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IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF LEGAL AFFAIRS,

Petitioner,

v.

BRADENTON GROUP, INC., et al.,

Respondent.

CASE NO.: 91,712
CONSOLIDATED

DISTRICT COURT OF APPEAL
FIFTH DISTRICT - NO. 96-02661

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* * * * * * * * * * * * * * * * * * * *

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH
JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA
HONORABLE R. JAMES STROKER

* * * * * * * * * * * * * * * * * * * *

BRADENTON GROUP, INC. et al.,
ANSWER BRIEF ON THE MERITS CASE NO.: 91,712

LAW OFFICE OF THOMAS F. EGAN
204 Park Lake Street
Orlando, FL 32803
407-849-1055

LAW OFFICE OF STEVEN G. MASON
1643 Hillcrest Street
Orlando, Florida 32803
407-895-6767

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

Statutes and Other Authorities

PRELIMINARY STATEMENT

In the trial court below, Bradenton Group, Inc. and Eight Hundred, Inc.(a/k/a Pondella Hall for Hire, Inc.) are defendants and will be referred to here as "Corporate Defendants". They are two of seventeen corporate and individual defendants. These two corporations appeal here jointly and are represented jointly by the same counsel.

In the trial court, the State of Florida was represented by lawyers of two offices of the Attorney General. Those offices are the Office of the Statewide Prosecutor and the Office of Economic Crimes. In the Fifth District Court of Appeal, no distinction was made between the offices. They will be referred to here as the Attorney General.

In the Fifth District Court of Appeals these Corporate Defendants were the Appellants in Case No.: 96-2661. The Attorney General in that case was the Appellee. In the Fifth District Court of Appeals Case No. 96-2979, these Corporate Defendants were the Appellees. The Attorney General was the Appellant.

There is a record on appeal that consists of pleadings in the trial court and pleadings in the Fifth District Court of Appeals. Reference to a record in this case will be by reference to an ("R-___"), followed by the page number. Also filed in this case with this brief is an Appendix. Reference to the Appendix will be by reference to App. followed by an item number, followed by page number in the item ("App. ___/___").

Because the Attorney General has filed an Appendix with its brief, the Corporate Defendants will also refer to the contents of that Appendix. That Appendix contains transcripts of both evidentiary hearings that were held in the trial court. Reference to the Appendix of the Attorney General, will be by reference to AG App., followed by the item number, followed by the page number of the item ("AG App.___/___").

Motion to Dismiss Appeal of Fifth District
Court of Appeal Case No.: 96-2979

These Corporate Defendants have filed a Motion to partially Dismiss the Appeal of the Attorney General. That Motion was based on the claim that this Court lacked jurisdiction over the appeal of the Attorney General as to Fifth District Case. No.: 96-2979. This Court has not ruled on that motion. By filing this answer brief, the Corporate Defendants do not waive that motion or the relief requested.

STATEMENT OF THE CASE AND FACTS

The Attorney General's Statement of the Case is unclear as to the description of the parties. It is unclear about the nature of the evidence in the trial court and the record, both in the trial court and in the appellate court. It is also unclear about the rulings of the two courts below. Dealing with clarifying those matters, this Statement will not repeat the full proceedings below.

These Corporate Defendants have filed a brief in companion Case No.: 92,084. That case deals with the same issues as here. Avoiding repetition would be desirable. However it is unavoidable.

Parties: According to the statement of the Attorney General, these corporations, Bradenton Group, Inc. and Eight Hundred, Inc., "conducted a large-scale, commercial bingo operation comprised of [15] bingo halls." Actually, Eight Hundred, Inc. was involved in bingo only insofar as it owned snack bars and machine concessions. This is admitted by the Attorney General in its Initial Brief on the Merits, p. 16 referencing AG App. 2, Exhibit A, at paras. 16, 34; and AG App. 4 at 91.

Bradenton Group, Inc. at the time of the injunction had no employees in Florida. At the time the injunction was issued in November 1995 and for a year prior, Bradenton Group, Inc. was the owner of two parcels of real estate here in Florida, one of which has been subsequently foreclosed as a result of the injunction.

All the income from these Corporate Defendants came from the lease of real estate, bingo equipment, or the operation of snack machines in these bingo halls. Affidavit of John S. Henning, App. B. See also, AG App. 11, pp. 31-33.

According to the Attorney General's statement of facts, the trial court entered an order based solely on improper testimony.

> This order was based upon the unsworn telephonic statement of an officer of the Respondent corporations.

AG Brief, p. xviii. This statement is a misstatement of the proceedings below. John S. Henning testified and was present. AG App. 11, p. 4. He had previously testified twice before Judge Stroker.

Corporate Defendants had previously filed with the court two affidavits in support of their position to obtain return of their

property and an injunction bond. Copies of those two affidavits are attached. [App. M] Mr. Henning's affidavit was also filed with the Corporate Defendants' Motion to Dissolve the Injunction. [App. B].

The hearing was noticed as an evidentiary hearing. AG App. 11, p. 3. [App. N] The court's practice is that witnesses are sworn. The only way that the Attorney General can make this claim is by excluding from its Appendix two pages of the record, pages 23-24. Those pages show Mr. Henning being put under oath.

However, this witness was cross-examined by the Attorney General and presented written evidence to the court summarizing its losses. The Attorney General was free to put on evidence, but did not. The Attorney General doesn't deserve the argument that he was unsworn, which is colorable only by removing pages from the record. With the pages, it makes no sense at all.

In any case, the Attorney General did not raise any issue as to Mr. Henning's testimony in the trial court or in the Fifth District Court of Appeal. A copy of the initial brief of the Attorney General in Fifth District Court of Appeals case no.:96-2979 is attached as App. O.

"Conducted" Bingo: There was no evidence that these Corporate Defendants actually "conducted" bingo, that is ran any bingo games. At the November 21, 1995, hearing, the Attorney General produced only one charity, the American Red Cross in Highlands County, represented by Jeanne Smith. [App. P, November 21, 1995, Transcript of Proceedings, pp. 49-68] When asked about who ran the games, the

American Red Cross stated that "... all those volunteers represent members of the American Red Cross." Id. at 53. Jeanne Smith further testified that they had rented the hall from Neway Rental to run bingo games. Id. at 66.

No Record of Profits: In their statement of the case, the Attorney General also states that these Corporate Defendants "made vast amounts of money in comparison to the relative crumbs they doled out ..." AG Brief, p. xi. The trial court was presented with no such evidence. There was, in fact, no analysis whatsoever presented to the trial court or in the record as to how much money these Corporate Defendants were making leasing equipment and property versus how much the other defendants were making and how much the charities were making or not making. Also, there was never any evidence by the Attorney General as to what the fair market rent is for a fully furnished 20,000 square foot building, with parking for 500 cars.

Proceedings in Fifth District Court of Appeal: So as to be clear, the Fifth District Court of Appeal affirmed the order of the trial court denying Corporate Defendants' Motion to Dissolve the Injunction. However, the Fifth District overruled and dismissed the legal and factual basis of that injunction. It, therefore, reversed the factual and legal findings of the trial court. Possibly, because of this, the factual record in the Brief of the Attorney General is confusing.

The Fifth District Court of Appeal reviewed the record and found both the Attorney General's factual and legal claim was

unequivocal and wrong. (Id., p. 13) Attached to the complaint and incorporated therein was the affidavit of financial investigator Larry Schuchman. The specific violations of law relied upon by the Attorney General to bring the RICO charges were violations of §849.0931, Fla.Stat., the Florida Bingo Law, specifically, violations of subsections 849.0931(1)(c), and subsections 849.0931(3),(5),(6),(8),(9),(11)and (12).

(App. C, Schuchman Affidavit, pp. 3-4; see also, R126-147, p.7).

Based on these violations of the bingo statute, Mr. Schuchman, then concluded as follows:

> Therefore, the operation of bingo games by the PONDELLA ENTERPRISE constitutes a series of illegal lotteries in violation of Fla.Stat. §849.09.

(App. C, Affidavit, p. 4)

Nowhere in this Affidavit did Mr. Schuchman identify any other violations of §849.09, Fla.Stat., that occurred or any other violation that would constitute a predicate act under §895.02, Fla.Stat.

Based on that conclusion, the Fifth District Court of Appeals held that this statutory metamorphosis by the Attorney General wouldn't fly.

