings to this proceeding in
 16 the event that for some reason somebody misses
 17 something this time, we have incorporated
 18 everything. Everything is running as if it's
 19 a continuous hearing.

20 Mr. Zuckerman. Mr. Lear.

21 MR. LEAR: Michael Lear, on
 22 behalf of CTD Entertainment, LLC.

23 Your Honor, we have a motion pending,
 24 motion of a non-party, CTD Entertainment, LLC
 25 to intervene as plaintiff that was filed June

1 operation meets the definition of sweepstakes
 2 and that there is no purchase necessary. The
 3 prizes are from a finite pool and the odds of
 4 winning are made available to all customers
 5 and the internet time purchased is never at
 6 risk. Given these facts and the arguments
 7 raised in the prior hearings, we submit that
 8 the two new entities, Page-Jaq and NHBC, have
 9 demonstrated a likelihood of success on the
 10 merits.

11 Further, they also have suffered
 12 irreparable harm. They are at a competitive
 13 disadvantage to entities outside of Cuyahoga
 14 County that are able to operate cafes and have
 15 lost customer good will and they have lost
 16 revenue and employees have been out of work.
 17 No harm will befall the prosecutors or any
 18 others by re-opening these two enterprises.
 19 And its in the public interest for these two
 20 enterprises to be opened immediately and that
 21 allows them to operate legitimate business.

22 Employees will go back to work and
 23 customers will purchase internet time and have
 24 access and abilities to use our facilities.

25 Because these two new plaintiffs can

1 18th of 2012.

2 We have a motion to intervene
 3 pending. Attached to that motion is our
 4 proposed verified complaint signed by the
 5 principle of CTD Entertainment, Christopher
 6 Skoda.

7 Your Honor, it's our position that
 8 the court shall grant intervention either as a
 9 matter of right or permissive intervention, I
 10 will incorporate into my argument what is set
 11 forth in that, in that motion.

12 Clearly, your Honor, there are laws
 13 or facts in common with this main litigation
 14 with respect to CTD Entertainment. Like the
 15 plaintiff parties that are existing in this
 16 action, CTD Entertainment operates as internet
 17 sweepstakes cafe known as Hot Slots internet
 18 cafe in Euclid, Ohio. That business was began
 19 prior to the passage of House Bill 386 in some
 20 time in early May of 2012.

21 CTD Entertainment does now have a
 22 permanent occupancy permit through the City of
 23 Euclid and also has an operating and an
 24 occupancy permit through the City of Euclid.

25 Like the plaintiff parties in this

1 lawful business.

2 As to the elements of the public
3 interest and harm to others, I will note that
4 Los Palmas has a number of employees that have
5 been out of work since Mr. Mason closed our
6 doors. Our customers have lost the
7 opportunity to purchase phone cards at
8 competitive rates.

9 Given these facts, your Honor, and
10 the arguments that I made at the previous TRO
11 hearings on behalf of other Tele-Connect
12 plaintiffs, I would ask that the court grant
13 Los Palmas' request for temporary restraining
14 order in the same form as the TRO that your
15 Honor granted in the case so far.

16 I request that a bond not be required
17 and that we be allowed to immediately reopen
18 the store that Los Palmas owns.

19 If your Honor does not have any
20 questions, I would thank the court.

21 THE COURT: Thank you.
22 Mr. Malek.

23 MR. MALEK: Nate Malek.

24 Your Honor, I represent LV & IBNEE,
25 LLC. I will reiterate some of the same issues

1 signed by Governor Kasich, they would be
2 considered operational because they did have
3 certificates and licenses that were required
4 by the law issued by the City of Westlake. I
5 have a copy of which, if the court wants to
6 see it.

7 Additionally, your Honor, I think
8 that on the basis for motion to intervene,
9 again, I will reiterate what the other
10 attorneys have said. There are common issues
11 of law and fact clearly in this case. All of
12 these businesses operate in the same manner.
13 They sell either internet time or phone cards
14 to customers that come in. The customers have
15 the option, if they want to, either
16 participate in the sweepstakes program or not
17 participate in the sweepstakes program. All
18 of them are operating very similar softwares.

19 My client in particular is using
20 Gateway software and Net Sweeps software,
21 which is non-VS2 software. It's all generally
22 the same type of business model. Clearly,
23 there are common issues of fact and law here.

24 We believe that the actions taken by
25 Prosecutor Mason in this case are not

1 that have been presented to the court thus far
2 this morning.

3 Currently, my client is in the
4 business of internet sweepstakes business.
5 It's located in Westlake, Ohio. Certificate
6 of occupancy was issued June 5th, 2012, six
7 days prior to the legislation being signed
8 into law by Governor Kasich.

9 I would represent to the court that
10 my clients can operate under the new law.
11 They would be grandfathered in and able to
12 operate an internet sweepstakes cafe in
13 Westlake.

14 THE COURT: I think your
15 client is in a unique situation because they
16 were in possession of permits and licenses and
17 ready to open when the cease and desist
18 letters went out. Correct? So they never --
19 they indicated to me they were open for a very
20 brief time on the day that the cease and
21 desist letter went out, which was what date?

22 MR. MALEK: May 30, 2012.

23 However, for all practical purposes they have
24 not operated because of the cease and desist.
25 I believe that under the statute, the new law

1 warranted and your intervention would be
2 required to allow these businesses and our
3 client's business to continue to operate in a
4 way that is allowed by law and not contrary to
5 law and that a TRO would be warranted because
6 all four factors would be met.

7 First of all, my client is clearly
8 allowed to operate by law under the State of
9 Ohio. Number two, they are not operating VS2
10 software. They were involuntarily closed by
11 Prosecutor Mason's office and my clients were
12 never allowed to even open.

