INTRODUCTION

This is an appeal from the dismissal of five (5) of seven (7) Defendants in a civil matter resulting from the theft of two (2) horses ultimately sold for slaughter for human consumption. A five (5) day jury trial was held in Jefferson Circuit Court beginning April 13, 1999 and a verdict was rendered which awarded Appellant $126,000 from the two Defendants to the action, who are not parties to this appeal, namely, Lisa and Jeff Burgess (see Judgment, **Exhibit A**).

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I.
FACTUAL CIRCUMSTANCES

This is a suit initially brought by Appellant, Judy Taylor (hereafter "Taylor") against Lisa Burgess, Jeff Burgess[1], Kenny Randolph (Appellee) and Eugene Jackson (Appellee) (R.A. 1-6.) The suit results from an arrangement known in the 'horse business', as a 'free-lease arrangement'. (R.A. 1080-1998.) Judy Taylor, the owner of two horses (Poco and P.J.) arranged for the horses to be cared for at the Burgess' farm in Indiana in exchange for allowing the Burgess' the opportunity to ride the horses. (R.A. Deposition Judy Taylor, 8/23/96 (hereinafter Depo. Taylor), p. 5, line 14-p. 7, line 4; p. 66, line 15-p. 68, line 8, p. 69, line 22-p. 70, line 24). Unfortunately, the Burgess' never intended to act as free-lessees, but rather, planned in advance, to sell the horses as soon as possession was obtained from Mrs. Taylor. (R.A. Depo. Lisa Burgess 604.) Mrs. Taylor, as the titled owner, who merely sought to place the horses in a home wherein they would be ridden in exchange for their ongoing care, never transferred title or ownership of the horses to the Burgess'. Eugene Jackson, (Appellee herein) an individual generally referred to as a 'killer-buyer' in the horse slaughter industry, purchased the horses from the Burgess' in September, 1994, within less than one week after the Burgess' took possession of the horses.

A few days after her horses were picked up in Jefferson County by the Burgess', Judy Taylor contacted the Burgess' to make arrangements to visit them - just as she and the Burgess' had earlier agreed. The Burgess' refused and denied having possession of the horses claiming they were with a 'friend', Kenny Randolph. (R.A. 317-323; Depo. Taylor, p. 71, line 12-p. 76, line 23; Depo. Lisa Burgess, filed 3/11/99, p. 7, line 19-p. 8, line 2.)

The Burgess' gave the Appellant the name and telephone number of Appellee Randolph (R. A.

[1]Judgment against the two Burgess Defendants was entered on May 3, 1999 following trial.

Depo. Taylor, p. 77, line 23-p.80, line 11) and then instructed Randolph to lie to Appellant when she telephoned him. (R.A. 317-323; Depo. L. Burgess, p. 8, lines 3-18.) The Burgess' told Randolph to lie and tell Appellant her horses, P.J. and Poco, were with Randolph, living happily at his farm, when in fact, P.J. and Poco had been sold to slaughter-buyer, Eugene Jackson. Appellee Randolph did exactly as told. When Appellant telephoned Randolph, he recited this concocted story as instructed and thereby caused Appellant's further delay in learning the true whereabouts of P.J. and Poco. At the time of the telephone conversation, Appellee Randolph knew Eugene Jackson had purchased the horses and that they would be sold for slaughter. (R.A. video Depo. of Kenny Randolph, 5/8/98.) Thus, Appellee Randolph prevented Appellant from intercepting and preventing P.J. and Poco's deaths.

If Randolph had not acted as the Burgess' agent but had told Appellant what he in fact knew to be true, i.e., that P.J. and Poco had been sold to Eugene Jackson for slaughter, Appellant could have located and *"purchased"* her horses from Eugene Jackson. Instead, Randolph consciously chose to recite a concocted story, which he knew to be false, at the instruction and direction of the Burgess', thereby acting as an agent for the Burgess'.

Because of Appellee Jackson's reputation as a killer-buyer, he was one of the first people targeted by individuals attempting to help Judy Taylor regain possession of her horses. (R.A. 317-323; 330-336; Depo. Taylor, p. 54 lines 1-23; p. 56, line 21-p. 57, line 2) Jackson repeatedly lied to investigators (R.A. 330-336) and others (R.A. Depo. Sharon Mayes, p.22, line 25-p. 23, line 25) who sought the whereabouts of the horses, denying he had purchased them. Consistent with the pattern of the killer-buyer industry (R.A. 324-336), Jackson also forthwith sold the horses to Appellee, Ryan Horse Company[2] on September 7, 1998 and only after selling them did he admit to investigators he had purchased them from Burgess'.

As a killer-buyer, Jackson is well acquainted with the stolen horse trade (R.A. Depo. E. Jackson, p.

[2]Ryan Horse Company, Jason Ryan and James Ryan are collectively referred to as 'Ryans' herein.

15, line 23-p. 17, line 25) and its connection to the slaughter industry. (R.A. Depo. James Ryan, 12/10/97, p. 27 line 15-p. 18, line 9.) Jackson either knew, or should have known, the horses were not the Burgess' to transfer for several reasons. (R.A. Depo. Jackson, p. 14 line 20-p.15, line 22.) For example, Jackson saw the registration documents which listed Judy Taylor as the registered owner before he paid Burgess' for the horses. (R.A. Depo. Jackson, p. 17 line 7-25.)

Killer-buyers, such as Eugene Jackson and the Ryans (R.A. 158,159,161), take no action to determine if horses are stolen (R.A. 324-337) since they dispose of them quickly to slaughter. (R.A. Depo. James Ryan p. 44 line 12-p. 46 line 10.) 'Killer-buyers' (R.A. 600) operate under a 'don't ask, don't tell' business practice. (R.A. 202; 324-336; Depo. Charlie Burress, p. 40 line 21-. 43 line 14; p. 48 lin 10-p. 49 line 16; Depo. James Ryan, 12/10/97, pp. 51-52 line 10.) They typically make a practice of generating/maintaining as minimal of a 'paper trail' as possible[3] to prevent detection of stolen horses. Although Burgess gave Jackson the registration documents, Jackson never transferred them to the Ryans, the subsequent buyers, because he sold the horses specifically for slaughter to Ryans, who purchased them for that purpose. (R.A. Depo. James Ryan, 12/10/97, p. 46 line 1-p. 48 line 16.)

Eugene Jackson purchased the horses and transported them from Indiana through Jefferson County, Kentucky and on to Bullitt County (R.A. 570), his residence. Consistent with the slaughter trade, Eugene Jackson in less than 24 hours, sold Poco and P.J. in a *"private sale"* (R.A. Depo. Jason Ryan, 12/10/97, p. 24 line 3-p. 25 line 6) at his home in Bullitt County to the Ryans. As stated above, Eugene Jackson knew Burgess' were not the titled owners of Poco and P.J., but he ignored that fact since he intended to and did re-sell the horses immediately for slaughter, thus intentionally eliminating any evidence of their existence or whereabouts. (R.A. Depo. James Ryan, 12/10/97, p. 39 line 17-p. 41 line 21.)

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[3]R.A. Depo. James Ryan, 12/10/97, p. 41 line 12-p. 42, line 7; p. 43 lines 1-13; p. 48 line 14-p. 50 line 7; Depo. James Ryan 12/10/97., p. 35 line 23-p. 36 line 5; Depo. Jason Ryan, 12/10/97, p. 14 line 21-p. 15, line 7 and p. 62 line 6-p. 63 line 1.