> At its essence, the defendants' argument is that violations of the bingo statute, section 849.0931, Florida Statutes, cannot be "racketeering activity" under Florida RICO, sections 895.01-.06. In a sense, this is correct, but we believe it is not dispositive of the issue on appeal.

(R126-147, p. 6).

In the trial court, Judge Stroker did not uphold this theory either. Rather, he reasoned that violations of §849.0931,

Fla.Stat., could constitute the basis of a RICO injunction because violations of the bingo statute constitutes a predicate RICO act. That reasoning is as follows:

> THE COURT: No. See, I read this to say Section 849.09 in its entirety; Section 849.14 in its entirety; Section 849.15.
> MR. SUAREZ: I see. So Your Honor is reading this 849.09 to include the Bingo Statute?
> THE COURT: To include whatever is in 849.09.
> MR. SUAREZ: Including 849.0931?
> THE COURT: Right.

(App. G, p. 16).

Judge Stroker held that because §849.09 is included under §895.02(1)(a) as a predicate act, §849.0931 is thereby also included because a statutory section that has numbers like 849.09 includes all other section such as §849.09___. Florida's bingo statute, §849.0931, is therefore an "unlisted" but included predicate act.

Having ruled against the Attorney General and the trial court as to the legal and factual basis as to a RICO injunction, the Fifth District Court of Appeal nonetheless upheld the issuance of the injunction. The opinion below upheld the issuance of the temporary injunction and the trial court's denial of the Corporate Defendants' Motion to Dissolve for the following reasons:

> The state's complaint and affidavit sufficiently allege that the defendants, as persons not authorized to conduct bingo under Florida law, set up, promoted, or conducted a lottery in violation of section 849.09. Consequently the trial court did not err in denying the motion to dissolve.

(R126-147,p. 19)

In its Statement of the Case, the Attorney General has identified new violations of the Bingo law. According to the Attorney General, these new facts prove that these Corporate Defendants were "conducting" illegal lotteries.

Based on the testimony of two former employees of these Corporate Defendants who were familiar with three or four of the fifteen halls, the following violations of law were shown. On pages xii, xiii, and xiv of the AG Brief, the Attorney General states in separate paragraphs that Highlands County charities were charged $300.00 for rent per session; that the charities were charged 75¢ per cup for coffee; that some of the charities were also charged for "shop points" for purposes of promotion; and that the price of bingo paper was inflated so that the hall operators could make a profit. There is also the allegation that it was proven at a hearing the these Corporate Defendants charged charities $2.00 for meals, when these meals only cost the Corporate Defendants 70¢.

Each of these alleged violations of law are, if they are anything, a violation of §849.0931, Fla.Stat., as to reasonable expenses and excessive rent. There are also allegations that state there were volunteers that received money in the form of tips, that some of these volunteers worked different games, that some of the halls gave away trips to Las Vegas as promotions, and that some of the organizations did not qualify as organizations. AG Brief p. xv. Each and every one of these violations, if they are violations at all, would be a violation of §849.0931, Fla.Stat.

Entry of Injunction: In addition to its complaint, the Attorney General filed a Motion for a Temporary Injunction along with the Affidavit of Larry Schuchman. This motion requested the court to issue an order to certain non-parties, namely NationsBank and Southtrust Bank of Southwest Florida and "any other financial institution and brokerage houses" to freeze and hold all corporate assets and accounts of all the defendants, including personal accounts. (App. C, p. 6).

Some of those accounts were listed in the motion. The banks and accounts were identified by means of an affidavit attached to the motion. (App. C, p. 6; Affidavit, App. C, p. 39-40) As stated in the affidavit of the Attorney General, this represented all accounts and all financial assets of Appellants. (App. C Affidavit).

The Attorney General requested that the injunction be entered without notice. In Paragraph 6, Page 3 of the Motion for Temporary Injunction (App. C), the Attorney General informed the Court as follows:

> Defendants should not be given prior notice of this proceeding because they would in all likelihood render their assets unavailable for forfeiture if notified of this proceeding.

It is not clear how real property would be unavailable. It also requested that the injunction be issued without a bond. This was done.

As to the justification for this injunction, that was set out in the motion as follows. In Paragraph 5 on Page 3 of the State's

Motion for Temporary Injunction (App. C), the Attorney General states:

> Plaintiff will be irreparably injured, and will have no adequate remedy at law, unless this Court grants preliminary relief preserving Defendants' forfeitable assets.

There is no statement as to what that irreparable injury would be except that the Attorney General needed to preserve assets pending a final judgment.

The Corporate Defendants filed in the lower trial court a Motion to Dissolve the Temporary Injunction. (App. B). The Corporate Defendants also filed a Motion for Order Requiring Injunction Bond. On the proceeding day, other defendants, namely Neway Rental and Leasing and Janet Feliciano, also filed motions to dissolve the injunction or, in the alternative, to modify it.

The court first held a hearing on the motions to dissolve of the other defendants, Neway Leasing and Janet Feliciano. The trial court, after an evidentiary hearing, denied their motion to dissolve. Pertinent excerpts of the transcript of that November 21, 1995, proceeding is included in the Appendix (App. G).

At the May 22, 1996, hearing on the Corporate Defendants' Motion to Dissolve the Injunction, the court heard only one witness on behalf of the Attorney General, a bank officer for Southtrust Bank. This witness presented personal financial statements of an individual, namely, Philip Furtney, that were used to obtain mortgage financing on two of the subject properties. No record of that hearing was made. The trial court ruled that the factual and legal findings as to the Motion to Dissolve of co-defendant, Neway

Rental, would apply as to all factual and legal issues regarding these Corporate Defendants.

SUMMARY OF ARGUMENT

The Attorney General, in the courts below and now here, takes the position that persons and entities that violate the regulatory provisions of Florida's bingo law, can be charged with conducting illegal lotteries, and therefore be subject to RICO. Charging a high rent, too much for coffee or too much for bingo paper in any stretch of the language cannot be construed as "conducting a lottery".

This position is not supported by any case authority. Likewise, this Court has ruled on the issue of bingo as a form of lottery, and held that it wasn't. Further, there is no support for this position in any legislative history relating to bingo, and it is expressly contrary to the language of §849.09 that says that its provisions cannot be applied to bingo.

Rather, the Attorney General appeals to help stamp out commercial bingo halls, that is halls for hire. As shown in the brief, that is contrary to the legislative intent to regulate these enterprises. There is also an appeal to this Court to waive any requirement for a bond in RICO cases. That is also contrary to the legislative intent, the express terms of Florida's RICO, and Rules of Procedure governing temporary injunctions.

ARGUMENT

I. INTRODUCTION

Both the trial court and the Fifth District Court of Appeal found that all the violations shown and proven in the trial court were first and foremost violations of §849.0931, Fla.Stat.. One question before the Fifth District Court of Appeal is still before this Court. Whether these violations of Section 849.0931 are also violations of §849.09, Fla.Stat., and, therefore, constitute predicate acts of racketeering?

Just on the basis of reading the two statutes, §849.09 and §849.08931, Fla.Stat., violations cannot be equated. The language of the two statutes are not the same. There are too many ways to violate each. It is inconceivable, for example, how a jury can be instructed that charging too much rent or 75¢ for a cup of coffee is really conducting an illegal lottery.

The second question before this Court deals with the injunction. Whether proof of violations of §849.0931, Fla.Stat., without more, constitutes the basis for the entry of a temporary RICO injunction, without notice, without a hearing or without a bond? In other words, if the owner of a bingo hall leases it to a charity that either does not have an office in that county or does not have a current IRS certification, pursuant to §849.0931(1)(c), is that owner "conducting" a lottery and, therefore, subject to racketeering and forfeiture of the property?

It is now the Attorney General's position that it is. As shown below, it had a different position a few years ago. This

unusual construction of statutes would produce the following result. If, as claimed by the Attorney General, charities were paying an inflated price of 75¢ for a cup of coffee or paying too much for bingo paper, the result is that the charities are charged with violations of §849.0931, Fla.Stat. for paying the price. The snack bar owner who charged and received the 75¢ be charged with conducting a felony lottery and, therefore, subject to racketeering charges.

This is a very curious result which would fly in the face of common sense. No one would ever consider that paying for or charging for rent, coffee or paper constitutes conducting a lottery game. Yet, this is where this case has come to. Compared to what Burger King charges for a coke, 75¢ for a cup of coffee hardly seems like racketeering.