13 Number four, there would be
14 irreparable harm caused to the community.
15 It's already happened in the county. The
16 customers in Cuyahoga County are going to
17 other counties to spend what funds they have
18 that otherwise would be spent at businesses
19 here in Cuyahoga County.

20 That irreparable harm that has been
21 caused to the employees of these businesses is
22 they are let go. They earn a wage legally,
23 lawfully, and have been affected by Prosecutor
24 Mason's actions.

25 So based on that, I would ask, first

1 Your Honor, with regards to a TRO,
 2 this company meets all the qualifications.
 3 They are not breaking the law in what we do.
 4 They provide a sweepstakes opportunity to
 5 people if they want to do it when they rent
 6 internet time.

7 If they cannot rent internet time,
 8 people will not be able to use their internet
 9 in their homes because in Maple Heights they
 10 don't have computers, may lose computer
 11 access. Employees are losing their jobs.

12 Yes. People. These owners also will
 13 suffer some economic harm because they will
 14 lose income. No one is harmed by this
 15 business. There is no good reason to close it
 16 down.

17 We believe, therefore, that because
 18 the criteria set forth by the State of Ohio in
 19 its wisdom for a TRO is met, that we should be
 20 granted a temporary restraining order without
 21 bond in this case pending a TRO and final
 22 hearing.

23 Thank you very much, your Honor.

24 THE COURT: Thank you. Mr.
 25 Delahunty.

1 activity to increase its business in a
 2 competitive manner. It's the same model,
 3 theory that McDonald's uses in its Monopoly
 4 games to take business away from Burger King.

5 Our client is in competition with
 6 FedEx, Kinko's, and other organizations which
 7 sell internet time. Cyber Time sells internet
 8 time at a rate of 20 cents per minute, which
 9 is an extremely competitive rate in the
 10 market.

11 It has been in business since May of
 12 2011. It was in business prior to House Bill
 13 386. And House Bill 386 speaks volumes with
 14 respect to the activity associated with
 15 sweepstakes in that the State of Ohio does not
 16 regulate criminal activities. It regulates
 17 legitimate businesses. House Bill 386 sets to
 18 regulate legitimate businesses operating in
 19 the State of Ohio.

20 Accordingly, the activity of Cyber
 21 Time internet cafe is a legal operation that
 22 was involuntarily closed as a result of a
 23 letter sent by the prosecutor's office, Bill
 24 Mason, telling them to cease and desist or be
 25 prosecuted.

1 MR. DELAHUNTY: Martin Delahunty,
 2 on behalf of Cyber Time Internet Cafe Maple,
 3 LLC.

4 Your Honor, we have filed a motion to
 5 intervene in the current action. We have
 6 attached to that a verified complaint. If I
 7 may approach, I gave your clerk a copy. We
 8 have amended the proposed complaint that we
 9 would file in this action.

10 May I approach, your Honor?

11 THE COURT: That's fine.

12 MR DELAHUNTY: I have withdrawn
 13 the original claims for violation of 4142 of
 14 the United States Code. Those have been
 15 withdrawn from the proposed complaint.

16 They are violation of the Ohio
 17 Constitution; Article 1, Section 1, which
 18 would be the freedom of speech and the illegal
 19 taking under the Ohio constitution.

20 With respect to the main stay of the
 21 action that's before us, to say a commonality
 22 of interest is just to repeat what everyone
 23 has said here. Each of these individuals
 24 along with Cyber Time is an organization that
 25 provides cyber sweepstakes as a promotional

1 The Cyber Time internet cafe utilizes
 2 IT software, non-VS2 software. A certificate
 3 has been attached to the complaint showing the
 4 legitimacy with respect to the software and
 5 with respect to this and the commonality of
 6 interest, Cyber Time would ask to be able to
 7 intervene with respect to this action.

8 The issues of law and fact with
 9 respect to whether or not this is legal
 10 gambling and whether or not it could be shut
 11 down are identical to this intervening
 12 plaintiff.

13 As to the rest, we have also filed in
 14 conjunction with our motion to intervene a
 15 motion for temporary restraining order.

16 Without belaboring the fact and
 17 hereby incorporate the arguments you have
 18 already heard with respect to counsel, with
 19 respect to the four main prongs, what I would
 20 add in addition is that ten individuals have
 21 lost their jobs as a result of the cease and
 22 desist letter as well as a number of
 23 independent contractors who perform services
 24 that suffered economic benefit from Cyber Time
 25 being open, have lost that. We are losing our

1 involuntarily shut down, losing revenues,
 2 employees. Its employees are losing wages.
 3 There will be no harm to the
 4 defendant in this case or to the public at
 5 large if the court grants injunctive relief.
 6 In fact, the public interest should be for the
 7 court to grant injunctive relief to permit us
 8 to reopen our business that will permit people
 9 to buy internet usage time at CTD
 10 Entertainment and permit its employees to get
 11 back to work rather than to come back again
 12 into Cuyahoga County.
 13 Like the other businesses in this
 14 case, the customers will go outside of this
 15 county to participate and purchase the usage
 16 time and participate in the internet
 17 sweepstakes. Revenue will leave Cuyahoga
 18 County, if the court doesn't grant relief.
 19 Based on all those factors, your
 20 Honor, I would submit that a TRO is
 21 appropriate in this case and we respectfully
 22 ask the court to grant a temporary restraining
 23 order on behalf of CTD Entertainment to permit
 24 it to open up its doors again and not require
 25 any bond.

