

Court of Common Pleas of Philadelphia County
Trial Division

Civil Cover Sheet

For Prothonotary Use Only (Docket Number)

MARCH 2024

02568

E-Filing Number: 2403050347

PLAINTIFF'S NAME G&B AMUSEMENTS LLC		DEFENDANT'S NAME THE CITY OF PHILADELPHIA	
PLAINTIFF'S ADDRESS 2450 GETTYSBURG ROAD, SUITE A CAMP HILL PA 19148		DEFENDANT'S ADDRESS 1400 JOHN F. KENNEDY BLVD. PHILADELPHIA PA 19107	
PLAINTIFF'S NAME TARIQ JALIL		DEFENDANT'S NAME THE COUNCIL OF THE CITY OF PHILADELPHIA	
PLAINTIFF'S ADDRESS 2101 S. 10TH ST. PHILADELPHIA PA 19148		DEFENDANT'S ADDRESS 1400 JOHN F. KENNEDY BLVD. PHILADELPHIA PA 19107	
PLAINTIFF'S NAME		DEFENDANT'S NAME	
PLAINTIFF'S ADDRESS		DEFENDANT'S ADDRESS	
TOTAL NUMBER OF PLAINTIFFS 2	TOTAL NUMBER OF DEFENDANTS 2	COMMENCEMENT OF ACTION <input checked="" type="checkbox"/> Complaint <input type="checkbox"/> Petition Action <input type="checkbox"/> Notice of Appeal <input type="checkbox"/> Writ of Summons <input type="checkbox"/> Transfer From Other Jurisdictions	
AMOUNT IN CONTROVERSY <input type="checkbox"/> \$50,000.00 or less <input checked="" type="checkbox"/> More than \$50,000.00	COURT PROGRAMS <input type="checkbox"/> Arbitration <input type="checkbox"/> Mass Tort <input type="checkbox"/> Commerce <input type="checkbox"/> Settlement <input type="checkbox"/> Jury <input type="checkbox"/> Savings Action <input type="checkbox"/> Minor Court Appeal <input type="checkbox"/> Minors <input checked="" type="checkbox"/> Non-Jury <input type="checkbox"/> Petition <input type="checkbox"/> Statutory Appeals <input type="checkbox"/> W/D/Survival <input type="checkbox"/> Other: _____		
CASE TYPE AND CODE E1 - EQUITY - NO REAL ESTATE			
STATUTORY BASIS FOR CAUSE OF ACTION			
RELATED PENDING CASES (LIST BY CASE CAPTION AND DOCKET NUMBER)		IS CASE SUBJECT TO COORDINATION ORDER? YES NO	
		FILED PRO PROTHY MAR 21 2024 G. IMPERATO	
TO THE PROTHONOTARY: Kindly enter my appearance on behalf of Plaintiff/Petitioner/Appellant: <u>G&B AMUSEMENTS LLC , TARIQ JALIL</u> Papers may be served at the address set forth below.			
NAME OF PLAINTIFF'S/PETITIONER'S/APPELLANT'S ATTORNEY MATTHEW H. HAVERSTICK		ADDRESS KLEINBARD LLC THREE LOGAN SQ 1717 ARCH ST 5TH FLOOR PHILADELPHIA PA 19103	
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SUPREME COURT IDENTIFICATION NO. 85072		E-MAIL ADDRESS mhaverstick@kleinbard.com	
SIGNATURE OF FILING ATTORNEY OR PARTY MATTHEW HAVERSTICK		DATE SUBMITTED Thursday, March 21, 2024, 03:54 pm	

Matthew H. Haverstick (No. 85072)
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Amusements LLC and Tariq Jalil*

G&B AMUSEMENTS LLC
2450 Gettysburg Road, Suite A,
Camp Hill, PA 17011

and

TARIQ JALIL,
2101 S. 10th St.,
Philadelphia, PA 19148

Plaintiffs,

v.

THE CITY OF PHILADELPHIA,
1400 John F. Kennedy Blvd.,
Philadelphia PA 19107

and

**THE COUNCIL OF THE CITY OF
PHILADELPHIA,**
1400 John F. Kennedy Blvd.,
Philadelphia PA 19107

Defendants.

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS

_____Term, 2024

No.

NOTICE TO DEFEND

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

**PHILADELPHIA BAR ASSOCIATION
Lawyer Referral and Information Service
1101 Market Street, 11th Floor
Philadelphia, PA 19107
(215) 238-6333
TTY (215) 451-6197**

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademias, la corte puede decidir a favor del damandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades o otros derechos importantes para usted.

LLEVA ESTA DEMANDA A UN ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR TAL SERVICIO. VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCION SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

**ASOCIACION DE LICENCIADOS DE FILADELFA
Servicio De Referencia E Informacion Legal
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G&B AMUSEMENTS LLC

2450 Gettysburg Road, Suite A,
Camp Hill, PA 17011

and

TARIQ JALIL,

2101 S. 10th St.,
Philadelphia, PA 19148

Plaintiffs,

v.