II.

THERE IS NO LEGAL AUTHORITY EQUATING VIOLATIONS OF FLORIDA'S BINGO LAW WITH VIOLATIONS OF FLORIDA'S LOTTERY LAW

There is an old saying among lawyers - if the law is on your side, argue it; but if the law fails you, argue the facts. If the facts fail you, pound the table. At one point in its brief, the Attorney General states as follows:

> Defendants have repeatedly misstated the facts, mischaracterized the law, and engaged in delaying tactics. The State respectfully submits the Defendants' misconduct provides no basis for requiring the State to post an injunction bond.

AG Brief, p. 21. This is pounding the table.

This is a civil case, involving criminal statutes. There is a criminal case pending, and these legal questions are important to that court. As of the question of whether violations of Florida's bingo law, §849.0931, Fla.Stat., can be equated to violations of the lottery law, §849.09, Fla.Stat., is an entirely legal question. The factual record before the trial court and the appellate court shows the facts to be clear and unequivocal. The language of the statutes and the intent of the Legislature show contrast.

The Attorney General, both on appeal and at the trial court, proposes to charge individuals and corporations with racketeering and to seize all their property because they violated sections of Florida's bingo law. That is, they are purportedly guilty of racketeering because, inter alia, they charged charities too much rent, too much for coffee, allowed charities to rent their halls, who did not have an IRS certificate under 501(c), or did not have offices within 15 miles of the place where they held the bingo games. By doing these things, are they conducting lotteries?

In the trial court and on appeal, the Attorney General took the position that if any person or organization, even an authorized charity, violated the regulatory provisions of §849.0931, Fla.Stat. in the conduct of its games, it violated the lottery statute. Now and after the opinion was rendered, it takes the position that the only "authorized" charities are exempt from this rule but the other organizations and individuals are not. They commit felonies lottery violations and are subject to RICO.

The first point to be made about this issue is that there is not a single case in Florida jurisprudence that states this position. There is also not a single statement of the Legislature that states it. As shown below, the cases that address issues of bingo and gambling all seem to uphold that illegal bingo is a violation of §849.0931, Fla.Stat., or, at best, gambling.

The state has cited a number of case authorities to support its position. Upon a review of each of these cases, not a single one squarely or even indirectly address the issue presented to this court. Because there are their legal authorities, each will be resolved.

1. Madar v. State, 376 So.2d 446 (Fla. 4th DCA 1979)

Madar is inapplicable to this discussion. The most obvious distinction is that Madar does **not** address the lottery statute, §849.09. The issue in Madar was whether the state could charge the accused with both violating the bingo statute and keeping a gambling house--specifically, the location or **premises** where the bingo game was held. The major distinction between these two offenses (sections 849.01 and 849.0931-formerly §849.093) is that one addresses a type of gaming and the second addresses the location where the gaming is conducted. State v. Schell, 211 So.2d 581, 583 (Fla 2d DCA 1968).

The Attorney General's dilemma is that the Legislature chose **not** to include the gambling house statute in the definition of racketeering activity. This statute, §849.01, is not included within the RICO statute. Again, if the Legislature wished for the

bingo statute or the gambling house statute to be predicate offenses for racketeering, it would have so stated.

2. Perlman v. State, 269 So.2d 385 (Fla. 4th DCA 1972)

Perlman addresses the issue of the gambling house statute rather than the legal contrast between lottery and bingo. Perlman **does not address** the lottery statute and its bingo exemption. Further, at page 387 of Perlman, the court noted that **former** section 849.093 (bingo statute) did not contain a penalty provision. At the time Perlman was issued, the Legislature had not enacted the criminal penalties for "willful and intentional" violations of the bingo statute. Therefore, Perlman provides no support for the Attorney General.

3. Carroll v. State, 361 So.2d 144 (Fla. 1978)

The issue in Carroll was whether the original bingo statute, §849.093, was constitutional under a due process and equal protection analysis. Nowhere within Carroll is the lottery statute cited. At best, Carroll discusses the lottery laws in general terms. There is no mention of the singular lottery statute, §849.09--or more importantly, its specific **bingo exemption**. As the lottery statute was not the subject of this Court's decision, it has no applicability to the issue presented here.

4. Caldwell v. State, 402 So.2d 1260 (Fla. 3d DCA 1981)[1]

Caldwell is a short, two paragraph opinion. Although the appellants were charged with a violation of the lottery statute,

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[1]Although Caldwell was not cited by the state in its initial brief, it has been cited previously.

via the use of bingo violations (under former §849.093, Fla.Stat. 1979), the court reversed. The conviction was therefore reversed on appeal. How does this support anything?

In Caldwell no additional issues were discussed or reached. In fact, in footnote 1, the court states, "In light of the disposition of this matter on the insufficiency of the evidence, it was not necessary to consider the other points urged for reversal. However, we seriously doubt if either of the other points were properly preserved for review on this record."

In short, the issue addressed to this court was **not** presented nor addressed by the Caldwell court. As support for this statement, the initial and answer briefs filed in Caldwell are included under separate cover as App. Q and R. Caldwell provides no precedent, guidance or instruction on the issue before this court.

5. Creash v. State, 179 So. 149 (Fla. 1938)

First and foremost, Creash **preceded** the bingo exclusionary language contained within the lottery statute. The logic of Attorney General uses of citing to cases that predate both the present lottery statute, the bingo statute and the RICO statutes is improper. Creash addressed bingo in the context of the gambling house statute.

The Attorney General in its brief omitted review of an additional case. This Court in the case, Greater Loretta Improvement Ass'n v. State ex rel. Boone, 234 So.2d 685 (Fla. 1970), which reviewed directly the relationship between the

statutory authorization of bingo and the constitutional prohibition, against it. The opinion of the Fifth District Court of Appeal referred to Loretta, however quoting from the dissent. (R126-147, p. 17) The majority opinion of this Court in Loretta, however, held that bingo was not a form of lottery, and thereby not prohibited by the Florida Constitution. Loretta, supra, p. 668-69.

The Attorney General took the position in the trial court that if someone, any person or any organization, violates the bingo statute in any way, he or she therefore is in violation, not of the bingo statute, but of the lottery statute. In 1992 and 1995, this was the Attorney General's position on the law. See e.g. Op. Att'y Gen. Fla. 95-21 (1995) and Op. Att'y Gen. Fla. 92-91 (1992)(Authorized bingo operators who fail to follow the statutory regulations for the conduct of bingo games would be conducting "illegal lotteries"). Opinion p. 13, n. 6.

In their brief and in this Court, the Attorney General has changed its position to exclude "worthy organizations" and only those organizations from this rule. The Attorney General, however, does not make the law. Supposedly, his function is to enforce it. What legal authority is there for this?

This is a legal position without legal authority. In fact, all the case authority argue against this position. Three of the cases cited by the Attorney General in fact uphold the proposition that where individuals conduct bingo games for money, without charity involvement, this can be used as evidence for a conviction of the misdemeanor crime of gambling, §849.08, or the felony crime,

keeping a gambling house, §849.01. Those cases are Creash v. State, 179 So. 149 (Fla. 1938), Madar v. State, 376 So.2d 446 (Fla. 4th DCA 1979), and Perlman v. State, 260 So. 385 (Fla. 4th DCA 1977). See also F.Y.I. Adventures, Inc. v. City of Ocala, 22 Fla.L.Wkly. D177 (January 10, 1997) withdrawn and reaffirmed 698 So.2d 583 (Fla.5th DCA 1997)(illegal bingo is equivalent to misdemeanor gambling, a second degree misdemeanor). municipal ordinance governing bingo.

Taking the above cases together, the conclusion is inescapable. Every court that has considered a situation where someone operates bingo in violation of the bingo statute, and without a charity, has held that the crime is, at best or worst, misdemeanor gambling. And if they own the facility, it is, at best, keeping a gambling house, the felony. There is no mention of lottery or RICO.

The only apparent support is the Attorney General's own opinions. The Opinions of the Attorney General on this issue now are inapposite, non-controlling and contrary. As stated previously, none of these self-serving, and contradictory opinions address the **expressed bingo exemption** contained within the lottery statute. More importantly, the Attorney General's staff (in spite of its political predilections) does not have the constitutional power to override the exemption language employed by the State Legislature in §849.09(3), or the power of courts to rule on the law.