Despite the fact that the Ryans conduct a public horse auction at least two times per month in Bullitt County (R.A. Depo. Charlie Burris, p. 7 lines 11-17; Depo. James Ryan, 12/10/97, p. 13 lines 13-24), and despite the fact that horses generally bring a higher price when sold at public auction (R.A. Depo. James Ryan, 12/10/97, p. 22 line 25-p. 23 line 25; p. 38 lines 16-24), Jackson elected to sell the horses immediately upon obtaining them because he knew they did not belong to the people from whom he had purchased them (the Burgess'). In other words, even though a horse auction sale was then scheduled for September 9, 1994 (R.A. Depo. James Ryan, 12/10/97, p. 36 lines 19-24; check #4227, Exhibit to Ryan Depo., marked as Exhibit 2, p. 10, pp. 18 line 15-p. 19 line 10; p. 24 lines 9-16) (2 days later), Jackson chose to 'get rid of the evidence' as soon as possible. (R.A. Depo. Jason Ryan, 12/10/97, p. 18 line 15-p. 17 line 12.) The Ryans came into possession of the horses on September 7, 1994 (R.A.Depo. James Ryan, 12/10/97, p. 41 line 13-p. 42 line 25) when they paid Eugene Jackson $1,700 for Poco and P.J. again without requesting their registration documents, the required Commonwealth of Kentucky certification documents (R.A. 359; 337-338) or any other information regarding the ownership of the horses. (R.A. Depo. Jason Ryan, 12/10/97, p. 24 line 3-p. 26 line 8.)

Thereafter on September 9, 1994 posters (R.A. 720-721) were posted at the Bullitt County horse auction on the sale night by individuals attempting to assist Appellant in obtaining the return of Poco and P.J.. (R.A. Depo. Jason Ryan, 12/10/97, p. 42 line 19-p. 43 line 25.) Although the mare was of average or not unusual (R.A. Depo. Sharon Mayes, 12/6/96, p. 8 lines 9-18) looks, the gelding was striking and unusual - most definitely not the type of horse any horse trader would overlook if located on his farm a short distance from his front door as was the case with Jackson and later, with the Ryans. (R.A. Depo. James Ryan, 12/10/97 pp. 47 lines 7-13; Depo. Ryan II, p. 36 line 7-p. 37 line 12.)

Thereafter, numerous contacts were made with several of the Appellees by Appellant, as well as, an Indiana police detective (R.A. 1172), a Virginia humane investigator, and a president of a local

humane association. The Appellees either lied or stonewalled the efforts to locate the horses.[4]

While numerous efforts were underway to locate and return the horses to Judy Taylor, James Ryan, President of Ryan Horse Company, was questioned about the whereabouts of the horses. The questioning of James Ryan occurred under oath in an action then pending in Jefferson Circuit Court, *Cobble v. Miller and Ryan, 92CI 00414*, an action which mirrored the factual circumstances in this very case! (R.A. 600.) In other words, James Ryan lied to the Appellant in this case under oath while defending himself against the same horse theft/slaughter allegations in a completely separate case. James Ryan not only committed perjury, but he continued in the *Cobble* case, the same course of conduct or predicate act, which is the basis for this action. This predicate act or business practice forms an integral part of the slaughter industry, i.e., buy stolen horses, deny any knowledge of same if questioned, maintain minimal business records and ship the horses quickly to slaughter where the evidence of their existence disappears entirely.

II.
PROCEDURAL HISTORY

i.
EUGENE JACKSON

This action was filed against Lisa Burgess, Jeff Burgess, Kenny Randolph and Eugene Jackson on August 23, 1995. (R.A. 1-6.) Jackson filed his Answer on October 2, 1995. Jackson's Answer stated in part, that *"[t]he venue of this action against this Defendant is improper in that he has dealt with no party in Jefferson County, Kentucky and he is a resident of Bullitt County, Kentucky where the proper venue for an action against him lies."* (See Answer of Eugene Jackson, p. 3, para. 11, R.A. 16-20.) Thereafter, Defendant Jackson participated in extensive discovery, i.e., by taking the deposition of Appellant, Judy Taylor

[4]Although he lied to several people, including Appellant initially, Appellee, Kenny Randolph ultimately confessed to the Indiana police that the horses had been sold to Appellee, Eugene Jackson, a known killer-buyer, and he had agreed with the Burgess' to lie to Judy Taylor about their whereabouts. (R.A. video Depo. of Kenny Randolph.)

and witness Sharon Mayes, filing Interrogatories, responding to interrogatories, questioning deponents, Lisa and Jeff Burgess, James and Jason Ryan and others, and filing various motions before the Trial Court, etc.. (e.g. R.A. 55-67, 89-90, 92.) On or about February 13, 1998, Jackson filed a Motion for Summary Judgment wherein he failed to allege any claim that the case against him should be dismissed due to improper venue. (R.A. 216-291.) Jackson's Motion for Summary Judgment was denied on April 20, 1998. (R.A. 371-372.) Following a change in counsel, Jackson filed a belated Motion to Dismiss alleging Jefferson County venue was improper. Following written Memorandums (R.A. 570, 585-627) and a hearing before Special Judge Earl O'Bannon, Jackson's Motion to Dismiss was denied on October 30, 1998. (R.A. 643.) Unbelievably, Jackson re-filed the exact same Motion to Dismiss after appointment of a new Circuit Court Judge (R.A.871.) Jackson's duplicitous Motion was then granted less than 1 month before trial. (R.A. 1132-1175.)

ii.

THE RYANS

Appellant sought and was granted leave to amend her Complaint on June 9, 1998(R.A. 476-478) to include the Ryans as Defendants The Amended Complaint alleged various violations by the Ryans of the Racketeering Influenced Corrupt Practices Act (hereinafter, RICO) 18 USC §1961, et. seq. (Chapter 96) incident to their ongoing corrupt business practices. (R.A. 479.) The Ryans filed their Answer on August 19, 1998 (R.A. 524-526) as well as, a Motion to Dismiss on October 8, 1998. (R.A. 548.)

Appellant subsequently sought leave to amend her Complaint with respect to the Ryan Appellees only, (R.A. 677-685.) On January 20, 1999 (as amended on March 5, 1999), the Trial Court dismissed the Ryans and denied Appellant the right to file her Second Amended Complaint against the Ryans (R.A. 841-844, 998-999). Those Orders became final by entry of the Trial Court's Order entered March 15, 1999. (R.A. 1006.)

iii.
KENNY RANDOLPH

With respect to Kenny Randolph, as noted above, suit was filed against him on August 23, 1995 (R.A. 1-6). Kenny Randolph filed an Answer claiming Kentucky could not properly exercise jurisdiction over him. (R.A. 306-308.) On May 7, 1998, Randolph sought dismissal of the case against him alleging Kentucky lacked in personam jurisdiction over him. (R.A. 374.) Randolph's Motion was denied by Order entered June 24, 1998 (R.A. 513 as amended 518) and although the Order, at his request (R.A. 516) contained the 'finality' language, his appeal of the trial Court's denial of his Motion to Dismiss was deemed to be an appeal from an interlocutory order (R.A. 731). His appeal was thus, dismissed by this Court (R.A. 731). Following the retirement of the Trial Judge, the Honorable Ken Corey, Randolph re-filed the exact same Motion to Dismiss before the newly appointed Trial Judge. Randolph's second *identical* Motion to Dismiss, which was denied earlier, (R.A. 879) was granted by the Trial Court on March 5, 1999 approximately 5 weeks before trial. (R.A. 1001.)