THE CITY OF PHILADELPHIA,

1400 John F. Kennedy Blvd.,
Philadelphia PA 19107

and

**THE COUNCIL OF THE CITY OF
PHILADELPHIA,**

1400 John F. Kennedy Blvd.,
Philadelphia PA 19107

Defendants.

PHILADELPHIA COUNTY
COURT OF COMMON PLEAS

_____Term, 2024

No.

COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND SPECIAL RELIEF

Plaintiffs G&B Amusements LLC, and Tariq Jalil, by and through their undersigned counsel, submit this Complaint and, in support, allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction under Section 931(a) of the Judicial Code, *see* 42 Pa.C.S. § 931(a).

2. Venue is proper in this Court under Section 931(c) of the Judicial Code, *see* 42 Pa.C.S. § 931(c).

PARTIES

3. Plaintiff G&B Amusements LLC is a Pennsylvania corporation, with its principal business address at 2450 Gettysburg Road, Suite A, Camp Hill, Pennsylvania 17011.

4. Plaintiff Tariq Jalil is a Pennsylvania resident and a franchise owner of 7-11 Store #26179 located at 2101 S. 10th St., Philadelphia, Pennsylvania 19148.

5. Defendant City of Philadelphia is a political subdivision of the Commonwealth of Pennsylvania organized as a home rule municipality under Article IX of the Pennsylvania Constitution. *See* Pa. Const. art. IX, § 2.

6. Defendant Council of the City of Philadelphia is an integral subpart of the City of Philadelphia, vested with the legislative power of the City of Philadelphia, *see* 53 P.S. § 12521; *see also* Phila. Home Rule Charter, Art I, § 1-101 (setting forth the general powers of City Council under the Philadelphia Home Rule Charter).

STATEMENT OF MATERIAL FACTS

A. The Crimes Code’s prohibition against gambling devices and the legality of POM Games under that provision.

7. Subject to certain exceptions, Section 5513 of the Crimes Code generally prohibits the manufacture, sale, distribution, and maintenance of gambling devices. *See* 18 Pa.C.S. § 5513.

8. Under this provision, an amusement device in which the element of chance predominates over that of skill is a prohibited gambling device; conversely, skill games, where the outcome of a game is determined predominantly by a player’s skill are legal amusement devices under Section 5513.

9. Pennsylvania courts have applied the aforementioned skill-versus-chance delineation for over a century to determine whether an amusement device is a legal game of skill, or an illegal gambling device.

10. For over a decade, electronic skill-based video game machines developed and manufactured by Pace-O-Matic, which are marketed under the trade name “Pennsylvania Skill” (hereinafter, the “POM Game”), have been distributed in the Commonwealth of Pennsylvania.

11. Although some initial questions existed regarding the legality of the POM Games when they were first introduced, any doubt in this respect was effectively settled in 2014, when the Beaver County Court of Common Pleas held that the devices were not gambling devices under Section 5513 of the Crimes Code. *See In re: Pace-O-Matic Equipment, Terminal I.D. No. 142613*, M.D. No. 965-2013,

2014 WL 12999182 (C.P. Beaver Dec. 23, 2014). A copy of the Beaver County Court of Common Pleas decision is attached hereto as Exhibit A.

12. In the intervening decade, no court in Pennsylvania has ever held the POM Game is an illegal gambling device.

13. To the contrary, every court that has been presented with the issue, has held that POM's Games are legal games of skill under the Crimes Code. For example, this year alone, the Courts of Common Pleas in Blair, Dauphin, Luzerne, Monroe, and York Counties all concluded that the POM Game is a legal skill game. *See Com. v. \$923.00 U.S. Currency*, No. CP-07-MD-599-2022, order (C.P. Blair Sept. 8, 2023); *In re: Six Pennsylvania Skill Amusement Devices and One Ticket Redemption Terminal*, No. 2022-SU-001993, order (C.P. York Aug. 22, 2023); *In re Four Pennsylvania Skill Amusement Devices*, No. 2022-08552, order (C.P. Luzerne, June 5, 2023); *Commonwealth v. \$14,611.00 U.S. Currency and Six Pennsylvania Skill Video Gambling Devices*, No. CP-67-MD-2529-2022, order (C.P. York Apr. 17, 2023); *In re Three Pennsylvania Skill Amusement Devices*, No. 2022-CV-06333-MD, 2023 WL 2666472 (C.P. Dauphin Mar. 23, 2023); *In re Four Pennsylvania Skill Amusement Devices and One Ticket Redemption Terminal Containing \$18,692.00 in U.S. Currency*, No. 6673 Civil 2021, order (C.P. Monroe Feb. 8, 2023); *Commonwealth v. L&M Music Co.*, No. 1771 Criminal 2022 (C.P. Monroe June 1, 2023). Copies of the Blair, Dauphin, Luzerne, Monroe (civil and criminal), and York County decisions are attached as Exhibits B-G.

14. And most recently, an *en banc* panel of the Commonwealth Court unanimously affirmed the decision of the Dauphin County Court of Common Pleas and held that the POM Game is a legal skill game and is not a slot machine under the Crimes Code. *See In re: Three Pennsylvania Skill Amusement Devices, One Green Bank Bag Containing \$525.00 in U.S. Currency, and Seven Receipts*, 306 A.3d 432 (Pa. Cmwlth. 2023) (Exhibit H).