1 We did have this discussion earlier.
 2 I explained if you were an LLC or a
 3 corporation you couldn't represent yourself.
 4 You indicated that you were a sole proprietor,
 5 so under Ohio law you could represent
 6 yourself.
 7 MR. WAKUT: My name is Robert
 8 Wakut.
 9 I represent Land of the Loot and
 10 Piggybank, a business in Parma Heights and
 11 Westlake respectively. Like a lot of others,
 12 our interests are the same as the other
 13 parties. A lot of arguments are the same as
 14 the ones that the previous plaintiffs made.
 15 The only thing that I have to add is
 16 that we do have a license to operate in both
 17 Parma Heights and Westlake and licenses are in
 18 place. We were involuntarily closed by the
 19 prosecutor's cease and desist letters. We
 20 were in operation before June '11. We do
 21 qualify for House Bill 386. We are
 22 sweepstakes with no purchase necessary. We
 23 sell internet time at a competitive rate.
 24 THE COURT: Any Federal
 25 claims in yours?

1 THE COURT: On behalf of Los
 2 Palmas, no Federal claims?
 3 MR. KEYES: That's correct.
 4 No Federal claims.
 5 THE COURT: On behalf of
 6 ISHU?
 7 MR. MALEK: No, your Honor.
 8 THE COURT: Mr. Delahunty
 9 already answered that question.
 10 Mr. Delahunty, any Federal claims?
 11 MR. DELAHUNTY: No Federal
 12 claims.
 13 THE COURT: Mr. Minshall?
 14 MR. MINSHALL: No, your Honor.
 15 THE COURT: Okay. I am
 16 missing somebody.
 17 Those with counsel I have addressed
 18 everybody, is that correct? Lawyers who are
 19 present with clients and filed the documents,
 20 has everybody had the opportunity to be heard
 21 on behalf of the proposed plaintiffs?
 22 Mr. Wakut, you are pro se. Would you
 23 like to come up. And you are going to talk to
 24 me at this stage why I should let you in the
 25 case.

1 MR. WAKUT: No Federal claims
 2 in my case.
 3 THE COURT: Anything else you
 4 would like to add?
 5 MR. WAKUT: The other thing
 6 we do not use VS2 software. A lab report will
 7 be included in my report. If there is any
 8 questions, that's it.
 9 THE COURT: Thank you. We
 10 also had one attorney who is seeking
 11 intervention, but has not yet filed the
 12 documents. So, sir, if you could come up.
 13 If you would state your name on the
 14 record and the names of the people that you
 15 represent.
 16 MR. ALEXANDER: Good morning,
 17 your Honor. My name is James Alexander, Jr.
 18 I am here today on behalf of two
 19 other internet cafe operators, who are not
 20 parties in this case at the moment. One is
 21 called Lucky Palms, and operates at 6701 St.
 22 Clair Avenue, Cleveland, Ohio. It's a LLC
 23 tag, T-A-G, LLC. That particular internet
 24 cafe has been in operation since November of
 25 2010.

1 complaint, who is seeking compensatory money
2 to be paid for violating the Ohio
3 constitution.

4 Now, my personal opinion is that I
5 would like to add to my verified complaint
6 based on the prior case that I had against the
7 city seeking compensatory damages against the
8 county for closing.

9 THE COURT: Everybody is free
10 to file leave for motion to go amend.

11 MR. MALEK: Even though we
12 filed a verified today, we can file again?

13 THE COURT: Correct. You
14 have the right to amend the first amended
15 complaint without leave or with liberal leave
16 prior to an answer, but remember you are on a
17 schedule, so you have to be respectful of the
18 fact that they are on a schedule to answer.

19 MR. MALEK: Thank you.

20 THE COURT: I will see
21 everybody at 1:00.

22 - - - -

23 (Thereupon, a recess was had.)

24 - - - -

25

1 It does not meet the definition of
2 gambling under the Revised Code in the State
3 of Ohio, does not meet the definition of a
4 gambling house. It is likely, we think, to
5 succeed based on Ohio case law in State versus
6 Dabish, and the fact that there is no risk,
7 doesn't meet the definition of gambling, does
8 not meet the Federal definition of gambling.
9 So we believe that we are likely to succeed.

10 My client has been damaged in that by
11 closing down his business, lost income, lost
12 customers to businesses outside of Cuyahoga
13 County, and unaffected by Prosecutor Mason's
14 letter.

15 We think that it is important in the
16 public interest because the fact that you
17 can't have a law sporadically enforced in the
18 State of Ohio where in most of the counties
19 it's not enforced as gambling against the
20 sweepstakes owners, but in Cuyahoga County
21 apparently it is and that needs to be
22 resolved.

23 We don't think in the early stages of
24 these proceedings, we don't think that our
25 entrance into this would in any prejudice

1 FRIDAY AFTERNOON SESSION, JUNE 22, 2012

2 THE COURT: Mr. Desanto, I
3 hate to tell you, I don't remember -- did you
4 argue the TRO portion yet?

5 MR. DESANTO: No.

6 THE COURT: We need to do
7 that for you before I have the defense
8 response, so they can respond to them all.

9 Is there anybody else that didn't get
10 the argue the TRO portion?

11 Mr. Desanto.

12 MR. DESANTO: Your Honor, I
13 represent the ISHU Corporation, who has
14 operated an internet cafe in Seven Hills,
15 Cuyahoga County, since September of 2010.
16 They received the Bill Mason letter on May
17 30th. They did close their operation. The
18 operation consisted of selling internet time.

19 As an inducement to selling internet
20 time, they would offer sweepstakes prizes with
21 a pre-determined prize. And that the players,
22 if they choose to play the sweepstakes never
23 risked any of their internet time, so there
24 was no risk involved and they were actually
25 selling the product of the internet time.

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1 anyone. We are similarly situated as all the
2 other people, other than perhaps the telephone
3 internet or the telephone businesses. We just
4 do internet. We ask that if Mr. Mason is not
5 restrained in his efforts to shut us down, we
6 would face criminal prosecution and damages
7 without reason.