ARGUMENT

I.
THE TRIAL COURT ERRED IN GRANTING JACKSON'S LATE FILED MOTION TO DISMISS RE: VENUE BECAUSE CR 12 PRECLUDES JACKSON FROM OBTAINING RELIEF UNDER THE PROCEDURAL CIRCUMSTANCES OF THE CASE

Pursuant to CR 12, the Trial Court previously determined Jackson was precluded from obtaining the relief he sought, i.e., dismissal because of his claim of improper venue. (R.A. 643.)

As stated above, Jackson initially plead improper venue in an Answer filed October 2, 1995. (R.A. 16.) However, Jackson failed to file any motion for dismissal for improper venue before further pleadings were filed on his behalf, contrary to CR 12.02 which requires that a motion making the defense of improper venue *"...shall be made before pleading..."*.

Thus, improper venue as a threshold issue must be plead and resolved before pleading further. Jackson failed to raise his venue claim before pleading further and in fact, filed his Motion for Summary Judgment in 1998, (R.A. 216) three years after service of the complaint on him without mention of his venue defense. Prior to filing a venue motion on October 8, 1998 (R.A. 567), Jackson had filed numerous pleadings before the Trial Court - none of which alleged a defect in venue.[5] (R.A. 27-28, 32-33, 46-67, 76-79, 81-84, 86-92, 96, 216-294, 536-541.)

In addition, CR 12.07 and 12.08 preclude Jackson from filing numerous and duplicitous motions to dismiss. When a motion for summary judgment is filed based on the complaint, answer and other pleadings, as was the case here, it is the functional equivalent of a motion for judgment on the pleadings under CR 12. (*LaVielle v. Seay, Ky., 412 S.W.2d 587 (1966).*) Jackson's initial Motion (summary judgment) as stated above, made no mention of any venue defense. Even if the summary judgment motion was categorized as just that, a motion for summary judgment, Jackson was obligated to file a CR 12 motion to dismiss prior to filing a motion for summary judgment, i.e., before he filed other pleadings.

> *"Lack of venue is a personal defense which is waived under CR 12 unless raised in a timely fashion. This rule is designed to forestall the dilatory practice of making a series of motions, delaying the final disposition of the case. If a Rule 12 motion is made, a party is required to join all defenses and objections available thereunder except as noted in CR 12.08(2)....practitioners should raise the defense of lack of venue in the first defensive move which they make."* Kentucky Civil Practice Before Trial, Vol. I, 2nd Edition, Section 4.10.

The case of *Licking River Limestone Company v. Helton, KY, 413 S.W.2d 61, 63 (1967)* is factually and legal dispositive of Jackson's late claimed motion. In *Licking River*, the court found the defendant's failure to bring the venue issue to the court until after the claimant *"...participated in the taking of depositions, answering interrogatories and moving for summary judgment..."* was too late. See

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[5]Other than his initial Answer in which he failed to seek any hearing or decision from the Trial Court.

also Jaggers v. Martin, Ky., 490 S.W.2d 763 (1973) (lack of venue is not a defense that can be raised at any time and was waived where Defendant failed to raise same for seven months after Complaint was filed); Miller v. Watts, Ky., 436 S.W.2d 515 (1968) (motorist's venue motion was properly refused where it was not made until fifteen months after suit was filed, during which time motorist knew of claimed basis for requested venue change and made other motions without raising venue question.)

The purposes of CR 12 are, among others, to bring venue issues to the immediate attention of the court before lengthy litigation occurs in one forum only to result in a dismissal and duplicitous litigation in another forum. To that end, CR 12.07 provides in relevant part, as follows:

Rule 12.07 Consolidation of Defenses in Motion:

> *"A party who makes a motion under Rule 12 may join with it the other motions herein provided for and then available to him. If a party makes a motion under Rule 12 but omits therefrom any defense or objection then available to him which Rule 12 permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted...."*

The dictates of CR 12.07 could not be any clearer in that Eugene Jackson filed a Motion to Dismiss himself from the action on or about February 13, 1998. (R.A. 216.) Eugene Jackson then had available to him, a claim of improper venue pursuant to CR 12.07 and 12.08. Eugene Jackson omitted from the motion filed in February, 1998, any mention of a venue defense. Thus, Eugene Jackson may *"not thereafter make a motion based on the defense or objection so omitted"*, i.e., venue.

Thus, Eugene Jackson's claim of improper venue ('defense or objection') has been waived. See CR 12.08 (defense of improper venue is waived if omitted from a motion as described in Rule 12.07 above). Nevertheless, Jackson did file such a Motion (dismiss due to improper venue) which Motion was denied on October 30, 1998, the Trial Court finding that Jackson had in fact, waived any venue defense. (R.A. 643.) It was error for the Trial Court to reconsider and then grant Jackson's second such Motion to Dismiss due to improper venue for the very same argument the Trial Court earlier determined to have been without merit. (R.A. 1132, 1175.)

II.
JACKSON VOLUNTARILY SUBMITTED TO THE TRIAL COURT'S VENUE BY FILING ACROSS-CLAIM AGAINST APPELLEES, LISA AND JEFF BURGESS

Less than sixty days before the first trial date, December 1, 1998 (a trial date which was originally scheduled in June, 1998) Appellee Jackson asked the Trial Court to dismiss him as a party Defendant due to improper venue. For the reasons set forth above, Jackson obviously waived his claim of improper venue. In addition, however, Jackson asked the Trial Court to dismiss him from the case when at the same time, he was pursuing a claim against other co-defendants in the same venue. Jackson's Cross-Claim against Appellees Burgess was filed pursuant to CR 13 and 14 in that Jackson's claim against the Burgess' arose 'out of the transaction or occurrence that is the subject matter of the original action and/or any property that is the subject matter of the original action and he sought indemnification from Appellees Burgess'. Jackson thus, asked the Trial Court to reach a ridiculous result by dismissing him as a party Defendant while at the same time allowing him to pursue a related claim in the same venue, regarding the same matters. Such a procedure would be an absurd result and contrary to the purpose of our Civil Rules. Again, *Licking River, infra at 63-64* provides a helpful analysis:

> "[Defendant driver of truck] *filed a cross claim against* [defendant owner of truck]. *It answered asking dismissal of* [driver's] *cross claim because of lack of venue, and it moved to dismiss on that ground. Venue having been established with respect to the original action* [sic] *it existed as to this cross claim. The purpose of our civil rules is to provide a one form of action system in which litigants who are properly joined are afforded means of settling entire controversies with minimum of expense and procedural steps.* (Citations omitted.)

III.
SINCE THE INJURY TO THE APPELLANT, JUDY TAYLOR, OCCURRED IN JEFFERSON COUNTY, KENTUCKY, VENUE HAS ALWAYS BEEN PROPER IN JEFFERSON COUNTY AND NO OTHER COUNTY

KRS 452.460(1) provides in part, that

"every other action for an injury to the person...must be brought in the county in which the

defendant resides, or in which the injury is done." (Emphasis added.)

Appellant, Judy Taylor, made her contract with Defendants Burgess, in Jefferson County, Kentucky. (R.A. 317-323.) The contract was performed in Jefferson County when Defendants Burgess took possession of Judy Taylor's horses and transported them to their home in Indiana knowing they would sell the horses and not maintain them at their home as agreed. (R.A. 317-323.) Defendants Burgess repeatedly told Judy Taylor, in Jefferson County, that her horses were fine and would be cared for when in fact, the horses at that time, were in Appellee Jackson's possession. (R.A. 321.) Judy Taylor's injury (permanent deprivation of her property, emotional trauma, etc.) occurred in Jefferson County while Appellee Jackson, conspiring with Burgess' and acting as their agent, was secreting her horses in several different counties and states so no one could locate them. Unlike the plaintiff in *Copass v. Monroe Co. Medical Foundation, Inc., 900 S.W.2d 617 (1995)*, who alleged that two different injuries occurred in two different counties perpetrated by different defendants, Appellant Taylor has alleged only one injury, the wrongful conversion of her property by fraud and deceit, which conversion initially occurred in Jefferson County, although it continued in various other counties. Thus, the factual circumstances in *Copass*, being completely different from this case, prevents *Copass* from being dispositive of this case.