15. Of equal import, two years earlier, a different *en banc* panel of the Commonwealth Court also held that the POM Game is not subject to the Pennsylvania Race Horse Development and Gaming Act, *see* 4 Pa.C.S § 1101, *et seq.*, and falls entirely outside the purview of that statutory scheme. *See POM of Pennsylvania, LLC v. Department of Revenue*, 221 A.3d 717, 735 (Pa. Cmwlth. 2019) (“[W]e hold that even if the POM Game were considered an illegal gambling device, the Gaming Act does not give the Gaming Control Board the power to regulate illegal gambling devices.”).

16. In short, these two Commonwealth Court decisions establish two important principles of statewide application: *first*, the Gaming Act is inapplicable to the POM Games, and *second*, the POM Games are subject to the settled analytical framework established under Section 5513 of the Crimes Code and, under that provision, the POM Games are legal games of skill.

17. Indeed, following the *In re Three Pennsylvania Skill* decision, both the Gaming Control Board and Pennsylvania State Police, Bureau of Liquor Control

Enforcement have acknowledged (in filings in other litigation) that the POM Game is now legal under Section 5513.

18. Following the Beaver County decision, POM expended significant time, money and resources in marketing, advertising and otherwise promoting the POM Game throughout Pennsylvania, including in the City of Philadelphia.

19. As a result of these efforts and its substantial investments, POM—acting through its route operators responsible for distributing the Skill Game—has entered into countless contracts with locations for the placement of the POM Games within their premises.

20. Among the route operators who have entered into such agreements is Plaintiff G&B Amusements LLC, which, in turn, has entered into contractual arrangements for the placement of the POM Games at numerous locations throughout the City of Philadelphia.

21. Indeed, given that the distribution and placement of POM Games is a substantial component of its enterprise, Plaintiff G&B Amusements LLC's continued commercial viability depends, in large part, on the continued operation of POM Games within the City of Philadelphia.

22. Plaintiff Tariq Jalil's 7-11 Store #26179 is among the locations that has entered into such contracts with G&B Amusements LLC.

23. Plaintiff Tariq Jalil derives substantial income from the POM Games and, having offered the POM Games to patrons at 7-11 Store #26179 for several

years, has arranged its business in reasonable reliance on its ability to continue offering those devices.

24. In short, therefore, the POM Games are indispensable to Plaintiff Tariq Jalil's operation of 7-11 Store #26179.

25. Plaintiff Tariq Jalil's 7-11 Store #26179 holds a Commercial Activity License issued by the City of Philadelphia pursuant to the City Code.

26. Plaintiff's Commercial Activity Licenses were issued to it only after it satisfied certain requirements set forth in the City Code and was conditioned upon Plaintiff's continued adherence to those prerequisites.

B. Chapter 9-5900 of the Philadelphia City Code.

27. On January 20, 2022, City Council adopted Bill No. 210923, which amended Title 9 of The Philadelphia Code, entitled "Regulation of Businesses, Trades and Professions," by adding a new Chapter, entitled "Prohibition on Certain Gambling Machines and Skills Games."

28. Bill No. 210923 was not returned to City Council with the Mayor's signature within twenty days of its passage and, thus, pursuant to Section 2-202 of the Philadelphia Home Rule Charter, it became effective on February 3, 2022.

29. The newly-enacted City Ordinance consisted of a single sentence, providing that: "It shall be unlawful for a business to operate any casino-style or skill game that accepts cash payment for the chance of a cash reward and is not otherwise regulated by the State of Pennsylvania." Phila. City Code, § 9-5901.

30. Given that the POM Game is “regulated by the State of Pennsylvania”—namely, by the Crimes Code—no attempt has ever been made to enforce Section 9-5901 of the City Code against Plaintiffs, or any other location housing a POM Game.

31. Indeed, the City Solicitor’s Office acknowledged, in writing, that Bill No. 210923 did not apply to the POM Game. A copy the City Solicitor’s Letter is attached hereto as Exhibit I.

32. On October 12, 2023, Bill No. 230699 was introduced in City Council (hereinafter, the “First Proposed Ordinance”), which sought to amend Section 9-5901 by deleting the substance of the current provision in its entirety and replacing it with a general proscription against all “gambling or skill-based cash payout devices,” except at facilities licensed by the Pennsylvania Gaming Act. A copy of Proposed Section 9-5901 is attached hereto as Exhibit J.

33. Among other things, the First Proposed Ordinance, provided that “[e]xcept at licensed facilities as authorized and defined in the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S § 1103, it is unlawful to operate a gambling or skill-based cash payout device or to allow the operation of such a device at a business location.”

34. In addition, Subsection Four of the First Proposed Ordinance provided that “[n]o person may operate a business at which a gambling or skill-based cash payout device is present.”

35. Under the First Proposed Ordinance, a “[g]ambling or skill-based cash payout device[,]” was broadly defined as “a device that accepts cash payment for the chance of a cash reward in connection with playing one or more casino-style game, one or more skill-based game, or a combination of such games.”