Worse still, if taken seriously it appears that the Attorney General is trying to create the law. Throughout the Attorney General's brief, it states that only "worthy organizations" are entitled to conduct bingo in the State of Florida, and are therefore exempt from prosecution under the lottery and the RICO Statute for violations of the Bingo Statute. See AG Brief at pp. xii, xx, 5, 6, 7, 8, 12 and 14. Nowhere within any of the statutes is the term of art "worthy organizations" used.

In fact, the bingo statute refers to "persons" who violate its provisions. Section 849.0931(13), Fla.Stat. It says that "any organization or other persons" who violates its provisions are subject to those penalties. Id. Editing this language to mean only "worthy organizations" is a product of political intentions, not legislative intent.

This evident, in reviewing the opinions of the Attorney General before this appeal, in 1992 and 1995. Then in the opinion of the Attorney General, even "worthy" organizations were subject to prosecution under the felony lottery statute for violations of the provisions of Section 849.0931, Fla.Stat. See e.g. Op. Att'y Gen. Fla. 95-21 (1995) and Op. Att'y Gen. Fla. 92-91 (1992). Everybody and every organization that violated any of the regulatory provisions of Section 849.0931, Fla.Stat. would therefore be subject to charges under Section 849.09 and therefore would be in violation of RICO. The Attorney General is in the wrong branch of government to write the law, and now amending the law.

III.

BINGO "HALLS FOR HIRE" ARE EXPRESSLY AUTHORIZED UNDER THE BINGO STATUTE

The Attorney General in its brief uses the words "worthy organizations." As stated above, this is not a term used in either §849.0931 or §849.09. The use of this term however appears to raise an issue of whether bingo halls for hire are even permitted under Florida law and subject to regulation under Section 849.0931, Fla.Stat. They are. Florida courts and municipalities have long been dealing with these entities. See e.g. Jordan Chappel Freewill Baptist Church v. Dade County, 334 So.2d 661 (Fla. 3d DCA 1976); F.Y.I. v. City of Ocala 698 So.2d 583 (Fla. 5th DCA 1997).

The reason for this argument is by the Attorney General is that it wants this Court to hold that what it terms "commercial bingo halls" are "unauthorized" and unworthy, and therefore, can be the subject of a lottery/RICO prosecution. There is a real problem with this.

Commercial halls for hire in Florida are not actually under any legal attack. There are approximately 180-200 of them in the State of Florida. In some counties, there are five or six of them.

As known to the Court below, almost all the 15 or so halls shut down by this injunction are presently running multi-charity bingo games, though now all the operators are American, not Canadian. AG App. 11, pp. 22-25.

Commercial bingo halls, that is multi-charity halls for hire, have been in existence in this State for almost 30 years. Their games are advertised in newspapers and operate in most counties of

Florida. There are probably five operating right now is Lee County alone. Also the are in existence in 47 other states and are common in Canada.

The opinion of the District Court on this is unclear. It held that the conduct of bingo could be "prosecuted" as a lottery violation (which in turn could form a predicate for RICO) by showing that the entity conducting the bingo games was not authorized to do so.[2]

> We hold that violation of the various regulations contained in the bingo statute by an **entity authorized** to conduct bingo is not a violation of the lottery law. (emphasis added)

(R126-147, p. 11)

> In short, under our statutory scheme, they who are authorized to conduct bingo violate the bingo statute; they who are not authorized to conduct bingo do not violate the provisions of the bingo statute.

This splits statutory hairs.

The District Court's ruling can be interpreted to mean that commercial bingo is unauthorized under the bingo statute (§849.0931) and hence these halls (including Bradenton Group, etc.) can be prosecuted under the lottery statute. A charity, providing it meets all the terms of the bingo statute, it must be charged under §849.0931 with violation of its provisions. However, an individual who works under the charity, who owns the property, or

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[2]The District Court eviscerated much of the government's theory of prosecution by holding that independent violations of the bingo statute, Section 849.0931 (other than the issue of authorization), could not be prosecuted under the lottery statute. This is in direct contrast to the attorney general's opinions on the issue.

provides services to the charity at the hall, commits a felony lottery violation and, therefore, racketeering, for violating the exact same provision. This conclusion does not follow.

If someone rents a hall, along with equipment, at whatever rate, for five or six charities to run bingo, does that constitute "conducting" bingo? This can't be and was never intended to be. The Florida Legislature when it drafted §849.0931 in 1991, was fully aware of all the problems with both charity hall and commercial hall bingo. See "Final Bill Analysis and Economic Impact Statement", Florida House of Representatives. [App. J, p. 14]. Section 849.0931, Fla.Stat. was drafted specifically to address problems with both the charity halls and with these commercial halls.

When the law was drafted, its intent was to create a statewide regulatory system along with comprehensive rules and regulations governing bingo, where it was held, how it was held, etc. Id. According to the Florida Legislature, the Division of Pari-Mutual Wagering of the Department of Business Regulation was to be in charge of regulating bingo in Florida. Id. p.3. There was no apparent intent by the Florida Legislature that the Attorney General was to play this part.

If these halls are now violating the law, by charging too much for rent or food, agents of the Florida Department of Business Regulation can go to their respective premises and pull all the charity licenses. Local authorities can enact ordinances further

prohibiting these activities. Bingo will stop if that is the problem.

For whatever reason, no charity licenses were or have ever been pulled; the result being that the same charities at Pondella Hall in Ft. Myers are still renting space and equipment to conduct bingo. The only difference now is the landlord.

The statutory provisions of §849.0931, Fla.Stat. undermine this position and show that charities and other groups may **contract** with corporations or individuals to conduct bingo. Otherwise, why would the legislature have created and amended the bingo statute to allow for these types of "commercial" arrangements?

The provisions of §849.0931, Fla.Stat. allow what the Attorney General refers to as "commercial operators" to provide halls to charities to conduct bingo. The Legislature clearly and equivocally intended that halls could operate seven days a week, two sessions a day, as long each charity limited its sessions to two a week. [App. J, p. 6, para.(7)(a), p. 7, para. (d)1]

These, are not after all Moose or Elks halls. In these cases, a typical situation is an individual or corporation purchases (or leases) a large free-standing property, between 15,000 and 20,000 square feet. It is equipped for bingo with--"[a]rticles designed for and essential to the operation, conduct, and playing of bingo,..." Section 849.0931(2)(a). These articles consist of furniture, tables, chairs, bingo machines and other business items/expenses such as bingo balls, doppers, advertising, bingo cards, electricity, janitorial services, etc.

These "commercial" entities are needed since many charities do not have the financial wherewithal to **purchase and outfit** a hall. There are a few charitable organizations that have their own facilities. Non-fraternal charities do not have such halls. As stated by Jeanne Smith, the director of the American Red Cross in Highlands county, without these bingo halls the Red Cross could not operate. The Legislature has sanctioned this arrangement.

Subsection 11 of the bingo statute reinforces the point that this type of commercial arrangement is permissible contingent upon "[t]he lease or rental agreement" not being subject to a percentage of the proceeds. The other caveat is that the owner/entity of the premises can only charge a rental rate (per session, per charity) which does not exceed rates for "[s]imilar premises in the same locale."

Nonetheless, the Attorney General's argument appears to be that this business structure constitutes a lottery. However, the statute does not address or forbid the owner of the premises from making money from other ancillary ventures associated with bingo. For instance, some of these bingo halls seat hundreds of people. They buy snacks, drink coffee, smoke cigarettes. How can selling these items to bingo players constitute an illegal lottery?

Although the bingo statute provides that a charity may not conduct bingo more than two times per week, if multiple charities are involved then obviously these halls can conduct many games.[3]

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[3]Local legislation (county to county) has been adopted addressing this point.

As such, the owner of the bingo hall installs (owns or leases) a snack bar catering to the bingo players. The owner also installs numerous vending machines for candy, cigarettes and other arcade-type games. Although the commercial owner may make money from these side ventures, it is not prohibited under the statute--and why should it be? This is aside from the rents charged under §849.0931(11)(c).

The District Court's opinion is flawed or, at a minimum, is unclear since "commercial" bingo, under the circumstances set forth here, is permissible. Bingo is "authorized" in halls for hire, where charities can conduct bingo under §849.0931. Renting a hall, furnished or not, is not conducting bingo.