SUMMARY OF VENUE ISSUE RE: JACKSON

Venue is a specific creature of statute controlled by the particular statutory language, the Rules of Procedure and the factual situation. Venue in civil matters varies *"widely"* depending on the particular statute proscribing the venue of a matter. Unlike criminal actions where the prosecution must prove the particular criminal acts occurred in the county where prosecuted, civil venue statutes are more varied and fact-specific since civil cases are governed by a variety of venue statutes and because venue may be waived in advance of the trial by failure to comply with CR 12.

Since it is clear Appellee Jackson waived his claim to request dismissal due to improper venue and the Trial Court made that specific finding (see Order of 10/30/98, R. A. 643), it was error for the Trial Court to later grant that same motion since the *"waiver"* issue had thus, been adjudicated and no new evidence or argument was submitted to the Court. Appellant requests this Court find Jackson waived his venue defense and that venue regardless of waiver, is proper in Jefferson County, Kentucky.

IV.
THE TRIAL COURT ERRONEOUSLY GRANTED RANDOLPH'S MOTION TO DISMISS RE: JURISDICTION

Kentucky's long-arm statute *"has authorized...the courts to reach to the full constitutional limits in pursuing non-resident defendants."* Poyner v. Erma Werke, GMRH, *618 F.2d 1186, 1188 (6th Cir. 1980).* The Supreme Court in International Shoe v. Washington, *326 U.S. 310, 316, 66 S.Ct. 154 (1945)* held that:

> *"Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"*

Three criteria have developed in determining the limits of due process within the *"minimum contacts"* formula of International Shoe, *supra.* First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing consequences in that state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or the consequences caused by the defendant must have enough of a connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. Kennedy v. Ziesmann, *526 F.Supp. 1328, 1330 (E.D. KY 1981).*

The purpose of Kentucky's long-arm statute, KRS 454.210, is to ensure that Kentucky courts comply with the federal constitutional requirements of due process before asserting personal jurisdiction over non-resident defendants. It has been interpreted to extend to the outer limits of the due process clause. Pierce v. Serafin, *Ky. App., 787 S.W.2d 705, 706 (1990).* Furthermore, courts must

consider the pleadings and affidavits in the light most favorable to the plaintiff, in this case, Judy Taylor. Autochannel, Inc. v. Speedvision Network, *1997 WL 847047 (W.D. KY 1997).* As the court in Autochannel, Inc., *supra* stated, "[d]*epending on which provision of KRS 454.210(2)(a) is applicable, a court may or may not find it appropriate to apply the long arm statute without some recourse to a due process analysis. In some cases, a court will be able to determine whether there is personal jurisdiction based solely on an application of the express language of KRS 454.210(2)(a).*" *1997 WL 847047* at p. 3. (Citations omitted.) The court went on to note that "[i]*n other cases, a court seeking to apply a broadly worded provision of the long-arm statute will rely much more heavily on due process principles.*" Id. Then the court noted that "[i]*n still other* [cases], *a court may find it appropriate to move back and forth between the language of the long-arm statue and a due process analysis.*" Id. The bottom line, however, was that "[i]*n all cases, ... Kentucky courts arguably have applied the clear directives of the long-arm statute modified only by the requirements of due process.*" Id.

The first part of the due process minimum contacts test is unquestionably met in this case. Appellee caused consequences in the forum state. This situation is analogous to Pierce, *supra, at 705.* In that case, mailing a letter was held to cause consequences in the forum state. Likewise, the two conversations (telephone calls) in this case, in which Appellee, Kenny Randolph intentionally (and pursuant to an advance agreement with Defendant, Lisa Burgess), gave false, deceptive and misleading information to Appellant, Judy Taylor, caused damaging consequences. Had Randolph given truthful information during the September 13, 1994 conversations regarding P.J. and Poco, i.e., that he did not have possession of them, but that they had been sold to Appellee, Eugene Jackson for slaughter, their deaths could have been prevented.

When a defendant sends fraudulent misrepresentations into a state it is considered conduct within the state because such conduct is deemed to have occurred within the state. David v. Weitzman,

677 F. Supp. 95, 97 (D. Conn. 1987). Appellee Randolph did not send fraudulent material into Kentucky, but he made fraudulent misrepresentations on the telephone to a person he knew was located in and receiving the information in Kentucky about a 'contract' created and entered into in Kentucky. Although he did not telephone the Appellant, he acted as Appellees Burgess' agent when he lied to Appellant as a result of Appellant's telephone call to him (R.A. Depo. Lisa Burgess, p. 8 lines 3-18), which telephone call he knew was orchestrated by his principal and co-conspirator, Lisa Burgess. In other words, Randolph's co-conspirator, Lisa Burgess, told Randolph she (Burgess) would direct Judy Taylor to call Randolph at his home and they agreed on the fraudulent mis-representation Randolph would then make to Taylor. (R.A. 1167-1172.)

It cannot fairly be argued that these telephone calls were not incidental. Indeed, the call between Appellant and Appellee Randolph led to further delay in Appellant learning the true whereabouts of P.J. and Poco and thus, their deaths, which is the essence of the cause of this action - the fraudulent misrepresentations made to Appellant. This situation is more analogous to *McGee v. Rickhof, 442 F.Supp. 1276 (D. Mont. 1978),* rather than to *Kennedy, supra* (incidental telephone calls did not establish minimum contacts). In *McGee, supra at 11-12,* the cause of action alleged was based on claimed negligent advice given by the non-resident defendant. The defendant, a physician, telephoned plaintiff in the forum state and advised plaintiff to return to work. Plaintiff alleged that the advice to return to work so soon after a delicate eye operation, was negligent advice given to plaintiff in forum state by non-resident defendant from outside the forum state. The *McGee* court found that this telephone call was sufficient to establish minimum contacts. Thus, there is sufficient due process contact if *"the defendant has 'purposefully directed his activities at residents of the forum and litigation results from alleged injuries that arise out of or relate to" those activities.'" Id. at 99.*

Brown v. Flowers Industries, Inc., 688 F.2d 328 (5th Cir. 1982) held a single defamatory telephone

call from out of state (analyzed as tortious conduct outside state causing injury in the state) was sufficient for due process purposes. The court in Flowers emphasized that *"the number of contacts with the forum state is not, by itself, determinative....What is more significant is whether the contacts suggest the non-resident defendant purposefully availed himself of the benefits of the forum state."* Id. *at 333* (citations omitted). In deciding whether the defendant did purposefully avail himself, the court considered (1) the foreseeability of consequences in the forum state; (2) the interest of the state in providing a forum; (3) the relative conveniences of the parties, and (4) whether the allegedly tortious act was intentional or negligent. Id. *at 333-34.*

Applying these factors to this case, Appellee Randolph, as an agent for the Burgess', purposefully availed himself of the benefits of the forum state in that Burgess', his co-conspirators, profited by selling the horses and Randolph as their agent, assisted them in so doing. Although Randolph did not call the Appellant, he may as well have done so for it was known Appellant would be directed by Burgess' to call Randolph and he planned in advance to lie to Appellant as part of a fraudulent scheme.