36. Notably, however, the First Proposed Ordinance does not define “casino-style game,” or “skill-based game.”

37. On December 14, 2023, by a vote of 14-1, the Philadelphia City Council voted to adopt the First Proposed Ordinance. The legislation was not signed by Mayor Kenney before his term expired, however, and the First Proposed Ordinance expired.

38. On January 25, 2024, Bill No. 240010 was introduced in City Council (hereinafter, the “Second Proposed Ordinance”). On March 7, 2024, the Second Proposed Ordinance was amended in minor fashion not germane to the instant action.

39. Like the First Proposed Ordinance, the Second Proposed Ordinance sought to amend Section 9-5901 by deleting the substance of the current provision in its entirety and replacing it with a general proscription against all “gambling or skill-based cash payout devices,” except at facilities licensed by the Pennsylvania Gaming Act. A copy of the Second Proposed Ordinance, as amended, is attached hereto as Exhibit K.

40. The language of the First and Second Proposed Ordinances is identical, with the only difference being the Second Proposed Ordinance does not apply to

“any location operating under a valid Commonwealth license to sell alcohol that has 20 or more seats readily available and in place for regular use by customers to consume food and beverages[.]” *See id.* at §(2)(c)(.2).

41. Although hopelessly vague, the Second Proposed Ordinance—if enacted—would seemingly apply to POM Games.

42. Indeed, upon information and belief, the Second Proposed Ordinance was introduced with the precise goal of targeting POM Games.

COUNT I
Declaratory Judgment-Violation of Section 13133 of the First Class City
Home Rule Act.

43. Plaintiffs incorporate by reference the foregoing paragraphs as if the same were set forth at length herein.

44. Because they are creatures of the State with no inherent powers of their own, municipalities possess only such powers of government as are expressly granted to them under the State Constitution or by the General Assembly.

45. Among the various limitations on the powers conferred on the City of Philadelphia is the First Class City Home Rule Act,¹ which provides, in relevant part, that “no city shall exercise powers contrary to, or in limitation or enlargement of, powers granted by acts of the General Assembly which are . . . [a]pplicable in every part of the Commonwealth.” 53 P.S. § 13133(b).

46. Statutes relating to substantive matters of statewide concern, such as the health, safety, security and general welfare of all inhabitants of the

¹ Act of 1949, April 21, P.L. 665, as amended, 53 P.S. §§ 13101–13116, 13131, 13133, 13155–13157.

Commonwealth are necessarily “acts of the General Assembly which are . . . [a]pplicable in every part of the Commonwealth.” *Id.*

47. Because gambling and gaming affect the health, safety, security and general welfare of all Commonwealth inhabitants, under the First Class City Home Rule Act, the City of Philadelphia is prohibited from enacting ordinances that in any way contradict, supplement or augment Section 5513 of the Crimes Code, or the Gaming Act.

48. The Second Proposed Ordinance, by its every terms, seeks to enlarge Section 5513’s prohibition against gambling devices, to include “skill-based cash payout devices[,]” and, thus, constitutes an impermissible exercise of authority under the First Class City Home Rule Act.

49. The Second Proposed Ordinance is contrary to Section 5513 because it seeks to prohibit that which Section 5513 permits.

50. Similarly, insofar as it seeks to subject “skill-based cash payout devices” to licensure under the Gaming Act, the Second Proposed Ordinance would enlarge the authority of the Gaming Control Board, in violation of the First Class City Home Rule Act.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in its favor: (a) declaring the Second Proposed Ordinance invalid under the First Class City Home Rule Act, *see* 53 P.S. § 13133; and (b) permanently enjoying the enforcement of the Second Proposed Ordinance.

Count II
Declaratory Judgment-Violation of Article IX, Section 2 of the
Pennsylvania State Constitution.

51. Plaintiffs incorporate by reference the foregoing paragraphs as if the same were set forth at length herein.

52. Article IX, Section 2 provides that “[a] municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.” Pa. Const. art. IX, § 2.

53. As interpreted by Pennsylvania’s appellate courts, Article IX, Section 2 prohibits home rule municipalities like the City of Philadelphia from exercising powers in violation of basic preemption principles, which provide that if the General Assembly has preempted a field, the state has retained all regulatory and legislative power for itself and no local legislation in that area is permitted.

54. The regulation of gambling and gaming devices are matters of statewide concern—and, in fact, have been regulated by statute for nearly two centuries—Section 5513 reflects an unmistakable legislative intent to preempt exercise of local authority over the subject matter.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in its favor: (a) declaring the Second Proposed Ordinance invalid as preempted by the Crimes Code; and (b) permanently enjoying the enforcement of the Second Proposed Ordinance.

Count III
Declaratory Judgment-Violation of Article I, Section 17 of the
Pennsylvania State Constitution.

55. Plaintiffs incorporate by reference the foregoing paragraphs as if the same were set forth at length herein.

56. Article I, Section 17 of the Pennsylvania State Constitution provides, in relevant part, that “[n]o *ex post facto* law, nor any law impairing the obligation of contracts . . . shall be passed.” Pa. Const. art I, § 17.