IV.
RICO INJUNCTION WAS IN VIOLATION OF STANDARDS OF LAW AND EQUITY

A. INJUNCTION STANDARDS

This does not appear as a garden variety injunction to preserve the status quo until a hearing on the merits. It was a request for injunctive relief pursuant to §§895.05(3),(5), Fla. Stat. The relief sought and right to such relief is somewhat unclear given the relationship of the RICO statute, the forfeiture statutes and Rule 1.610, Fla.R.Civ.P..

It was the Corporate Defendants' position that the injunction issued by the trial court had to satisfy the requirements of Rule 1.610, Fla.R.Civ.P. This was set out in the Motion to Dissolve the Injunction. It also has to satisfy the requirements of §895.05, Fla.Stat, Florida's RICO law.

The lower court, however, took the position that the injunction was governed by the provisions of §895.05, Fla.Stat., and these common law provisions, in part, were waived. However viewed, the injunction violates the laws governing injunctions. This is too extraordinary a judicial order to have been done without notice, without a bond, and without regard to the rights of individuals, both named and unnamed. More importantly, the express purpose of the injunction is to have the court enjoin the use by the defendants of all the personal property, bank accounts, etc. of defendants.

This is clearly overboard. In the context of litigation, this is also an unbelievable request. This is so for a number of reasons. First, the effect of the injunction was to render the accused, but still innocent defendant, destitute as the first step in the legal process.

Second, the Attorney General requested and received an injunction that denied the defendants use and access to their bank accounts and use or transfer of any of their personal property. The justification was that "the Defendants should ... in all likelihood render these assets unavailable for forfeiture if notified of this proceeding." (AG App. 2, p.3, para 6).

At appears as though neither this Court nor any other Court of Appeal in the State of Florida has ever approved an injunction freezing property of defendants in order for the plaintiff to have something to execute upon following judgment. As the Fifth

District Court of Appeal stated in the Acquafredda v. Messina, 408 So.2d 828 (Fla 5th DCA 1982):

> No action for equitable relief can be maintained unless it falls within some acknowledged head of equity jurisprudence. Thus, where a complaint seeks an injunction to prevent a defendant from disposing of assets until an action at law on a debt can be concluded, no equitable cause of action is stated and no injunction should issue.

408 So.2d at 829, citing B.L.E. Realty Corporation v. Mary Williams Co., 101 Fla. 254, 134 So.47 (1931); Lopez-Ortiz v. Centrust Savings Bank, 546 So.2d 1126 (Fla. 3d DCA 1989); Mary Dee's Inc. v. Tartamella, 492 So.2d 815 (Fla. 4th DCA 1986).

Finally, the State of Florida requested and received a injunction preventing defendants from conducting bingo games, whether legal or not. Florida's RICO law, §895.05(1), Fla.Stat., sets out a number of purposes for which injunctions can be issued following judgment. However, there is nothing there that freezes assets and denies a person a right to conduct his business legally.

B. EQUITABLE STANDARDS

Under the common law standards for an injunction, an injunction is not available to act in place of the police. There is nothing that an injunction can do that criminal statutes do not already do. For that reason, Florida courts have recognized the general rule of law that a court lacks jurisdiction to enjoin the commission of a crime. Travelers Insurance Company v. Conley, 637 So.2d 373 (Fla. 5th DCA 1994).

Another common law standard for the issuance of an temporary injunction is that it should be granted sparingly and only after

the moving party has alleged and proven facts which entitle him/her to relief. Liberty Financial Mortgage Corporation v Clampitt, 667 So.2d 880 (Fla. 2d DCA 1966). Where it is done without notice as here, this court has stated:

> The allegation verified by the presenter must be strong and clear, and the trial judge should raise in his or her own mind all possible responses a defendant could raise if present. Because the incursion upon precious due process rights is facilitated by issuance of ex parte orders, trial courts should issue them only where an immediate threat of irreparable injury "which forecloses the opportunity to give reasonable notice" exists.

Lieberman v. Marshall, 236 So.2d 120, 125 (Fla. 1970), State v Beeler, 530 So.2d 932 (Fla. 1988).

To protect innocent parties from abuse, after reviewing the motion and affidavits and before issuing an injunction, the court must examine the allegations and make specific findings. The court must require the moving parties to prove the following items in order to obtain a temporary injunction: (1) that the moving party will suffer irreparable harm unless the status quo is maintained; (2) that the moving party has no adequate remedy at law; (3) that the moving party has a clear legal right to relief granted; (4) and that the temporary injunction will serve the public interest. Liberty Financial Mortgage Corporation v Clampitt, supra. See also, Richard v. Behavioral Healthcare Options, Inc., 647 So.2d 976, 978 (Fla. 2d DCA 1994).

In addition to the above factors, the injunction itself must contain "clear, definite, unequivocally sufficient factual findings ... to support each of the four conclusions necessary to justify

its entry ..." City of Jacksonville v Naegle Outdoor Advertising Company, 634 So.2d 750 (Fla. 1st DCA 1994), affirmed 659 So.2d 1046 (Fla. 1995). In effect, the allegations must lead the court to clear, unequivocal factual findings. The allegations and sworn statement cannot be conclusive.

As to all issues, the party moving for the injunction has the burden of proof. A temporary injunction is an extraordinary remedy which a court should grant only after movant has proven sufficient facts entitling it to relief. Dania Jai Alai Intern., Inc. v Murua, 375 So.2d 57 (Fla. 4th DCA 1979), Jennings v Perrine Fish Market, Inc., 360 So.2d 434 (Fla. 3d DCA 1978), Bemis Corporation v City of Jacksonville, 298 So.2d 467 (Fla. 1st DCA 1974), cert. denied 310 So.2d 743 (Fla. 1974). At a subsequent hearing, the burden directed at the ex parte order and the burden of proving all these requirements again falls on the party seeking to support the order. See DeLisi v Smith, 401 So.2d 925 (Fla. 2d DCA 1981).

The above criteria are substantive. They are also procedural requirements set out in Rule 1.610, Fla.R.Civ.P. Those specific procedural requirements are that the movant must file and present an affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition. Rule 1.610(a)(1)(A) Fla.R.Civ.P..

The moving party must also certify in writing any efforts that have been made to give notice, Rule 1.610(a)(1)(B), Fla.R.Civ.P., and the reasons why notice should not be required. Rule

1.610(a)(1)(C), Fla.R.Civ.P. In addition, the injunction entered shall define the injury, state the findings by the court why the injury may be irreparable, and give the reasons why the order was granted without notice if notice was not given. Rule 1.610(a)(2), Fla.R.Civ.P.

In this case, notice was not given to any of the parties. In fact, in the State's motion it specifically states, "defendants should not be given prior notice of this proceeding because they would in all likelihood render their assets unavailable for forfeiture if notified of this proceeding." Motion for Temporary Injunction (App. 2/3, para. 6). This is not a sufficient excuse. The law and due process should not tolerate this procedure. As stated by the Fifth District Court of Appeal ...

> The [Defendant] was not afforded meaningful notice as required before injunctive remedy may be imposed, nor were the terms of the Florida Rule of Civil Procedure 1.610(a)(1) relating to dispensing with notice met. Neither public policy, the interest of justice, nor due process can tolerate the procedure or result below.

Simpson v. Simpson, 524 So.2d 1124 (Fla. 5th DCA 1988). See also Conway Meats, Inc. v. Orange Avenue Partnership, 440 So.2d 674 (Fla. 1st DCA 1983).

Florida's RICO law does not alter this. Nor does the fact that the State Attorney General is a party. There is no attorney certification in the motion of any efforts that had been made to give notice. This is inexplicable, in part, because the largest portion of the property here at issue, the real property, could not have been removed prior to hearing.

The temporary injunction itself does not "define the injury" nor does it "state findings by the court why the injury may be irreparable." As to the reasons it was given without notice, the order simply repeats the statement in the motion. "This relief is granted without notice to Defendants because Defendants would in all likelihood render these assets unavailable for forfeiture if notified of this proceeding." (AG App. 3, p. 4, para 6).