In addition, Randolph definitely could foresee the consequences since he knew at that time the horses had been sold for slaughter. His commission of this fraudulent misrepresentation has the foreseeable consequence of both direct economic injury to Appellant (loss of value of her horses) and severe emotional distress. Appellee Randolph knew Appellant was very much attached to and loved her horses, for according to him, he lied about the true whereabouts of P.J. and Poco to *"save her feelings."* (R.A. video Depo. Kenny Randolph, 5/8/8.) Therefore, Randolph could have foreseen when Appellant learned the true fate of P.J. and Poco, she would suffer severe emotional distress and that his role in the scheme only exacerbated her injury.

Secondarily, Kentucky has an obvious interest in providing a forum for this suit. Since a

Kentucky resident was victimized in this state and her injury (emotional distress, etc.) occurred in this state. Also, it would not be a great inconvenience for Randolph if Kentucky exercised personal jurisdiction over him, for it involves no great distance for Randolph to travel, and no great expense is involved (no plane ticket to be bought).

Finally, the fraudulent misrepresentation made by Randolph, was intentional and not accidental or merely negligent. Therefore, all four factors enunciated by the *Brown, supra* court have clearly been met.

The circumstances in *J.E.M. Corp. v. McClellan, M.D., Harold M. Vegel, Max Assoulin, 462 F.Supp. 1246 (D. Kan. 1978)* are also similar to the case at bar. In *J.E.M. Corp.*, plaintiff contracted with defendant McClellan for the sale of an apartment complex. Part of the payment was a quantity of jade. Plaintiff initiated a single phone call with out-of-state defendant Vogel in Chicago to receive an appraisal value for the jade. Plaintiff alleged Vogel represented over the phone that the jade was worth as much as McClellan claimed and plaintiff alleged Vogel intentionally misrepresented the value to mislead plaintiff and to induce the plaintiff to enter into a contract. The court held that a fraudulent misrepresentation made from outside the forum that causes tortious injury in the jurisdiction constitutes a tortious act within the state. Whether Appellee Randolph's act is characterized as causing tortious injury in this Commonwealth by an act or omission outside of the Commonwealth, or he acted as an agent for Defendants Burgess outside the state, the jurisdictional requirements are met. Without Randolph's part in this concocted scheme, it would not have been successful.

> *"An individual is personally responsible for his own tortious conduct. A corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity; if he is shown to be acting for the corporation, the corporation may also be liable but the individual is not thereby relieved of his liability."* Oxmans' Erwin Meat Co. v. Blacketer, 273 N.W.2d 285, 289 (Wis. 1979).

Consequently, it seems to follow Randolph cannot hide behind the Burgess'. Although the Burgess' are liable, it does not relieve Randolph of liability when he committed the intentional tortious and fraudulent misrepresentation. While in *Oxmans, supra,* the defendant made misrepresentations when in plaintiff's forum state, when read in conjunction with *J.E.M. Corp., supra,* a phone call is sufficient to establish the intentional tort of fraudulent misrepresentation in the forum state.

Since, Randolph acted as the agent of and conspired with Defendants Burgess who without question, have the requisite minimum contacts, this is all that is required for the Trial Court to exercise in personam jurisdiction over Kenny Randolph. Randolph admitted he recited the concocted story as the Burgess' requested. (R. A. video Depo. Kenny Randolph,. 5/8/98.) However, Randolph also meets the pre-requisite of jurisdiction based on a tortious act committed outside of the Commonwealth, which caused injury within.

Randolph may claim his 'innocence' or lack of involvement and thus, deny his co-conspirator and agency status, but the facts upon which such a determination may be made, are issues for the jury. Thus, the Trial Court was correct in initially determining his defense was a matter for a jury to decide. Reversing that Opinion and dismissing Randolph, was clear error.

V.
VENUE IS PROPER IN JEFFERSON COUNTY, KENTUCKY AGAINST THE RYANS AS TO APPELLANT'S FEDERAL AND STATE LAW CAUSES OF ACTION

The Trial Court's dismissal of Appellees Ryan due to 'improper' venue, was also error. In this case, Appellant alleges the injury done to her by the Ryans, involved among other actions, nationwide business practices prohibited by RICO, the deliberate secreting of her horses and, the suborning of perjury with respect to the whereabouts of her horses.

The Ryans deliberately purchased Appellant's horses from Appellee Jackson in a manner which is contrary to and violative of various state laws and regulations. (See e.g., KRS 257.070.) Those laws

exist for the protection of the citizens of this Commonwealth such as Appellant. The injury to Appellant as a result of Ryans' activities, occurred in Jefferson County because Judy Taylor was injured in Jefferson County, Kentucky and not any other county. Thus, since *"the injury* [was] *done"*, KRS 452.460, to Judy Taylor in Jefferson County, Kentucky, venue is proper in Jefferson County.

Venue concerns the place where the lawsuit should be heard. See e.g., *Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167-68 (1939).* The key to venue is that it is purely statutory (see *Leroy v. Great W. United Corp., 443 U.S. 173, 180 (1979)*) and is primarily a matter of *"convenience of litigants and witnesses."* 15, 5A Wright and Miller, Federal Practice and Procedure, *3801, at 3-4 (1985)* (quoting *Denver and RGWRR v. Brotherhood of RR Trainmen, 387 U.S. 556, 560 (1967).* Venue in a civil RICO case is like venue in other cases. As will be discussed below, venue over a RICO defendant can be established under the general Federal venue provision (*§1391*), *infra* or under RICO's separate venue statute, *§1965*, *infra*, i.e., where a substantial part of the events or omissions occurred or in a place where the defendant is found, resides, transacts his affairs, has an agent, or where justice requires.

THE ELEMENTS OF RICO
(a)
INTRODUCTION

18

The Racketeer Influenced Corrupt Practices Organization Act (RICO) embodied in Title IX of the Organized Crime Control Act was enacted by Congress in 1970 in an effort to combat the infiltration of organized criminal activity within businesses in the United States. RICO is perhaps the broadest, most sophisticated and most comprehensive Federal criminal (and civil) legislation ever enacted.[6] See generally Tannenbaum & Molo, State and Local Government's Use of the Treble Damages

[6]The RICO venue statute is considerably expansive in that it provides in any district court of the United States in which the ends of justice require it, other parties residing in other districts may be brought before the Court. 18 USC §1965 (b); and see *Butcher's Union Local No. 498, United Food and Commercial Workers v. SCC Inv., Inc., 788 F.2d 535 (9th Cir. 1986) (Section 1965(b))* which allows nationwide service of process when *"justice"* required it was intended to enable plaintiffs to bring all members of nationwide RICO conspiracy before a court for a single trial):
(continued...)

Remedy under Civil Rico: a Means of Redressing the Economic Effect of Unlawful Conduct, 35 Baylor Law Review 1 (1983); Atkinson, Racketeering Influenced and Corrupt Organization, *18 USC §1961-1968*; Broadest of the Federal Criminal Statutes, *69 J. Crim. Law and Criminology 1 (1978)*. The Act prescribes enhanced penal sanctions and severe civil penalties against those defendants who participate in the affairs of an entity by engaging in a pattern of racketeering activity in violation of its substantive provision. *18 USC §1962*. As stated above, the Act grants a private right of action for treble damages and attorney's fees to any person who is injured in his business or property by a RICO violation. *18 USC §1964(c) (1995)*.