57. In the context of the above constitutional provision, the term “law” includes municipal ordinances.

58. The Second Proposed Ordinance violates Article I, Section 17 in two discrete ways.

59. *First*, Plaintiff Tariq Jalil received a Commercial Activity License after satisfying then-existing criteria previously for its issuance.

60. Since that time, Plaintiff Tariq Jalil has been subject to the various requirements for maintaining that license.

61. The Second Proposed Ordinance, however, retroactively attaches additional conditions on the Commercial Activity Licenses obtained by Plaintiff Tariq Jalil and imposes penalties for any violation of those conditions.

62. As such, the Second Proposed Ordinance is an *ex post facto* law in violation of Article I, Section 17 of the State Constitution.

63. *Second*, the Second Proposed Ordinance impairs each of the Plaintiffs’ above-described contractual relationships.

64. In this regard, any law which enlarges, abridges, or in any manner changes the intention of the parties as evidenced by their contract, imposing conditions not expressed therein or dispensing with the performance of those which are a part of it, “impair[s] the obligations” of such contract—regardless of whether the law affect the validity, construction, duration, or enforcement of the contract.

65. Here, the Second Proposed Ordinance would interfere with a valid contract executed between Plaintiff Tariq Jalil and Plaintiff G&B Amusements LLC, as it would unilaterally and immediately prohibit the POM Games from being maintained at 7-11 Store # 26179.

66. Furthermore, although laws that incidentally destroy existing contracts will be upheld if they are passed pursuant to a legitimate exercise of the police power, the Second Proposed Ordinance is not reasonably necessary to protect the health and welfare of the citizens and, thus, this exception to the general proscription against impairment of contracts is inapplicable.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in its favor: (a) declaring the Second Proposed Ordinance invalid under Article I, Section 17 of the Pennsylvania Constitution; and (b) permanently enjoining the enforcement of the Second Proposed Ordinance.

COUNT IV
Declaratory Judgment-Violation of Plaintiffs’ Vested Property Interests
under Article I, Section 1 of the Pennsylvania State Constitution.

67. Plaintiffs incorporate by reference the foregoing paragraphs, as if the same were set forth at length herein.

68. Under Article I, Section 1 of the Pennsylvania Constitution all persons have a constitutionally protected right to the enjoyment of a vested property interest.

69. Plaintiff G&B Amusements LLC has expended considerable effort, time, and resources to procure the POM Games and offer them for placement in various locations within the City of Philadelphia.

70. Plaintiff G&B Amusements LLC has also organized and structured its commercial activity in reasonable reliance on its continued ability to continue in this legal commercial enterprise.

71. Similarly, Plaintiff Tariq Jalil devoted substantial effort, time, and resources to obtain its Commercial Activity License and enter into contracts to offer POM Games to the respective patrons and customers at 7-11 Store # 26179.

72. Furthermore, Plaintiff Tariq Jalil has ordered his affairs in reasonable reliance on his continued ability to operate the POM Games on the premises at 7-11 Store # 26179 without jeopardizing its Commercial Activity License.

73. All Plaintiffs, therefore, have a vested property interest in the POM Games and, Plaintiff Tariq Jalil has a similar vested interest in its Commercial Activity License.

74. In order to pass constitutional muster under Article I, Section 1 of the State Constitution, any governmental act that interferes with a person's vested property interest must satisfy the heightened rational basis test articulated in *Gambone v. Commonwealth*, 101 A.2d 634 (Pa. 1954).

75. Specifically, under *Gambone*—the continued vitality of which was recently reaffirmed by the State Supreme Court—“[a] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. *Gambone*, 101 A.2d at 637.

76. Thus, “[w]hile a state may regulate a business which affects the public health, safety, and welfare, it may not, through regulation, deprive an individual of his right to conduct a lawful business unless it can be shown that such deprivation is reasonably related to the state interest sought to be protected.” *Sec’y of Revenue v. John’s Vending Corp.*, 309 A.2d 358, 361 (Pa. 1973).

77. The Second Proposed Ordinance does not satisfy *Gambone*’s heightened rational basis test for two overarching reasons.

78. First, insofar as the Second Proposed Ordinance purports to be in furtherance of some as-yet undefined governmental interest in the health and safety of the citizens, the strictures it imposes are not narrowly tailored to achieve that objective.

79. Second, the Second Proposed Ordinance is unreasonable, unduly oppressive, and wholly “beyond the necessities”—unclear as they are—that may have prompted the legislation in the first instance.

80. As such, the Second Proposed Ordinance violates Article I, Section 1 of the State Constitution.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in its favor: (a) declaring the Second Proposed Ordinance unconstitutional under Article I, Section 1 of the State Constitution; and (b) permanently enjoining the enforcement of the Second Proposed Ordinance.

COUNT V
Declaratory Judgment-Violation of Article III, Section 32 of the State Constitution, Prohibiting Special Laws.