If the method was wrong, so was the purpose. The law is also well settled that an injunction cannot be issued merely to preserve property for subsequent seizure or judgment. For example, where a movant sues and tries to prevent dissipation of funds taken by conversion or the like, an injunction is not a proper remedy. See Digaeteno v. Perotti, 374 So.2d 1015 (Fla. 3d DCA 1979). See Also Lopez-Ortiz v. Centrust Savings Bank, 546 So.2d 1126 (Fla. 3d DCA 1989)("[t]he test for unavailability of an adequate remedy at law, under these requirements, is 'whether a judgment can be obtained, not whether, once obtained, it will be collectible.'" Id. at 1127. citing Mary Dee's Inc. v. Tartamella 492 So.2d 815 (Fla. 4th DCA 1986)) Simpson v. Simpson, 524 So.2d 1124 (Fla 5th DCA 1988)

The Attorney General had a legal remedy. Under Chapter 895 there are legal remedies. Under §895.07, the State of Florida could have filed with the local authorities a RICO lien notice. Section 895.07, Fla.Stat. This would have the effect of preventing the sale or transfer of the real property.

Alternatively, the State could have filed an action pursuant to §932.701, Fla.Stat. This is a civil action for forfeiture and

permits seizure of property, both real and personal, prior to judgment. They did not do so. There appears a number of reasons for this.

A forfeiture action would only apply to forfeiture of contraband materials as that term is used in §932.701(2)(a), Fla.Stat. Seizure would have to occur and a prompt hearing would have to held. Most importantly, if the State failed in its case, the rights of the injured party would have to be repaired.

Under §932.704(9), Fla.Stat. the seizing agency would have to pay the loss of income, value; in short, damages. Defendants would prefer such an action because it would give them a remedy for the State's wrong. In any case, this is another remedy at law available to the State of Florida.

C. RICO INJUNCTION STANDARDS

In their Motion to Dissolve the Injunction, these Corporate Defendants argued as one ground, among others, that the State of Florida failed to show irreparable harm, lack of an adequate remedy at law, a clear legal right or a substantial likelihood (App. B, p. 1-2, para. 2). The State of Florida, however, simply alleged these elements in its Motion for a Temporary Injunction. The trial court did not require these criteria to be met.

The trial court held that irreparable harm was not necessary. For that matter, the trial court disregarded all the common law elements. The reason for this lies in the RICO statute. Florida's RICO law provides a court with legal authority to enjoin alleged violations of Florida's RICO provisions. The State of Florida

sought the injunction pursuant to §895.05(5), Fla.Stat. The trial court expressly entered the injunction pursuant to §895.05, Fla.Stat.

There is a split in authority for the proposition, which authority is discussed below, that an injunction entered pursuant to §895.05 need not meet the requirements of equity and common law. As shown above, this injunction does not. There is no authority however for the proposition that a RICO injunction can be entered in violation of Florida's RICO law. That is what happened here.

Under §895.05, there is not a single provision that allows for or permits an injunction allowing all personal and real property of individuals or corporations frozen and seized by injunction. Rather, if the agency wishes to seize property it can do so pursuant to §895.05(3). The State wanted the real and personal property seized, wanted the businesses closed, but wanted the seizure done by an injunction not by the law governing forfeiture and seizure in §932.701 and not by police action.

If they wanted a preliminary injunction under §895.05, the State of Florida and the lower court is required to follow the law. That law is as follows:

> (6) Any aggrieved person may institute a proceeding under subsection(1). In such proceeding, relief shall be granted in conformity with the principles that govern the granting of injunctive relief from threatened loss or damage in other civil cases, except that no showing of special or irreparable damage to the person shall have to be made. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of significant loss or damage, a temporary restraining order and a preliminary injunction may be issued in any such action before a final determination on the merits. (Emphasis added).

It is the position of these Corporate Defendants that the trial court should have required an injunction bond prior to issuing the injunction in November 1995. The fact it did so in October 1996 is 11 months too late.

Under this statement of the legal requirements of a temporary injunction, the State of Florida was required to post an injunction bond. The arguments by the Attorney General that Federal law should guide this Court as to the requirements of an injunction bond is nothing more than smoke and mirrors.

No matter what Federal law states as to injunctions for the Federal government, Florida law is and was crystal clear. An injunction bond is required, as well as a showing that there was any immediate danger of significant loss or damage.

It was not even alleged. Likewise, the State of Florida asked for and the court entered an injunction that ordered that accounts be frozen, buildings and property seized by an injunction, all without the posting of a bond. If they want to use RICO, the State of Florida must comply by its provisions, including these.

The Florida Legislature never contemplated this kind of creative litigation under RICO by a state agency. Under §895.05, the Florida Legislature was clear that unless provisions for a bond are made, an injunction should not be issued. Under §895.05(5), it provides that a state agency may institute proceedings and:

> Pending final determination, the circuit court may at any time enter such injunctions, prohibitions, or restraining orders, or take such actions, including the acceptance of satisfactory performance bonds, as the court may deem proper.

Nothing here excuses a state agency from a bond.

More importantly, the Florida Legislature in setting out the right to injunctive relief under RICO, required that before a court proceed to enjoin defendants, the court was required to take action to protect the rights of individuals who are subsequently found to be innocent. They were concerned about abuses of the draconian law.

> 895.05 Civil remedies.-(1)Any circuit court may, after making due provision for the rights of innocent persons, enjoin violations of the provisions of s. 895.03 by issuing appropriate orders and judgments ... . (Emphasis added).

Nothing was done here to protect the rights of innocent persons. The State's Brief and motion in the trial court makes no showing of any provision for the "rights of innocent persons."

On the other hand, under Rule 1.610(b), Fla.R.Civ.P., a court may, in its discretion, enter a temporary injunction without the posting of a bond or with a small bond if the harm is not great. A court may also waive the requirements of a bond if the State of Florida, or one of its agencies, is the movant. However, Rule 1.610(b), Fla.R.Civ.P., does not apply here.

The injunction sought here is an injunction pending RICO forfeiture. It froze assets; it shut down businesses; it laid people off; stopped rents being collected, etc. It was a drastic and draconian remedy, done without notice and without apparent recourse. For without a bond, a citizen whose life and business is destroyed by a improvident injunction would be without remedy.

Without a bond, if the Corporate Defendants prevail, they will be without remedy. Under §60.07, Fla.Stat., where an injunction is dissolved, a defendant may move for the court to hear evidence and assess damages under any injunction bond in place. But under Rule 1.610(b), Fla.R.Civ.P., the court may waive the requirement of a bond for the State of Florida. Under the ruling of the Florida Supreme Court in the case, Parker Tampa Two, Inc. v Somerset Development Corp., 544 So.2d 1018 (Fla. 1989), the role of a bond in an injunction action was settled.

Under Parker Two, the Florida Supreme Court held that damages for a wrongful injunction under §60.07, Fla.Stat., were limited to the amount of the bond unless the injunction was obtained maliciously or in bad faith. Parker Two, 544 So.2d at 1021. Because of that, an injunction bond is a requirement for entry of a temporary injunction without notice except where the State of Florida or an agency is involved.

In Parker Two, in §60.07 and in Rule 1.610, there is nothing that suggests that a governmental agency should be treated less or more favorably than a private citizen. See e.g. Davie v. Sloan, 566 So.2d 938 (Fla. 4th DCA 1990)(damages to a municipality are limited to the bond amount). On the other hand, a state agency that obtains a injunction does not act as its own surety. See Treasure Island v. Provident Management Corporation, 21 Fla.L.Weekly D1521 (Fla. 2d DCA, June 28, 1996)(held that a municipality was not acting as its own surety in an action for an injunction where no bond was required).

No cases in Florida have addressed this issue of the waiver of a bond in a RICO forfeiture proceeding. No court should. The language of the statute is clear and the intent of the Legislature is clear. A court cannot waive a bond for a preliminary injunction under RICO. It also cannot waive the requirement that the moving party show that unless the injunction is issued there is a showing of immediate danger of significant loss or damage. That is the language of the statute.

If the Attorney General followed the provisions of §932.701, the Florida forfeiture statute, no bond is required. The reason for this has nothing to do with the fact that an injunction is not involved and the State is a movant. Rather, under the provisions of that statute, the State of Florida and the agency that engages in the seizure must act as a surety for its actions. See §932.704(9)(b), Fla.Stat.(1995):

> ... The trial court shall require the seizing agency to pay to the claimant the reasonable loss of value of the seized property when the claimant prevails at trial or on appeal and the seizing agency retained the seized property during the trial or appellate process. The trial court shall also require the seizing agency to pay to the claimant any loss of income directly attributed to the continued seizure of income-producing property during the trial or appellate process.