Pursuant to *18 USC §1961 et. seq.*, racketeering activity is described and proscribed in detail, but for purposes of this action, the statute makes illegal any act which is indictable under *Title 18, USC §1341, 1343, 2314 and 2315.*[7] **(Exhibit B.)** In order to be actionable as a RICO violation, there must exist a pattern of racketeering activity. A pattern of racketeering activity requires at least two predicate acts of racketeering activity within the previous ten (10) years. *18 USC §1961(5)*. *United States v. Field, D.C.N.Y. 1977, 432 F.Supp. 55, affirmed 578 F.2d 1371, cert. dismissed 99 S.Ct. 43, 439 U.S. 801 58 L.Ed. 2d 94.* (The United States Congress has thus made two acts within a specific period of time and in the course of a particular type of enterprise a *"pattern"* of prohibited racketeering activity which is an independent criminal offense punishable more severely than simply twice the penalty for each constituent offense.)

It is this 'business' practice in its entirety which constitutes a portion of the Appellant's claim against the Appellees Ryan, i.e., an action under the United States Racketeering Influenced Corrupt

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[6](...continued)
Andrade v. Chojnacki, 934 F.Supp. 817 (S.D. Tex. 1996) (by authorizing nationwide service of process RICO enables plaintiffs to bring before a single court all members of nationwide RICO conspiracy).

[7]Section 1341 (relating to mail fraud); 1343 (relating to wire fraud); and 2314 and 2315 (relating to interstate transportation of stolen property).

Practices Act (hereinafter RICO)[8]. Federal courts do not maintain exclusive jurisdiction of civil RICO claims. To the contrary, such claims may be filed in State court by private plaintiffs for treble damages and attorney's fees. *18 USC 1964(c), (1982)*[9] (a private cause of action is created in favor of "[a]*ny person injured in his business or property, by reason of violation of Section 1962*").

The Trial Court's Order granting Ryans' Motion to Dismiss Appellant's Amended Complaint against them because of a state law venue objection (R.A. 841, 998) should be set aside because (1) state procedural defenses such as state law venue objections are not controlling in RICO claims, and (2) RICO claims are governed by the RICO venue statute and the general United States venue statute under which Appellant has properly filed suit in Jefferson County, Kentucky.

(b)
State Procedural Defenses Such As Venue Objections Are Not Controlling In RICO Actions

Although venue is proper in Jefferson County over Ryans for several reasons under state law *infra at 28-29,* Appellees' claim that state law prohibits a trial of the action in Jefferson County, is incorrect because RICO has eliminated state procedural defenses - and rightfully so or federal statutes would then be interpreted in light of each individual state's law - something the Supremacy clause and Commerce clauses of the United States Constitution would not permit. *United States Constitution, Sections 8, 10 and Amendment XI.*

> *"We are satisfied that Congress did not intend to incorporate the various states' procedural and evidentiary rules into the RICO statute....(citations omitted). To adopt appellant's reading of* [a] 'chargeable' [act] *would result in precisely the same criminal act, proscribed by the laws of two states, being the basis of a RICO violation in one state but not in the other - simply because of differences in what are essentially procedural rules....Other courts' interpretations of §1961(1)(A) support our interpretation of the statute. See e.g.,* United States v. Brown, 555 F.2d 407, 418 n.22

[8]Appellant also filed an Amended Complaint against Ryan's for various State and common law causes of action (R.A. 681-685) which the Trial Court declined to accept and this refusal is also a basis for this Appeal.

[9]See e.g., *Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan, 543 F.Supp. 198 (S.D. Tex. 1982)* and *Van Schaick v. Church of Scientology of California, Inc., 535 F.Supp. 1125 (D. Mass. 1982)* as examples of private civil RICO actions.

(5th Cir., 1977), cert. denied 435 U.S. 904 (1978) *(rejecting Georgia's accomplice testimony corroboration request in a RICO prosecution)*; United States v. Licavoli, *and cases cited therein....*United States v. Paone, 782 F.2d 386, 393-94, cert. denied, 483 U.S. 1019, 107 S.Ct. 3261, 97 L.Ed.2d 761 (1987).

In *United States v. Licavoli, 725 F.2d 1040, 1047 (1984) (6th Cir.) cert. denied 467 US 1252, 104 S.Ct. 3535*, the Court of Appeals rejected the defendant's attempt to prevent a RICO prosecution based on Ohio's substantive and procedural laws. The *Licavoli* Court's reasoning is instructive, i.e., *"RICO nowhere indicates that two criminal acts otherwise qualifying as predicate acts may not both constitute predicate acts because under state law a defendant could not be convicted of or sentenced for both crimes."* Id. at 1046. Thus, on an even more compelling issue than venue, i.e., duplicitas criminal charges, a substantive issue, the 6th Circuit has determined it is Federal law and not State law which takes precedence in RICO matters.

The second claim advanced in *Licavoli* was a state procedural defense which was likewise, held inapplicable by the 6th Circuit.

"The reference to state law in the statute [RICO] *is simply to define the wrongful conduct, and is not meant to incorporate state procedural law.* (Citations omitted.) *Livacoli at 1047."*

And see *Kipperman v. McCone, 422 F.Supp. 860 (D.C. Cal. 1976)* (this issue has been so well settled that it should hardly need revisiting), (venue determination in federal question case is properly matter of federal law); *Sterling Television Presentations, Inc. v. Chintron Co., Inc., 454 F. Supp. 183 (D.C. N.Y. 1978)* (while jurisdiction over person is determined according to state law, venue is a question of federal law).

As can clearly be seen, State procedural and even substantive defenses have no bearing on RICO actions. As stated above this is necessarily so to prevent numerous different state interpretations of a federal act. While she does not concede that venue is improper under Kentucky law, Appellant has demonstrated that even if it were, such impropriety would give way to the necessary federal statute.

(c)
Venue Of Appellees Ryan Is Proper In Jefferson County Under The Federal RICO Statute *18 USC §1965 and 28 USC §1391*

(i) Venue Under RICO, *18 USC §1965*

While the federal RICO venue statute speaks primarily of federal court venue, its language is expansive:

Title 18 USC §1965(a) provides as follows:

> *"(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs."*

Congress intended *§1965(a)* to serve as a venue statute. *1970 House Report No. 1549, 91st Cong., 2d Sess.*, reprinted in *1970 USCCAN 4007, 4081. Section 1965(a)* provides a four part test to determine whether venue in a particular forum is proper in a RICO case. Under this test, venue is proper if the RICO defendant (1) resides in the forum, *Van Scharek, supra* (2) is found in the forum, *Shuman v. Computer Assn's. Int'l., 762 F.Supp. 114, 116 (E.D. Pa. 1991)* (the term *"is found"* has been construed to mean presence and continuous local activity), (3) has an agent in the forum, *Dooley v. United Technologies Corp., 786 F.Supp. 65, 79, 81 (D.D.C. 1992)* (activities of co-conspirators satisfy the *"has an agent"* language); or (4) transacts his affairs. The term transacts his affairs is synonymous with *"transacts business". King v. Vesco, 342 F. Supp. 120 (D.C. Cal. 1972).*

Likewise, *§1965(d)* applies to actions in State courts such as the present case:

> *"(d) All other process in any action or proceeding under this* [RICO] *Chapter may be served on any person in any judicial district in which such person resides, is found, has an agent or transacts his affairs."*

In the present case, the Ryans transact business in Jefferson County and numerous other counties in Kentucky. (R.A. Depo. James Ryan, filed 3/11/99, p. 12 line 20, p. 14, line 8.) In addition to routinely transacting business in Jefferson County, James Ryan perpetrated a direct and intentional fraud of the very type typical of Ryan's business practices when he lied under oath regarding the whereabouts of

Appellant's horses. Ryan's dishonest statement which is an integral part of his normal business practice occurred in Jefferson County. Ryan thus, transacted his affairs (business) in Jefferson County when he intentionally lied to Appellant by denying all knowledge of the subject horses when they were then in his possession. Had James Ryan been truthful when questioned on September 21, 1994 in Jefferson County, Appellant's horses would have been recovered. However, he was not truthful and the crux of Appellant's claim against Appellees Ryan is this very act occurring in Jefferson County which is part of the Ryans' normal, ongoing business practice, i.e., a predicate act of a fraudulent nature. Thus, venue under *18 USC §1965* is clearly proper in Jefferson County, Kentucky pursuant to the above provisions.