8 Thank you.

9 THE COURT: Mr. Lambert.

10 I think everybody made their argument
11 for the TRO.

12 You said you wanted to respond en
13 masse?

14 MR. LAMBERT: Yes, your Honor.

15 Your Honor, may it please the court:
16 We previously argued that this court was
17 without jurisdiction to enjoin a potential
18 criminal prosecution, so I am not going to
19 repeat that. I do want to make some comments.

20 We have sat here today and listened
21 to several vendors argue that our customers
22 have lost the ability to purchase phone cards.
23 Our customers cannot purchase internet time.
24 They are not able to use internet time.

25 Several of the movants claim that

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1 in the First Amendment area has intervened in
2 a potential criminal prosecution.

3 We have cited those laws, those cases
4 and we would urge you again to deny the motion
5 for temporary restraining order.

6 Thank you.

7 THE COURT: I would certainly
8 agree with you in the sense that in the end
9 this case might end up with some preliminary
10 injunctions and no preliminary injunctions or
11 a mix of the two, I agree with you. Everybody
12 is going to have to litigate their particular
13 set of facts on their own, even for those who
14 have had the TRO granted. Granting the TRO or
15 not granting the injunction, that is a
16 separate issue that will be heard. And I
17 don't disagree that everybody has a different
18 twist of the fact that's going to require
19 litigation on each of those issues. So at
20 least we agree on that.

21 MR. LAMBERT: Thank you, your
22 Honor.

23 THE COURT: Is there anybody
24 for the plaintiffs that wishes to offer any
25 rebuttal?

1 MR. GOURASH: Your Honor,
2 briefly. Dan Gourash, on behalf of two new
3 intervenors.

4 I want to address the argument made
5 by the prosecutor with regard to the
6 irreparable harm issue and competitive
7 disadvantage that our clients are at.

8 Clearly, the fact that we cannot
9 offer sweepstakes which are legal under Ohio
10 law, not violating any statute or illegal
11 gambling or gambling house put us at a
12 competitive disadvantage with others outside
13 of Ohio.

14 Using his own example, if you tell
15 McDonald's in Cuyahoga County that you can't
16 offer your Monopoly sweepstakes in every other
17 county in Ohio, you can do that. McDonald's
18 in other counties are going to be at a
19 competitive disadvantage to those in Cuyahoga
20 County where you can't offer that same
21 sweepstakes.

22 So I think his point doesn't reach
23 the true nature of the competitive
24 disadvantage. By not having our ability to
25 market our internet time or our phone cards,

1 they put us at a competitive disadvantage,
2 which they cannot deny.

3 You just addressed the second point
4 that I was going to make, at least for my
5 clients, those that want to get up and say for
6 themselves, we have presented facts for you
7 today with regard to our specific operation
8 and entitle us to a TRO.

9 Thank you.

10 THE COURT: Anybody else wish
11 to rebut?

12 Mr. Desanto.

13 MR. DESANTO: Your Honor, I
14 would like to address the part that says that
15 recognition by the court as well as the
16 prosecutors that all of these operations are
17 different, but Mason's letter was not
18 different. It was to all operators, cease
19 your operations. And they don't have any idea
20 what each one of these individual operations,
21 how they work, yet they sent this letter. And
22 it's not a ruse that these prosecutors say
23 it's a ruse because they closed their
24 businesses down when they couldn't do the
25 sweepstakes. That's not a ruse. That's the

1 fear of the power of Government.

2 Most cases that ever involve
3 sweepstakes in the State of Ohio have all been
4 misdemeanor type stuff and haven't been
5 successful. But this prosecutor chose to
6 threaten us with corrupt activities, money
7 laundering, felonies of the second degree.
8 This is a serious threat. Even if you were
9 conducting your business one hundred percent
10 legal, you would be foolish to challenge Mr.
11 Mason when those are the stakes.

12 The proper way to do that would be
13 close down exactly as these plaintiffs have
14 done and bring it to the court's attention.
15 And it's very important here, Mr. Mason has
16 chosen to take this drastic action and he
17 should have paused when you have enforcement
18 that in some counties is no enforcement, other
19 counties some enforcement. That's the
20 signature of a bad law. That's the signature
21 of a vague law and to threaten these business
22 people with money laundering and corrupt
23 activities, any intelligent person would have
24 closed down and done what they have done.

25 Thank you.

1 served by the granting of the TRO as the
 2 businesses have received licenses/permits from
 3 local governments are not operating in
 4 violation of Ohio law based upon pleadings and
 5 arguments to date and that the legislature has
 6 specifically permitted the business of
 7 sweepstakes enterprises, that no bond is
 8 required of any of the plaintiffs.

9 The following schedule applies to
 10 these plaintiffs being the same schedule as
 11 applied to the other plaintiffs and set by the
 12 parties. The TRO will be effect until the
 13 hearing date on the preliminary injunctions on
 14 August 27th, 2012, and continuing until
 15 issuance by this court of its ruling on the
 16 motions for preliminary injunction. That the
 17 hearings on the motion for preliminary
 18 injunctions will be held August 27th through
 19 August 30th and continuing thereafter as
 20 needed commencing at 10:00 a.m. on August
 21 27th.

22 That the defendant's answers are due
 23 on or before June 29th. That all written
 24 discovery, to wit; requests for production of
 25 documents and interrogatories are to be served

1 orders that all parties are ordered to submit
 2 hearing briefs for the preliminary injunctions
 3 on or before noon on August 22nd and those
 4 pleadings are to be delivered to the court on
 5 the date of filing with the clerk.

6 For those of you who are new to the
 7 case, I have told the other attorneys, my
 8 staff attorney, Julie Vacarelli, whose husband
 9 is an assistant county prosecutor, so she has
 10 been Chinese-walled from this case. The staff
 11 attorney is Laura Creed. So please do not
 12 call my staff attorney with any questions. Do
 13 not e-mail her or attempt to talk to her in
 14 any way, but you can ask anything you need
 15 either through us, through Deena, or through
 16 Laura Creed.