81. Plaintiffs incorporate by reference the foregoing paragraphs as if the same were set forth at length herein.

82. Subject to certain limited exceptions, Article III, Section 32 of the State Constitution generally prohibits enactment of “special laws,” which are laws that grant some special right, privilege, franchise, or immunity or impose some particular burden or disability on a specific person or a limited class of persons.

83. Although certain reasonable classifications made in furtherance of legitimate governmental interest are permissible, an enactment is an invalid special law if the classification it creates is arbitrary and unreasonable, not reasonably related to a valid legislative objective, lacks a substantial distinction for the classes created, or otherwise rests on a false or deficient classification that creates preference and establishes inequity.

84. The touchstone of the prohibition against special laws is that similarly situated persons must be treated similarly and, thus, a law may not confer special benefit or privilege upon one person or group and excluding others that are similarly situated.

85. Furthermore, to pass constitutional muster, the classification must be sufficiently flexible, such that it allows members to move into and out of the class.

86. Finally, while Article III, Section 32, by its plain terms, applies only to acts of the General Assembly, in *Schultz v. City of Philadelphia*, 122 A.2d 279 (Pa. 1956), the Pennsylvania Supreme Court held that the prohibition against special laws applies with equal force to local ordinances, as Philadelphia City Council does not have legislative powers beyond those that may be exercised by the General Assembly.

87. Against this backdrop, the Second Proposed Ordinance is an unconstitutional special law, as it unreasonably singles out “skill-based cash payout devices” for differential treatment.

88. This classification is arbitrary and not reasonably related to a valid legislative objective, as there is no coherent reason for treating such devices differently than other amusement devices, such as arcade games, Lottery kiosks, or ATM machines.

89. Furthermore, the Second Proposed Ordinance lacks a substantial distinction for the classes created—*i.e.*, “skill-based cash payout devices” versus other devices that are used for amusement, cash dispensation, or both—and, lacking any cogency, rests on a false or deficient classification that creates preference and establishes inequity.

90. Furthermore, given that the Gaming Act strictly regulates the number of facilities that may be licensed within the City of Philadelphia, the practical effect

of the Second Proposed Ordinance is to grant the privilege of housing “skill-based cash payout devices” to only a handful of entities.

91. Thus, in addition to its unreasonable classification in denying the right to operate “skill-based cash payout devices,” the Second Proposed Ordinance also grants special privileges to a limited and inflexible class, in violation of the constitutional proscription against special laws.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in its favor: (a) declaring the Second Proposed Ordinance unconstitutional under Article III, Section 32 of the State Constitution; and (b) permanently enjoying the enforcement of the Second Proposed Ordinance.

COUNT VI
Declaratory Judgment-Violation of the Takings Clause of Article I, Section 10 of the Pennsylvania State Constitution.

92. Plaintiffs incorporate by reference the foregoing paragraphs as if the same were set forth at length herein.

93. Article I, Section 10 of the State Constitution prohibits the taking of private property “without authority of law and without just compensation being first made or secured.” Pa. Const. art I, § 10.

94. Thus, even where the government’s interference with a private property interest passes muster under Article I, Section 1 and the attendant substantive due process considerations, Article I, Section 10 requires payment of just compensation for a taking of private property.

95. A “taking” of property occurs under Article I, Section 10 not only when there is a physical seizure or commandeering of private property, but also where the government acts to deprive a person of all or substantially all economic use of its property—*i.e.*, a “regulatory taking.”

96. The Second Proposed Ordinance is a regulatory taking because, if finally enacted, it would render the POM Games essentially useless.

97. Furthermore, Plaintiffs have expended substantial resources in procuring, distributing, and offering the POM Games—and have done so in reasonable reliance on the continued effect of Section 5513 of the Crimes Code.

98. Plaintiffs’ investment-backed expectations are, therefore, sufficient to sustain a claim for a regulatory taking.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in its favor: (a) declaring the Second Proposed Ordinance a regulatory taking under Article I, Section 10 of the State Constitution; and (b) ordering the City to compensate Plaintiffs for the value of the property taken.

Respectfully submitted,

Dated: March 21, 2024

/s/ Matthew H. Haverstick
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*Attorneys for Plaintiffs G&B Amusements
LLC and Tariq Jalil*

VERIFICATION

I, Brent Bauman, owner of Plaintiff G&B Amusements LLC, verify that the statements made in the foregoing Complaint are true and correct to the best of my knowledge, information, and belief. I make this verification subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Dated: _____

3/21/24



Brent Bauman

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

Dated: March 21, 2021

KLEINBARD LLC

/s/ Matthew H. Haverstick

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY

PENNSYLVANIA

CRIMINAL DIVISION

In re:

PACE-O-MATIC, INC. EQUIPMENT

TERMINAL I.D. NO. 142613

:
:
:
:
:
:
:

M.D. 965-2013

MEMORANDUM OPINION AND ORDER

H. KNAFELC, J.

December 23rd, 2014**I. PROCEDURAL HISTORY**

On November 19, 2013, agents of the Pennsylvania Bureau of Liquor Control Enforcement seized a Pace-O-Matic, Inc. video game device from the American-Italian Club located in Aliquippa, Beaver County. The manufacturer of the device filed a timely Petition for Return of Seized Property and requested a post-seizure hearing pursuant to Pennsylvania Rule of Criminal Procedure 588. This Court held a hearing on the matter on September 26, 2014. The sole purpose of that hearing was to gather evidence as to whether the confiscated property constituted a gambling device per se. The evidence fails to demonstrate that the machine is a gambling device per se, and Petitioner's motion for its return is GRANTED.