Finally, as the Ryans admittedly live, do business and are found in the United States District of the Western District of Kentucky, a RICO action could obviously be filed in Jefferson County at the United States District Court located at Sixth and Broadway Streets in Louisville, Kentucky. That the initial forum (Jefferson Circuit Court) is but four blocks north, can hardly be seen as a greater inconvenience to the Ryan Appellees.

(ii) Venue Under *28 USC §1391* (General Venue Statute)

If venue were improper under the RICO venue statute, it would then be appropriate to inquire whether venue would be proper under the general federal venue statute, *28 USC §1391.* *Van Schaick v. Church of Scientology of California, Inc., 535 F.Supp. 1125 (D.C. Mass. 1982).* The legislative history (*House Report, 4007, 4034*) and many cases, indicate that RICO's *§1965(a)* was intended to liberalize the general venue provisions and to afford plaintiffs a broad choice of forum. W. Mark Cotham & Hett G. Campbell, Civil Actions Under the Racketeer Influenced and Corrupt Organizations Act, *3 Rev. Litig. 223, 249 (1983)* (explaining that "[t]*he tremendous variations in state venue provisions make it impossible to generalize about the advantages that RICO's venue provisions offer. Since state venue*

provisions may often require that a suit be brought in the county where defendant is domiciled, RICO may uniquely permit suits where defendant is merely 'found', has an agent or transacts its affairs" (footnotes omitted)); see also, Anchor Glass Container Corp. *v.* Stand Energy Corp., *711 F.Supp. 325, 327 n.7 (S.D. Miss. 1989)* (indicating that the Special RICO venue provision *"liberalizes those found in §1391(b)"*); Farmers Bank of Del. *v.* Bell Mortgage Corp., *452 F.Supp. 1278, 1280-81 (D. Del. 1978)* (concluding that "[g]*iven the language and legislative history of Section 1965...its provisions were not intended to be exclusive, but rather, were intended to liberalize the already existent venue provisions found in Title 28"*); Paul A. Bastista and Marks Rhodes, Civil Rico Practice Manual §2.6 (1995 Cum. Supp. No. 1) (explaining that in seeking venue, the plaintiff's *"general objective...is to secure the broadest possible venue"* while the *"defendants typically seek the narrowest range of venue...Civil RICO...serves the plaintiff's objectives...."*)

Because venue is proper under *18 USC §1965*, Appellant will only briefly review the general venue statute. Magic Toyota, Inc. *v.* Southeast Toyota Distributors, Inc., *784 F.Supp. 306 (D.S.C., 1992)* (RICO venue provision are supplemental to those found in the general venue statute); in accord Delta Education, Inc. *v.* Langlois, *719 F.Supp. 42 (D.N. Hamp. 1989);* Miller Brewing Co. *v.* Landau, *616 F. Sup. 1285 (E.D. Wis., 1985).*

The general venue statute also confers venue of this action on the Jefferson Circuit Court pursuant to *sections (b)* and *(c)* of *§1391* which provide in relevant part, as follows:

> *"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may...be brought only in...(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred..."*
>
> and
>
> *"(c)...a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced* [i.e., Kentucky]. *In a state which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that state within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant*

contacts." (Emphasis added.)

And, finally, *28 USC §1392* is also instructive.

"(a) any civil action, not of a local nature, against defendants residing in different districts in the same state, may be brought in any of such districts."

"(b) any civil action, of a local nature, involving property located in different districts in the same state may be brought in any of such districts."

Thus, *§1391(b)* permits venue to be established *"where the claim arose."* See e.g., DeMoss *v.* First Artists Production co., *571 F. Supp. 409, 411 (N.D. Ohio 1983)* appeal dismissed, *734 F.2d 14 (6th Cir., 1984)*. In addition, if the defendant is a corporation, *§1391(c)* provides that "[a c]*orporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business."* Bulk Oil (USA, Inc. *v.* Sun Oil Trading Co., *584 F.Supp. 36, 39 n. 6 (S.D. N.Y. 1983).*

Further, *28 USC §1392(a) supplements §1391(b)* and may be used in a RICO case. See Uniroyal Goodrich Tire Co. *v.* Munnis, *No. 89-2690, 1989 U.S. Dist. Lexis 13352 at 3 and n. 1. (E.D. Pa., July 31, 1989.)*

Accordingly, venue in a civil RICO case may be established if the Appellant meets any test articulated in either *§1391(b)(c) or §1965(a).* The Appellant need not satisfy both statutes. Dooley *v.* United Technologies Corp., *786 F.Supp. 65, 80 n. 15 (D. D.C. 1992);* General Environmental Science Corp. *v.* Horsfall, *753 F.Supp. 664, 674 (N.D. Ohio 1990).*

As can be seen, venue over Ryan Horse Company, a corporation, is proper in either the Eastern or Western District of Kentucky. Also, pursuant to the above provisions, venue over Ryan Horse Company, James Ryan and Jason Ryan, is proper in the Western District of Kentucky or any judicial district in which a substantial part of the events giving rise to the claim, occurred.

Jefferson County is, of course, the one and only county in Kentucky in which a substantial part of the events giving rise to the claim occurred. To make a non-exhaustive list, it is for example, the County wherein Defendant, Lisa Burgess first contacted Appellant, Judy Taylor, to inquire about

possession of the horses, the County wherein the agreement was reached between the Burgess' and Judy Taylor, the County wherein the horses were maintained and from which they were picked up and transported by Burgess' to Indiana. Jefferson County is also the County in which Appellee, Eugene Jackson first illegally entered Kentucky from Indiana with the horses and the County wherein Judy Taylor was located when Defendants Burgess and Appellee Randolph via telephone conversation with her, repeatedly lied to her regarding the whereabouts of the horses, thus preventing her from obtaining their return. Finally, Jefferson County is one of the counties wherein Appellees Ryan purchase and sell horses and the very County wherein Appellee James Ryan under oath lied about his possession of the horses on September 21, 1994, thus again, and for the final time, preventing Judy Taylor from obtaining possession of Poco and P.J.

In short, Jefferson County is the location where the final act was committed by James Ryan, which forever precluded Judy Taylor from reclaiming her horses. There is no other county within this Commonwealth or any other State, wherein any substantial part of the events leading to the filing of this action, occurred.

In light of Appellant's Second Amended Complaint against the Ryans, which the Trial Court declined to allow Appellant to file (R.A. 677-685, 841-844, 998-999), Appellees Ryan should be subject to venue in Jefferson County on other State law causes of action. See *Southmark Prime Plus, L.P. v. Falzone, 768 F.Supp. 487, 491 (D. Del. 1991)* (explaining that the RICO defendants would not be inconvenienced if the court exercised jurisdiction under *§1965(b)* because, among other things, venue was proper under other counts in the same lawsuit; thus defendants would have to appear before the court anyway.) In addition, the related claims against all other Appellees were then pending before the Jefferson Circuit Court and the Ryans (as well as, Jackson and Randolph) were all integral witnesses in the trial and were required to travel to Jefferson County with respect to the very matters

which form the basis for the present claims against the Ryan's in this action.[10]

VI.
THE TRIAL COURT ERRONEOUSLY REFUSED APPELLANT'S SECOND AMENDED COMPLAINT WHICH ALLEGED STATE LAW CAUSES OF ACTION[11]

The precedent for Appellant's position above-stated is of long standing origin. The case of *Peaslee-Gaulbert Co. v. McMath's Adm'r., Ky., 146 S.W. 770 (1912)* is illustrative. In *Peaslee*, a house painter was killed in Christian County, Kentucky by an explosion of a dryer sold by a company in Jefferson County. As the cause of action was one in tort as is the case herein, the *Peaslee* court's analysis of 'where the injury is done' is most illustrative and compelling.