17 Now, the bad news is Laura Creed is
 18 on vacation this week, so if you need
 19 something, you just have to call and ask to
 20 talk to Deena. She will give me a message.
 21 If it's something that I can answer I will be
 22 happy to answer it. If it's something that
 23 you think already is going to need some kind
 24 of conversation, try to get the parties
 25 involved on the phone before you call me.

1 on or before July 2nd and electronically or
 2 hand-delivered to opposing counsel on the date
 3 of filing. That all responses are to be
 4 served on or before July 9th with the same
 5 service requirement.

6 That the parties will mutually
 7 exchange expert reports on or before July 23rd
 8 with the same service requirements as above.
 9 That depositions will continue up to August
 10 26th and all parties are ordered to cooperate
 11 in the scheduling of all depositions. The
 12 court will offer its juryroom as needed for
 13 any party wishing to conduct depositions here,
 14 asking only that counsel contact the court in
 15 advance of that request.

16 That the court has advised counsel
 17 that they are to seek the court's assistance
 18 during discovery disputes as needed. That any
 19 objection logs contained in depositions to be
 20 used at the hearing are to be filed with the
 21 court or before 9:00 a.m. on August 26th and
 22 delivered to 18-C on the date of filing.

23 The court will not consider any
 24 extensions of discovery without a joint
 25 request from all the parties. The court also

1 Just to save time.

2 If it's a procedural scheduling
 3 question, I can answer them, but I think I
 4 have pretty much laid those out on the docket.
 5 Anything else? Try to talk to the opposing
 6 counsel whoever has the issue and then call
 7 me. You can come in if you want or call me,
 8 whatever you want to do. Okay.

9 So now, the only question remaining
 10 is do you want this e-signed or take
 11 responsibility for walking it through to the
 12 court? It doesn't matter to me. You just
 13 tell me.

14 MR. YELSKY: I will walk them
 15 through.

16 THE COURT: That means if
 17 somebody wants a certified copy you have to
 18 follow Mitch down there and as he gets his
 19 certified copy, after it's walked through then
 20 the clerk will issue a certified copy for a
 21 fee.

22 MR. LEAR: I have one
 23 clarification. When you read that you
 24 indicated CTC Entertainment. The correct name
 25 is CTD, as in dog, Entertainment.

1 Just so you know, because you are
2 proceeding on your own, the court can't give
3 you legal advice, the attorneys can't give you
4 legal advice, my office can't give you legal
5 advice. When you do file them with the court
6 make sure you serve everybody with your
7 pleadings. All right.

8 So the next motion to intervene left
9 over from last week is Lucky Palms and Feeling
10 Lucky.

11 There is a motion to intervene for
12 Mr. Alexander.

13 MR. ALEXANDER: Good afternoon,
14 your Honor. As you stated I am here on behalf
15 those two business entities, SOR, Inc., LLC.

16 THE COURT: You can't talk.
17 Anybody here can't talk in the back. We need
18 to make a record. It has to be quiet so the
19 court reporter can hear.

20 If I haven't told you before, cell
21 phones have to be off, no computers can be
22 used, I-pads, electronic devices, tape
23 recorders. No cameras or video or audio
24 except for the media. Sorry.

25 Go ahead, sir.

1 facility.

2 He has not been able to keep his
3 employees in the business, that he put a lot
4 of money to start it.

5 As I indicated, he has received all
6 of the necessary permits from the City of
7 Cleveland to operate.

8 Your Honor, this operator has not
9 used -- this operator has not utilized the VS2
10 software operating system, which has been the
11 subject of a lot of discussion in this case.
12 And he was in place before Statute 386 was
13 enacted.

14 Given the fact that the issues are
15 identical to the parties already in the case,
16 we would ask that with respect to SOR that it
17 be permitted to intervene.

18 Now, with respect to Feeling Lucky,
19 the record will need to indicate that there
20 was a time during the operation of that
21 business when there was VS2 software, however,
22 it was a step-in process. She doesn't have
23 that operating system. In fact, she uses the
24 very same one as the Lucky Palms.

25 Prior to that VS2 software she had a

1 MR. ALEXANDER: That's all right.
2 So SOR, LLC, operates under the name
3 of Lucky Palms. It's located, was located at
4 6701 St. Clair Avenue in Cleveland, Ohio.

5 That business started, your Honor, in
6 about February of 2011. It did not stop until
7 it had gone over its building permits and gone
8 through zoning review with the City of
9 Cleveland.

10 Lucky Palms operated successfully and
11 continuously until they received this letter
12 as the subject of this proceeding from the
13 county prosecutor.

14 THE COURT: When did each of
15 them open?

16 MR. ALEXANDER: Now, two
17 different entities. SOR opened in February of
18 2011. And the Feeling Lucky opened in
19 approximately December of 2011.

20 Mr. Awad, the principal of SOR, LLC,
21 got his notice around the 1st of June or 31st
22 of May saying cease and desist from operating
23 and so he did that. And he has not been able
24 to operate since that time nor his public has
25 not been able to come in and out of this

1 different operating system called Network
2 Sweepstakes. So it has not been an issue in
3 our operation being a VS2 software operating
4 system.

5 Likewise, as I said, she started
6 operating in December of 2011, so likewise we
7 would be grandfathered.

8 So we would make the same arguments
9 that I have heard here in other cases on
10 Friday and previously.

11 I haven't heard what I would like to
12 add to the record, why this principle, which
13 would apply to this case; the Supreme Court
14 indicated that the uneven mechanism for
15 counting ballots in various counties violated
16 the equal protection of laws. What we have
17 got here, my clients and other companies
18 similarly situated are allowed to operate in
19 most counties around the State, but here this
20 county prosecutor has elected to use some
21 different guidelines in trying to enforce the
22 gambling ordinance. So I think there is an
23 equal protection argument that needs to be
24 made and we will make it in this case.