Under RICO, the seizing agency does not appear liable for any damage it has done. Two parts of the injunction here at issue deal directly with freezing and holding the real and personal property of the Corporate Defendants.

The first case which construed the injunction provisions of §895.05 is the case of Finklestein v. Southeast Bank, 490 So.2d 976

(Fla. 4th DCA 1986). The court held that a party seeking an injunction under Florida's RICO must satisfy all the common law elements. Id. at 981. The party must show (1) irreparable harm; (2) a clear legal right; (3) an inadequate remedy at law; (4) consideration of the public interest. The only difference RICO has made, according to the Finklestein court, is as follows:

> The Florida RICO Act has eliminated the necessity of showing special or irreparable damages as a prerequisite to recovery, substituting it with the requirement of showing immediate danger of significant loss or damage.

Id. As to immediate danger or loss, the court found that the mere showing that funds will be transferred pending final judgment is not enough. Id. at 983, citing St. Lawrence Company, N.V. v. Alkow Realty, Inc., 453 So.2d 514 (Fla. 4th DCA 1984).

The Third District Court of Appeal came to a somewhat different result. The court in the case, Banco Industrial de Venezuela, C.A. v. Jose Suarez, 541 So.2d 1324 (Fla. 3d DCA 1989), found that:

> In determining whether to grant permanent injunctive relief, therefore, we agree with the Finklestein court that common law principles remain applicable, except for a showing of "irreparable damage" which the statute obviates. As we read the plain language of the balance of section 895.05(6), the only requirements for a preliminary injunction under the Florida RICO Act, upon the filing of a verified complaint, are (1) posting a sufficient bond against damages, and (2) showing an "immediate danger of significant loss or damage."

In this case, the Attorney General has done neither of these. The trial court could not waive the statute but must follow the law if it chooses to enter an injunction pursuant to §895.05.

V.

THE CIRCUIT COURT ORDER REQUIRING THAT THE STATE POST A BOND DID NOT CONSTITUTE AN IMPERMISSIBLE MODIFICATION OF THE BOND.

The Attorney General had argued in the Fifth District Court of Appeal that the trial court, once it entered its order denying the Corporate Defendants' Motion of Dissolve the Injunction and once the Notice of Appeal was filed, lacked jurisdiction to enter an order requiring the posting of an injunction bond. In the five pages in which it makes its argument, it does not cite a single case that states this proposition of law.

The Attorney General also argues that a trial court is prohibited from taking any action that effects the status of the appeal and the entry of an order requiring a bond effected the status of the appeal. Actually, the entry of the order requiring the posting of a bond had no effect on proceedings in the appellate court or in the trial court.

Once the order was entered requiring the posting of a bond, all proceedings were stayed by the Fifth District Court of Appeal. The status of the case remained the same. The State retained the benefit of an injunction, seizure of Corporate Defendants' property, and really did not have to post a bond until December 15, 1997.

The problem with this argument by the Attorney General is that there is a Rule of Procedure directly on point. There is also abundant case law which supports the trial court's action. The

Rule of Procedure is set out in Rule 9.130(f), Fla.R.Civ.P. It states as follows:

> **Stay of Proceedings:** In the absence of a stay, during the pendency of a review of a non-final order, the lower tribunal may proceed with all matters, including trial or final hearing; provided that the lower tribunal may not render a final order disposing of the cause pending such review.

The order entered by the trial court setting an injunction bond was not a final order in any sense. Further, it did not dispose of the cause pending such review. For whatever reason, there is no discussion whatsoever of this well-established rule.

Contrary to the Appellant's assertion, this factual scenario is not contrary to any Rule of Procedure. Once an interlocutory appeal is filed, the trial court may proceed with the cause only so long as it does not destroy the subject matter of the appeal, See e.g., Ward v. Gibson, 340 So.2d 481, 482 (Fla. 3rd DCA 1976). That rule has been specifically applied to injunctive matters. Sharp v. Bussey, 176 So.2d 763, (Fla. 1937).

As stated in Sharp, if modifications are necessary to the equitable operation of orders granting temporary injunctions, the circuit court may apply the remedy. This is so when such orders are pending on appeal; and in such cases, the appellate court may grant leave to apply to the circuit court for appropriate modifications of temporary injunctions to conserve the equitable rights of the parties. All circuit court orders are subject to appellate review.

This Court has addressed this matter directly. This Court has repeatedly emphasized that a preliminary injunction is an

inherently dynamic process. The bond amount is "an orderly step-by-step-procedure", whereby "...[t]he affected party is free to move for [a] modification," and to directly appeal any order denying the request. Parker Tampa Two v. Somerset Development, 544 So. 2d 1018, 1021 (Fla. 1989). Any language drawn from the law as to permanent injunction appeals would seem distinctly inapposite, See Jones v. Sterile Products Co., 658 So.2d 1099, 1101 (Fla 5th DCA 1995). A bond is normally not required once the permanent injunction has been entered. Medical Facilities Dev., Inc. v. Little Arch Creek Properties, Inc., 656 So.2d 1300, 1304, n. 7 (Fla. 3rd DCA 1995).

The injunction bond is a distinct and severable concern functioning to compensate a defendant for a wrongfully-obtained injunction. Federal Rule of Civil Procedure Rule 62(c), for example, provides that when an appeal is taken from a judgment granting, dissolving, or denying an injunction, the district court may modify the terms of the injunction "as to bond or otherwise as it considers proper for the security of the adverse party".

Under Florida Rules, as to injunctions there are various stages of an injunction. For example, the appellate court may review and rule upon the sufficiency of the pleadings as to an ex parte injunction. It can do so without awaiting the trial court's ruling and determination as to a defendant's motion to dissolve. United Steel Workers v. Seminole Asphalt Refin., Inc., 262 So.2d 215, 216 (Fla 1st DCA 1972). Legal sufficiency issues can be

distinguished from factual matters and can be separately resolved and developed.

The instant factual scenario demonstrates the inherently oppressive quality of this rule of status with which the Appellant seeks to redefine the preliminary injunction proceedings. It is their theory that once the appeal was taken on the injunction order, the enjoined, here the Corporate Defendants, had to abandon their separately filed request for an injunction bond, which although filed on January 11, 1996, the circuit court did not grant until October 14, 1996. Had the Appellee waited for a ruling as to the injunction bond, the Appellee would have risked the argument that any interlocutory appeal of the underlying injunction order was untimely. Cf. McGurn v. Scott, 596 So.2d 1042, 1044-45 (Fla. 1992) (recognizing "procedural quandary" in partial summary judgement context).

A. THE EVIDENCE WARRANTED MODIFICATION OF THE BOND TERMS OF THE INJUNCTION

In its brief, the Attorney General argues that the trial court erred in entering an order requiring a bond because "[t]his order was based upon the unsworn telephonic statement of an officer of the Respondent corporations." AG Brief, p. xviii. It is added that these statements were also "unsworn, conclusory, self-serving and uncorroborated statements...". AG Brief, p. 14. The Attorney General, therefore, concludes that the trial court abused its discretion. Id. As stated above, the Attorney General doesn't deserve this type of argument.

In their appendix, the Attorney General has attached as an Exhibit, the purported record of the proceedings of that hearing. Thoughtfully omitted however is the first two pages of Mr. Henning's testimony, pages 23 and 24 of the transcript. At the top of page 23, an omitted page, the record states that Mr. Henning was duly sworn.

Anyhow, the evidence before the court, both testimonial, and provided by affidavit, was more than sufficient. The hearing on the bond was entered the order on October 14, 1996, one year after the initial ex parte order granting the temporary injunction. At the October 10, 1996, modification hearing, the Corporate Defendants introduced evidence that the losses at one hall alone approximated $600,000 "for the year ending to date." (AG App. 11, p. 27, Transcript of October 10, 1996, hearing). All the assets of one business, Bradenton Group, Inc., had been the subject of foreclosure. Rents, lease income, payments on sale contracts, etc. have all been lost and were being lost. There was simply no issue as to these losses.

This complaint though is misplaced. It was the Attorney General that in the first instance elected to pursue the most drastic and draconian methods and initiate forfeiture in the instant case: an ex parte request for an injunction and restraining order as to all the assets of ongoing businesses. The instant facts are the archetypal model for the modification of bond.