> *"...The negligence and wrongdoing, if any, had its beginning in Jefferson County, but it was, if anything, a continuing act of negligence or wrongdoing, for which an action might be brought in any county in which injury resulted therefrom, and the cause of action did not arise until some person suffered injury or loss by reason of the wrongful act. As no actionable tort could have been committed until either person or property was injured, it seems quite clear that, if the words of the code are to be given their reasonable meaning, the venue of the action was in the county where the tort was in fact committed by the infliction of injury, as well as in the county where the tort-feasor resided. There may be a continuing species of wrongdoing that only becomes actionable when injury results therefrom, and in such a state of case we know of no reason why the venue of the action should not lie in the county where the overt act of wrongdoing, if we may so term it, is committed. A tort is nothing more than an injury or wrong for which a civil action may be brought by the injured party against the wrongdoer, and, to give full effect to the Code provision that the action to recover damages may be brought in the county where the tort was committed, it should be construed to mean that it may be brought in that county in which the injury or wrong complained of was committed. To give to this section the construction contended for by appellant would in many instances confine the jurisdiction to the county of the defendant's residence, when it was intended that it might also be brought in the county where the person or property was in fact injured, which is usually the county of the residence of the complaining party. If it had been intended to limit the jurisdiction to the county in which the corporation resided or had its chief office, there would have been no reason for inserting the provision that the action might also be brought in the county where the tort was committed; and, as in the present case, the tort could not have been committed in any other county than that in which the injury complained of occurred, we have no doubt that the Christian circuit court had jurisdiction."* (Peaslee-Gaulbert Co., at 771-772.)

The *Peaslee* holding was later reaffirmed in *Graham v. John R. Watts & Son, Ky., 36 S.W.2d 859, 860*

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[10]All Appellees except Kenny Randolph were called to testify in the trial of this action. Randolph's testimony was presented by video deposition at trial.

[11]This section also applies to Appellee Eugene Jackson, as well as, the Ryan Defendants.

(1931) a suit for fraud and deceitful misrepresentation (*"the tort, if one was committed, occurred at the place where plaintiff's injury was inflicted and his damage sustained"*). Because Judy Taylor's claim in this action involves precisely the same wrongdoing, i.e., 'fraud and deceit' the *Graham* Court's reasoning is of special relevance.

> *"...[2] Taking up first question(1), it may be stated with absolute verity that one guilty of fraud practiced upon another, whereby the latter is induced to act differently from what he otherwise would, to his injury and damage, is liable to the one so acting thereon for the damage sustained, unless he is relieved by some other principle of law, none of which is involved in this case. One of the most common species of fraud coming within the general principle stated is that of misrepresentations, or false representations directed to the defrauded person,..."* Graham at 861.

The *Graham* Court, thus had no hesitancy in finding venue to be proper in the county wherein the plaintiff was injured, i.e., the county wherein the farmer purchased and planted the defective (misrepresented) seed and not the County wherein the seed was created or marketed. Similarly, the tort complained of in this case resulted in injury and damage to Judy Taylor in Jefferson County, particularly given the fact that Jim Ryan, President and CEO of Ryan Horse Company, suborned perjury by testifying he and/or Ryan Horse Company did not know the whereabouts of the horses when they were at that very moment, in his actual possession.

Before the Trial Court, Ryans relied on the case of *Copass v. Monroe County Medical Foundation, Inc., 900 S.W.2d 617 (1995),* in support of their Motion that venue is improper in Jefferson County. *Copass* provides no precedent in this case. In *Copass*, the Court of Appeals held the plaintiff could not sue two separate medical providers, one in Jefferson County and one from Monroe County, in the same action in Jefferson County. The distinction in *Copass* which renders it inapplicable to this action, was the plaintiff's allegation of two separate injurics - one occurring in Jefferson County and the other occurring in Monroe County. Understandably, the *Copass* court required the plaintiff to sue the Jefferson County defendant for the injury occurring in that county, in Jefferson County, and likewise, the Monroe County defendant for the separate injury occurring in Monroe County, in Monroe County.

In this case, Judy Taylor has sued a number of defendants for a single injury which injury occurred in Jefferson County, Kentucky.[12] No injury occurred to Judy Taylor in Bullitt County or in Hardin County as Appellees argued (R.A. 552-559; 570-572), but rather in Jefferson County, where the Appellees were properly summonsed.

VII.
VENUE FOR A CONVERSION ACTION IS PROPER IN THE COUNTY WHEREIN THE PROPERTY WAS CONVERTED

In the case of *Hileman v. Day Poros Lumber Co., Ky., 64 S.W. 419 (1901)* the court found venue proper in Letcher County against Breathitt County defendants in a suit alleging plaintiff's property (logs) were taken from them in Letcher County. Thus, the injury incident to the tort of conversion was found to have occurred in the county in which the property was taken, i.e., where first converted. In this case, Jefferson County is the county wherein Judy Taylor's horses were taken. Jefferson County is thus, the appropriate venue.

CONCLUSION

Appellee Kenny Randolph engaged in intentional fraudulent misrepresentations as an agent and co-conspirator of Lisa dn Jeff Burgess. His actions intentionally caused injury to a Kentucky resident while she was physically located in Kentucky. The Trial Court's initial ruling declining Randolph's Motion to Dismiss on jurisdictional grounds, was proper. The second Order sustaining Randolph's Motion to Dismiss, was error.

Appellee Eugene Jackson waived his right to seek dismissal on the basis of improper venue by failing to seek a judicial determination for three years, while at the same time, actively participating in the litigation. The Trial Court's initial (10/30/98) Order finding he had waived venue was correct

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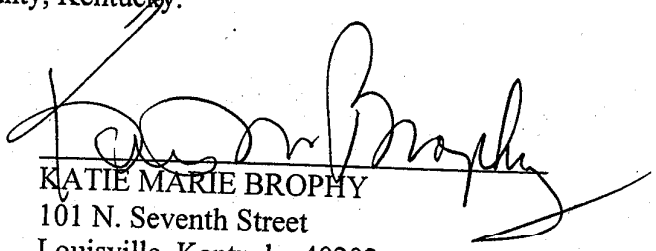
[12] *"The injury occurred in Webster County and appellants filed the suit there. It was their option, and it cannot be changed to any other county other than by agreement or by compliance with the provision of KRS 452.010, et".* Blankenship v. Watson, Ky. App., 672 S.W.2d 941, 944 (1984).

and should be reinstated. Further, Jackson like the Ryans, was properly served in Jefferson County for purposes of State law because the tort occurred in Jefferson County, Kentucky and only in Jefferson County, Kentucky. Appellant, Judy Taylor, was injured in Jefferson County, Kentucky and only in Jefferson County, Kentucky. And further, as to the Ryans, Defendants against a Federal statute, State venue defenses are inapplicable and thus, Federal venue statutes both control and authorize the filing of the action in Jefferson County, Kentucky.



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