25 THE COURT: Are you making a

1 If your Honor wants to get into
 2 particulars of the NOVA cafe, for example, the
 3 affidavit that was filed on behalf of manager,
 4 who is here in the courtroom today, the owner
 5 of NOVA; you want to get into those
 6 particulars, Mr. Nelson will be able to handle
 7 those issues.

8 THE COURT: I think the best
 9 way to proceed would be first to have each of
 10 the VS2 software users approach, give me the
 11 basic information, then the cafe, when you
 12 opened, whether or not you have permits and
 13 licenses, why you were closed.

14 Then after that is done, you can go
 15 into a software issue, Mr. Lambert, whatever
 16 you and defense is comfortable as far as
 17 speaking. If you want to speak after they
 18 make the initial or if you want to wait until
 19 the computer discussion.

20 I want to begin logically with who
 21 they are, when they closed, do they meet the
 22 basic test before we get into the computer
 23 issues. You can think about it. Whenever you
 24 want to talk about it, let me know.

25 MR. NELSON: May I approach?

1 Pursuant to that ordinance my client is
 2 required to pay a \$5,000 annual fee to the
 3 City of Brook Park and a \$30 per terminal
 4 monthly fee to the City of Brook Park and that
 5 is also the affidavit before the court.

6 Your Honor, pursuant to that
 7 procedure NOVA is required to have a
 8 computerized -- have a license attached to
 9 each computer. The City of Brook Park
 10 attaches those licenses to each computer
 11 terminal that is operated by the NOVA internet
 12 cafe. This computer terminal, your Honor, is
 13 available to individuals who come in and buy
 14 internet time and that computer can be used
 15 for searching the Net, playing games that are
 16 on the hard drive of the internet cafe
 17 terminal.

18 Your Honor, these annual licenses
 19 that NOVA operates under is an annual license
 20 and that license is subject to an inspection
 21 by the City of Brook Park and their safety
 22 department comes in and inspects each year.

23 Currently, your Honor, the license
 24 expires and is renewed annually pursuant to a
 25 letter of extension. The application deadline

1 THE COURT: This is limited
 2 to just the request for the TRO on the basic
 3 facts without going into the computer. We
 4 will do that separate. All right.

5 Starting with NOVA.

6 MR. NELSON: Michael Nelson,
 7 bar number 0044045.

8 Your Honor, I am before the court
 9 today on the verified motion for a temporary
 10 restraining order on behalf of Nova's cafe,
 11 internet cafe. NOVA internet Cafe is located
 12 at 15318 Brookpark Road in the City of Brook
 13 Park, Ohio.

14 The business was purchased by
 15 Mr. Vimal Patel, last name P-A-T-E-L. He is
 16 currently the sole owner and shareholder of
 17 NOVA. He purchased it in early 2011. The
 18 cafe is managed by Ms. Jackie Pratt, who is
 19 the full-time manager. She has been the
 20 manager and also the affiant in this matter.
 21 She has been the manager since July of 2011.

22 The NOVA cafe, your Honor, operates
 23 under Brook Park Ordinance No. 9657210, which
 24 in fact established procedures for licensing
 25 of internet cafes in the City of Brook Park.

1 is early April, and the license, actual hard
 2 license is usually delivered in early June.
 3 There is a letter that they get each year that
 4 indicates that they are allowed to operate
 5 while that license is being processed and that
 6 that license is in exhibit three contained in
 7 the affidavit before the court.

8 The NOVA internet cafe has a point of
 9 sale counter, 49 computer terminals and it
 10 also has an auto-attend, that sort of explains
 11 to individuals who come into a cafe how they
 12 can utilize the internet and also how they can
 13 redeem prizes that are preset on the hard
 14 drive of the computer terminal.

15 The NOVA cafe is a stand alone
 16 business, your Honor, out on Brookpark Road
 17 surrounded by industrial complexes. And there
 18 is a separate internet cafe, your Honor, 500
 19 feet from that that operates under the system
 20 that you have previously allowed to proceed.

21 In fact, your Honor, this will come
 22 up later in the discussion, the rules and
 23 regulations that apply to both NOVA as well as
 24 the non-VS2 software cafes are the same. In
 25 fact, the rule certifies this is not gambling.

1 made contributions to, your Honor, as part of
2 their social commitment to the community.

3 The closing of the NOVA cafe has also
4 impacted, your Honor, the surrounding
5 businesses. Their vendors include Gordon's
6 Food Services, Marc's and Wal-Mart provided
7 food to the cafe.

8 One other thing to be noted. No
9 alcohol, no alcoholic beverages, no alcohol
10 allowed in the place. Your Honor, the food
11 that is provided is a complimentary food.

12 Finally, your Honor, my client has
13 on-going business obligations that even though
14 the City of Brook Park has been gracious,
15 there are other vendors such as Multi-Flow,
16 ADT, Waste Management, Direct TV, and AT&T who
17 are not quite as gracious and understanding.
18 My clients have not been able to pay those
19 bills and they are at risk of not only losing
20 those services between, and if the court
21 grants a temporary restraining order, there
22 may be services that they would have to, that
23 they may not be able to get because of the
24 harm that this closing has created.

25 Finally, your Honor, my client while

1 point.

2 So now, Ms. Flanagan.

3 MS. FLANAGAN: Thank you, your
4 Honor. Good afternoon.

5 For the record, Erin Flanagan,
6 representing Cyber Space Westlake, LLC. Your
7 Honor, I am here on a motion for TRO to ask
8 that --

9 THE COURT: Let's talk first
10 about the motion to intervene.

11 MS. FLANAGAN: Sure.

12 THE COURT: Tell me about
13 when you opened or whether or not they have
14 permits, why they closed.

15 MS. FLANAGAN: Cyber Space
16 Westlake opened in mid-April 2011. They have
17 all permits and licenses from the City of
18 Westlake and they have been in constant
19 operation since opening in April of 2011. But
20 for the last period starting in or around May
21 31st, when they actually did not receive a
22 letter from Mr. Mason, but all of the internet
23 cafes around had letters that threatened
24 criminal prosecution if they were, if Cyber
25 Space kept their doors open.