As the Florida Supreme Court has noted, the defendant in an injunctive matter is free to move for modification of an injunction

at any time. See Parker Tampa Two v. Somerset Development, 544 So.2d at 1021. That decision necessitates that the trial court carefully review and weigh changed circumstances to assess the continuing validity of the initial bond determination. Cushman & Wakefield, Inc. v. Cozart, 561 So.2d 368, 371 (Fla. 2d DCA 1990).

Rather than challenge the singularly appropriate exercise of discretion to impose a bond in the instant case, the Attorney General substitutes a new standard of review. That standard is that the evidence presented to the trial court for the bond must conclusively refute all prior evidence. The Attorney General states this standard as follows:

> By basing its decision to require an injunction bond on the unsworn, conclusory, self-serving and uncorroborated testimony which did not conclusively refute the detailed evidence previously presented by the State, the trial court abused its discretion.

AG Brief, p. xx.

What evidence did they present as to a bond amount?

Anyhow, if this is a legal standard for a trial court to use to set an amount for a temporary injunction bond, the Attorney General has made this standard up. There is no legal authority for it. None was cited. Worse still, in the body of brief, the Attorney General recognized the holding in this Court under the Parker Two case. This Court has set a standard. It is not great.

In that case, this Court stated one standard for imposition of an injunction bond is the "good faith representations of the parties". Parker, 544 So.2d 1018 (Fla. 1989). The amount of the bond can reflect prospective damages and can include prospective

attorney fees. See Medical Facilities Dev., Inc. v. Little Arch Creek Properties, 656 So.2d 1300, 1306 (concurring opinion) citing Neal v. Neal, 636 So.2d 810 (Fla. 1st DCA 1984). It can include other factors. See e.g. Cushman & Wakefield, Inc. v. Cozart, 561 So.2d at 371(the adverse party's chances of subsequently overturning the injunction).

VI.

NO POLICY SUPPORTS LEGAL SUBTERFUGES

As stated above, the law does not support the position of the Attorney General. The express language of Florida's RICO act allows a court to require an injunction bond from the State. Likewise, the express language of §849.09, §849.0931, and §895.02, Fla.Stat. prohibit statutory metamorphous. Violations of the bingo statute do not equal lottery violations and, therefore, racketeering. At the end, the Attorney General pounded the table.

First the Attorney General argues that the Corporate Defendants brought own their own financial ruin, and therefore the need for a bond. AG Brief, p. xxii, pp. 20-21. In this final argument, the Appellant asserts unfounded allegations of the Appellee's inequitable conduct to rationalize liability for the damages attending the instant injunction. Worse still, the Attorney General states that...

> In the case at bar, Defendants have repeatedly misstated the facts, mischaracterized the law, and engaged in delaying tactics. The State respectively submits that Defendants' misconduct provides no basis for requiring the State to post an injunction bond.

(AG Brief, pp. 20-21).

The Attorney General seems to argue that these perceptions of misconduct retrospectively constitute a justification or excuse for the Attorney General's determination to seek an ex parte injunction in the first instance, thereby functionally shutting down the business and eroding the value of its remaining assets.

The Attorney General does not deserve an argument such as this. All their assets were seized and all accounts were frozen. The court had even ordered that the corporations could not even use their assets to pay their own attorneys. [App. S]. Even Manuel Noreiga could pay his attorneys. Nonetheless, there is real irony in the Attorney General's position. See e.g. United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d at 905(government rationalized an ex parte shut down of a going business done to prevent "waste", held to be ironic).

Its efforts to protect the Defendants assets were really empty. At the hearing pertaining to the injunction bond on October 10, 1996, the Attorney General presented a motion to the court, without notice, without giving counsel a chance to review it, and without notice, asking the court to grant it. The court in fact refused to hear it, and rightly so. See AG pp.3-4.

Prior to this bond being ordered, the Attorney General thought so little of having a receiver again appointed that they failed to notice it for hearing and failed to file a motion. In any case, this does not constitute "misconduct" by Defendants.

Chill: The Attorney General has appealed to this court on another ground. The Attorney General now argues that requiring a

bond would "chill" the Attorney General and law enforcement (AG Brief, p. 18) in their efforts to protect the public. Some chilling is probably appropriate here.

The Appellant is simply disregarding and dismissing the express language of Florida RICO law. When the Florida Legislature enacted Florida RICO law, it allowed for temporary injunctions. A precondition of a temporary injunction under RICO is that a bond shall be posted. See §895.05(6), Fla.Stat. (1995). That is what the Legislature said.

Anyhow, the rule has always been that criminal activity alone is insufficient to justify the shutdown of a business where there is some evidence of legitimate business activities conducted at the defendant's properties. See United States v. Puello, 814 F.Supp. 1155, 1164(E.D. N.Y. 1993); United States v. All Assets of Statewide Auto Parts, 971 F. 2d at 901. Police do not enjoin to enforce the law, they arrest. They have guns.

The facts of the instant case unequivocally demonstrate the impermissible use of the injunctive procedure as a crippling substitute for the markedly less intrusive procedure such as a lis pendens, RICO notice, the Florida Forfeiture Act, §932.06, Fla.Stat. The attorney general misunderstands the legal and the police functions of government.

CONCLUSION

Courts and laws do not exist to assist governmental agencies in seizing people's property, shutting down businesses, etc. That is, not prior to final judgment or conviction. The kind of

injunction the Attorney General obtained is extraordinary, draconian and has done probably irreparable damage. If a business is operating in violation of the law, police have guns, agencies can revoke licenses, etc. In short, the police authorities can always stop crime from being committed.

The Attorney General wants this Court to completely ignore the intent of the Legislature in enacting Florida's Bingo law, RICO law and Florida Forfeiture law, and go on a crusade against "commercial bingo halls." The Legislature had the intent in these laws to protect innocent people, guard against overreaching. It was not to assist in seizing property and businesses.

The prevailing claimant in a forfeiture case can and must be awarded loss of value of, or income attributable to, the seized property. Section 932.704(9)(a), (b), Fla.Stat.. Because the Attorney General chose to avoid those safeguards for the public and use a RICO injunction to seize property, as the court below said, if they want the power, they must suffer under it. (R127-146, p. 22).

Worse, they have done all this on a theory about the reach and meaning of criminal statutes. Those statutes should be construed in favor of defendants, not in favor of the government, and increased police power and range. Here, Florida's lottery statute states that it cannot be applied to bingo. Only by adding words and meanings to this language can the decision of the trial court be upheld and that of the Fifth District Court of Appeal. This Court should uphold the requirement of a bond and hold that RICO

charges and lottery charges cannot be charged for any violations of Section 849.0931, as was done here.

Respectfully submitted this 7th day of February, 1998, at Orlando, Orange County, Florida.

STEVEN G. MASON, ESQUIRE
FLORIDA BAR NO. 842508
LAW OFFICES OF STEVEN G. MASON
1643 HILLCREST STREET
ORLANDO, FL 32803
407/895-6767

LAW OFFICES OF THOMAS F. EGAN
204 PARK LAKE STREET
ORLANDO, FL 32803
407/849-1055

CERTIFICATE OF SERVICE

It HEREBY CERTIFY that a true copy of the foregoing has been furnished via U.S. mail, this 9th of February, 1998, to JACQUELINE DOWD, ESQUIRE, Office of the Attorney General, 28 W. Central Blvd., Suite 310, Orlando, FL 32801; to OFFICE OF THE STATEWIDE PROSECUTOR, 28 West Central Boulevard, Suite 300, Orlando, FL 32801; to ANDREW L. SIEGEL, ESQUIRE, Executive Pavilion, Suite 412, 300 N.W. 82nd Avenue, Plantation, FL 33324; to PAUL OLSON, ESQUIRE, 1776 Ringling Blvd., Sarasota, FL 34236-6836; to STEVEN G. MASON, ESQUIRE, 1643 Hillcrest St., Orlando, FL 32803; with the original and seven copies being filed via Federal Express this 7th day of February, 1998, with the CLERK OF THE SUPREME COURT, Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927.

LAW OFFICE OF THOMAS F. EGAN
204 PARK LAKE STREET
Orlando, FL 32803
407/849-1055

BY: Thomas Egan
THOMAS F. EGAN
Florida Bar #569895