During the hearing, this Court heard testimony on the operation of the confiscated device. The Court heard testimony on two issues: first, whether Petitioner was entitled to lawful possession of the res; and second, whether the games installed on the device were games of

chance or games of skill. Both parties stipulated that the other elements of a gambling device per se, consideration and reward, were satisfied. The device requires a player to put in cash in order to access the games installed on the device. Successful play has the potential to reward a player with more credits than he or she put into the device. Thus, this Court is tasked only with resolving whether the games on the device are games of skill or games of chance. Because of the level of interactivity between the game and the player, as well as the gameplay mechanics, the evidence fails to show that the games included on the device—Tic-Tac-Toe, unlockable bonus game, and the “Follow-Me” mini-game—are anything other than games of skill. The device is therefore not a gambling device per se and shall be returned to Pace-O-Matic, Inc.

II. STATEMENT OF FACTS

The property seized in this case is a coin-operated table top machine that offers a Tic-Tac-Toe puzzle, an unlockable bonus game, and a “Follow-Me” mini-game. The player uses a touch screen navigate through the system. A player initiates the game by inserting money into the device. A player can place a bet of 40, 80, 120, 160, or 200 “points.” One point equals one cent. A player then proceeds to select one of three themes. These are “Bombs and Bombshells,” “Pirates Prize,” and “Cocktail Cove.” While the graphics and some pay amounts differ depending on which theme the player chooses, the gameplay is functionally equivalent among the three themes. The player has access to the same features regardless of which theme he or she chooses, and the themes will thus be treated interchangeably.

The first game that the player interacts with is the Tic-Tac-Toe puzzle. This is the primary game included on the device, and a player cannot access the other features of the game without first playing the Tic-Tac-Toe puzzle. Upon initiating gameplay, the game spins each of the nine reels arranged in a three-by-three grid on the screen. After the reels stop spinning, the

player has ten seconds to select one of the nine cells to change a symbol in that position to a wild symbol. The player is tasked with choosing the most advantageous spot to place the wild.

Whether one spot is more advantageous than another depends on the value of the symbols in the row, column, or diagonal that was completed, and whether completion of one row, column, or diagonal completes another. If the player does not make a selection in the allotted time, no wild symbol will be placed on the screen. Because a random number generator excludes an automatic winning game, failure to place the wild will always result in a loss for the player. Each game will have at least one spot where placing the wild will result in a nonzero score, and no game will be completely unwinnable.

A player has the opportunity to access a bonus game while playing the Tic-Tac-Toe puzzle. Certain symbols in the three-by-three grid have the potential to unlock the bonus game. A player must align three bonus symbols in a row, column, or diagonal on the three-by-three grid. Where the player manages to place a wild in the proper position, the game awards the player with a bonus shooting game. There are slight differences in the bonus games depending on the theme chosen, but the core gameplay mechanics of the three bonus games are virtually identical, and will be treated in the same manner. The bonus games are shooting-style games. Targets appear at random positions across the screen, and the object of the bonus game is to target all of the symbols on the touch screen during the time allotted (30 or 45 seconds, depending on the theme chosen). The speed with which the targets appear on the screen and the fact that they are scattered about the screen provides the game's challenge. The player is rewarded with points depending on how many of the symbols he or she was able to target and touch.

If, during the Tic-Tac-Toe game, the player wins an amount that is less than 104% of the purchase price to play the game, the player is afforded the option of selecting the "Follow-Me" mini-game. A player who chooses to proceed with the Follow-Me feature is presented with a three-by-three grid of colored dots. Essentially, the Follow-Me feature is a memory game. The dots flash in a random sequence which the player must repeat. Starting with one circle flashing, the player will need to follow the correct sequence for a total of forty rounds of play, with each sequence adding another circle. If a player successfully follows the pattern each time, the player is awarded with 104% of his or her original wager. For example, if the player had wagered 40 credits, successful completion of the Follow-Me mini-game would result in a payout of 42 credits.

III. LEGAL BACKGROUND AND ANALYSIS

A motion for return of property pursuant to Rule 588 is intended to return goods to a person aggrieved by a search and seizure based upon the right to lawful possession and the non-contraband status of the goods. Pa. R. Crim. P. 588; *Com. v. Pomerantz*, 573 A.2d 1149, 1150 (Pa. Super. Ct. 1989). Rule 588 provides, in pertinent part, the following:

Rule 588. Motion for Return of Property

- (A) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he or she is entitled to lawful possession thereof. Such motion shall be filed in the court of common pleas for the judicial district in which the property was seized.
- (B) The judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property to be forfeited.