1 a small businessman, Mr. Patel, has invested
2 well over \$150,000 in his cafe. The court has
3 had an opportunity to look at the photographs.
4 It is a place that is safe. Environment is
5 clean, comfortable and inviting.

6 At this time, your Honor, we would
7 ask the court, based on the arguments, that
8 this business is a legitimate business. There
9 is no criminality attached to it, that the
10 City of Brook Park has been in it on a regular
11 basis, that they pay the licensing fee, the
12 annual fee, and in fact have a license to
13 operate pursuant to the Brook Park ordinance
14 that the court would grant the temporary
15 restraining order and verified complaint.

16 Thank you, your Honor.

17 THE COURT: Any Federal
18 claims in your proposed complaint?

19 MR. NELSON: May I have a
20 moment, your Honor?

21 Your Honor, all the claims contained
22 in our complaint are based on the Ohio
23 constitution.

24 THE COURT: We will proceed
25 hearing argument about intervention at this

1 They actually did not receive a
2 letter from Mr. Mason as all other internet
3 cafes around them did. So in an abundance of
4 caution they themselves closed their doors in
5 late May. They have been, like I said, they
6 were licensed first in April of 2011. They
7 are compliant now with House Bill 386, which
8 the Governor signed in on June 11th, 2012.
9 Therefore they are grandfathered under Ohio
10 law, House Bill 386, legalizes internet cafes
11 that use entertainment videos or video
12 sweepstakes that were in operation before June
13 11, 2012, therefore, it applies to Cyber Space
14 Westlake.

15 In addition, Cyber Space Westlake
16 requires the interim injunctive relief of the
17 TRO to stop the irreparable injury caused by
18 the defendant' action, the cease and desist
19 letter.

20 As I said, Cyber Space Westlake in an
21 abundance of caution closed its doors because
22 it would not and did not want to be criminally
23 prosecuted. It has ten employees. Those
24 employees have not been working for the month
25 of June. And it has a steady clientele which

1 different tact with this.
 2 First of all, I think you do have
 3 jurisdiction to the hear Federal claims. Any
 4 court of the State, any level in the State has
 5 such jurisdiction. If what happened before
 6 happens again and this county tries to remove
 7 this thing, that will be dealt with. But I
 8 think unless and until that happens, you do
 9 have jurisdiction to entertain the claims and
 10 that they are properly before the court as
 11 presented by my clients.

12 Number two, we would be willing to
 13 ask the court orally to amend our pleading
 14 from the United States constitutional sections
 15 or constitutional amendments that are cited to
 16 the equivalent State constitutional
 17 provisions. There is no reason to delay this
 18 thing over this issue.

19 So we ask you to revisit the decision
 20 you have announced earlier today.

21 That's it. Thank you, Judge.

22 THE COURT: Anything from the
 23 defense about the motion to intervene or not
 24 at this point, just intervention?

25 MR. LAMBERT: No, your Honor.

1 your verified complaints and come back. Then
 2 we will begin the proceeding as to the
 3 temporary restraining orders.

4 MR. NELSON: May I?

5 Consistent with your order on Friday,
 6 you gave an oral order allowing NOVA to
 7 intervene. We have filed the verified
 8 complaint for TRO and preliminary or permanent
 9 injunctive relief along with required
 10 affidavits and are prepared to go forward.

11 THE COURT: Ms. Flanagan, you
 12 filed yours?

13 MS. FLANAGAN: Yes.

14 I have provided the prosecutor with
 15 -- he has received a copy of the motion as
 16 well as the affidavit.

17 THE COURT: Let's take a five
 18 minute break and catch up on some journal
 19 entries.

20 ----

21 (Thereupon, a recess was had.)

22 ----

23 THE COURT: Now, we are going
 24 to proceed to the hearing on the TRO for the
 25 two new intervenors, which are NOVA and Cyber

1 We object to the all the motions to
 2 intervene especially in light of the fact that
 3 the parties are using software that is
 4 involved in a pending criminal prosecution.
 5 We feel that it would -- it's most improper to
 6 have a civil case going which will interfere
 7 with a criminal prosecution, your Honor.

8 THE COURT: The court will
 9 allow intervention over the defense's
 10 objection of NOVA internet Sweepstakes Cafe
 11 and Cyber Space Westlake. I will not permit
 12 intervention of Jimkat.

13 I am not going to go down this path
 14 again with removals back and forth and delays
 15 in the case because of things going to Federal
 16 Court and prejudice other people who are
 17 already in the case.

18 If you would like, Mr. Kelleher, to
 19 amend your proposed verified complaint, I am
 20 happy to hear it, but at this point
 21 intervention is denied for your client.

22 So I am going to give a journal entry
 23 to those who I have permitted to intervene.
 24 You need to now go downstairs and file your
 25 motion for temporary restraining order and

1 Space. You have made your preliminary
 2 argument for the TRO and placed the basic
 3 information on the record. I am satisfied
 4 that that information doesn't need to be
 5 repeated.

6 Now, we need to move to the
 7 discussion of the software.

8 Is there anything that you, as the
 9 defense, want to say in rebuttal to the things
 10 that have previously been stated about the
 11 TRO, being licenses and permits, when they
 12 closed, when they opened, those kinds of
 13 things, other than I know you object; but is
 14 there anything in addition you want to put on
 15 before we begin discussing software?

16 MR. LAMBERT: No, your Honor.

17 THE COURT: Mr. Nelson, I
 18 presume you want to go forward.

19 MR. NELSON: At this time we
 20 are going the ask the court for permission --

21 Mr. Mark Schamel filed a Pro Hac Vice
 22 motion. He is going to argue the specifics
 23 regarding the actual software, its
 24 comparability, and if there are any
 25 differences at all between it and the Gateway

1 THE COURT: So some people
 2 got more than one letter?
 3 MR. MAY: J. D. May.
 4 Some of these cafes have dual owners
 5 and in an abundance of caution we didn't want
 6 to accidentally notify one and not the other
 7 and get them all in trouble together.
 8 THE COURT: Was anybody not
 9 notified by letter that you are aware of?
 10 MR. MAY: We continued to
 11 find out about cafes. And that's why it went
 12 to 53. Initially it was 50, then it was 51
 13 and 53. There are probably some cafes we
 14 still didn't know about at the time because we
 15 could only find them sort of based upon
 16 location without alerting everyone what we
 17 were doing and going to each City Hall.
 18 For example, one was in Linndale, if
 19 you can believe that, and we didn't know about
 20 that.
 21 THE COURT: Has there been
 22 any follow-up to determine if all 53 closed?
 23 MR. MAY: We toured
 24 through with our agents, the county, and found
 25 that all but two or three had closed pursuant

1 difference between the two types of software
 2 that are being used. I recognize VS2 software
 3 as a defendant in the other case. And I
 4 recognize that the defense doesn't agree with
 5 the proceedings so far, and their objections
 6 have been delineated and recorded for them.
 7 But I will say this: I certainly
 8 recognize that if I grant the TRO to the VS2
 9 software people, it's going to subject
 10 everybody involved to discovery and
 11 Mr. Lambert believes that that is a problem.
 12 I happen personally to believe that
 13 that's a double-edged sword for both of you.
 14 If I grant the TRO and place you on a
 15 discovery schedule, it means that Mr. Lambert
 16 may be concerned about the fact that you might
 17 get discovery from them that might impinge on
 18 the criminal case, but equally he can get
 19 discovery from you, unless you exercise the
 20 Fifth Amendment right.
 21 So what I would say to you is that if
 22 I grant the TRO and put you on a discovery
 23 schedule, if there is a reason that somebody
 24 has to invoke the Fifth Amendment right,
 25 although, I don't see VS2 software as not part

1 to our request that they --
 2 THE COURT: Were charges
 3 against the two or three that remain open?
 4 MR. MAY: Not yet.
 5 THE COURT: Any of those two
 6 or three that remain open are not subject to
 7 the TRO and are not subject to the criminal
 8 case, right, that's pending, things that are
 9 pending now?
 10 MR. MAY: I believe that's
 11 correct.
 12 THE COURT: Anything else,
 13 Mr. Lambert?
 14 MR. LAMBERT: No, your Honor.
 15 THE COURT: I don't think you
 16 need to talk to me about the software.
 17 MR. SCHAMEL: That's fine, your
 18 Honor. Do you want me to talk to you about --
 19 I have a couple of points. I won't get into
 20 the stuff that the court doesn't want to hear
 21 about.
 22 THE COURT: I don't need to
 23 have a discussion about a proprietary software
 24 at this point, if Mr. Lambert is saying that
 25 he is not making argument that there is a

1 of my case, but if that comes up he can always
 2 ask for a stay as to that portion of the civil
 3 case and, of course, I would grant that.
 4 Additionally, I would say the same
 5 thing I have said before, that if discovery
 6 proceeds on the non-VS2 software as it is
 7 proceeding on the VS2 software, as opposed to
 8 the non-VS2 software, that this discovery is
 9 going to be focused and limited. We are not
 10 going on any frolics.
 11 Mr. Mason is not going to get deposed
 12 20 times. Your clients aren't getting deposed
 13 20 times. People are going to have to
 14 cooperate. These are going to be focused. I
 15 offered to have them done in the juryroom, if
 16 you would like. And these questions are going
 17 to have to be very specific to my case and not
 18 fishing expeditions.
 19 I have heard the arguments about the
 20 TRO. I have asked some questions that I felt
 21 were important, given the fact that the VS2
 22 software is not somehow distinctly different
 23 from the other software. I don't see any
 24 reason why the TRO shouldn't also apply to the
 25 VS2 software defendants.

1 hold another hearing. It's important probably
2 so everybody gets to appear in court and the
3 defense gets to examine each one. Maybe they
4 won't object, maybe they will. Maybe they
5 want to make a specific record and I want to
6 make sure they can do that.

7 MR. SCHAMEL: So I am clear for
8 purposes again, your Honor; the order is, your
9 Honor, is going to specifically find there is
10 no discernible differences as it relates to
11 the software?

12 THE COURT: Yes. Because
13 that's in the record.

14 MR. SCHAMEL: Thank you.

15 THE COURT: So the lawyers
16 for VS2 software are ordered in the back.

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18 (Thereupon, Court was adjourned.)

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1 CERTIFICATE

2 I, Timothy M. Schaefer, Official
3 Court Reporter for the Court of Common
4 Pleas, Cuyahoga County, Ohio, do hereby
5 certify that as such reporter I took down
6 in stenotype all of the proceedings had in
7 said Court of Common Pleas in the
8 above-entitled cause; that I have
9 transcribed my said stenotype notes into
10 typewritten form, as appears in the
11 foregoing Transcript of Proceedings; that
12 said transcript is a complete record of the
13 proceedings had in the trial of said cause
14 and constitutes a true and correct
15 Transcript of Proceedings had therein.
16
17
18
19
20

21 _____
22 Timothy M. Schaefer, RMR
23 Official Court Reporter
24 Cuyahoga County, Ohio
25