A petitioner's motion for return of property must, at a minimum, allege that the petitioner is entitled to lawful possession of the property at issue. *Pomerantz*, 573 A.2d at 1150. The

petitioner must prove that he is entitled to possession by a preponderance of the evidence.

Beaston v. Ebersole, 986 A.2d 876, 881 (Pa. Super. Ct. 2009). A preponderance of evidence standard is tantamount to a “more likely than not” standard. *Com. v. \$6,425.00 Seized from Esquilin*, 880 A.2d 523 (Pa. 2005).

Where a petitioner meets the minimal burden of establishing entitlement to lawful possession, unless there is countervailing evidence to defeat the claim, the moving party is entitled to the return of the identified property. *Ibid.* The Commonwealth must prove the per se nature of machines seized as gambling devices by a preponderance of the evidence. *Com. v. Irwin*, 636 A.2d 1106, 1107 (Pa. 1993).

A machine is a gambling device per se if three elements are present: (1) consideration, (2) result determined by chance rather than skill, and (3) reward. Because both the Petitioner and the Commonwealth have stipulated that the machine meets the consideration and reward elements, only the second element—whether the result is determined predominantly by chance or skill—will be addressed in depth.

That successful play is determined by chance rather than skill is an element essential to a finding that a machine is a gambling device per se. *Com. v. Two Elec. Video Poker Game Machs.*, 465 A.2d 973, 977 (Pa. 1983). Courts must determine in each case the relative amounts of skill and chance present in the play of each machine and the extent to which skill or chance determines the outcome. *Ibid.* In order for a game to constitute gambling, it must be a game where chance predominates rather than skill. *Ibid.* A showing of a large element of chance, without more, is not sufficient, and the outcome need not be wholly determined by skill in order for a machine to fall outside the gambling per se category. *Ibid.* The mere fact that a machine

involves a substantial element of chance is insufficient to find that a machine a gambling device.

Ibid.

A game decided predominately on the basis of probability rather than any real input of skill from a player will be a game of chance. The level of interactivity and the consequences of a player's choices in playing the game are relevant in determining whether the game is one of chance or skill. *See id.* at 976 (noting that while skill, in the form of knowledge of probabilities, can improve a player's chances of winning a video poker game, chance ultimately determines the outcome because chance determines the card dealt and the cards from which one can draw); compare *Com. v. Dent*, 992 A.2d 190 (Pa. Super. Ct. 2010) (holding that although skill can determine the outcome in a poker game, players are still subject to defeat at the turn of the cards), with *Am. Amusements Co. v. Neb. Dep't of Revenue*, 807 N.W.2d 492 (Neb. 2011) (noting that because the gameplay in a tic-tac-toe puzzle was under the control of the player and not the machine, the game was one of skill rather than chance).

A. Lawful Possession

The initial burden is on the Petitioner, Pace-O-Matic, Inc., to prove that it is entitled to lawful possession of the res at issue by a preponderance of the evidence standard. *Beaston v. Ebersole*, 986 A.2d 876, 881 (Pa. Super. 2009). Petitioner has met that burden here. The device at issue is a coin-operated tabletop video game machine manufactured by Pace-O-Matic, Inc. The fact that Petitioner has manufactured, designed, and provided the source code for the machine makes it more likely than not that Petitioner is entitled to lawful possession of the video game machine at issue.

B. Gambling Device Per Se

Upon a showing of lawful entitlement, the burden shifts to the Commonwealth to prove by a preponderance of the evidence that the video game machine seized is contraband. *Com. v. Irwin*, 636 A.2d 1106, 1107 (Pa. 1993). Specifically, the government must show that the video game is a "gambling device per se." *Ibid*. In determining whether a machine can be seized, the machine must be so intrinsically connected with gambling as to constitute a gambling device per se. This intrinsic connection is met where three elements are present: (1) consideration, (2) result determined by chance rather than skill, and (3) reward. *Ibid*. The parties in this case have stipulated that, because a player must insert money to begin play and is enticed to play by the promise of a payout, the first element, consideration, and the third element, reward, are met. The only issue remaining is whether successful play is determined predominantly by skill or chance.

There is no doubt that the games at issue contain elements of skill and chance. It is therefore the task of this Court to determine, on balance, whether skill or chance is the dominant factor in successful play. The operation of the machine and the way a player interacts with the machine must be evaluated. As noted, the machine contains the following features: (1) a Tic-Tac-Toe puzzle; (2) an unlockable bonus shooting game; and (3) a "Follow-Me" mini-game. The extent to which chance and skill decide the outcome of each game must be evaluated.

1. Tic-Tac-Toe Puzzle

The parties disagree on whether skill or chance dominates the outcome of the Tic-Tac-Toe puzzle. The Commonwealth asserts that the skill required to place the wild symbol in a spot is outweighed by the chance determination of the puzzle itself. This Court respectfully disagrees with the Commonwealth's position. Although there often is, as the Commonwealth points out, an "obvious" position where placement of the wild would generate a nonzero score, several puzzles

have a position where placement of the wild will lead to a more advantageous score. It takes skill for a player to recognize both which symbols are most advantageous to his or her payout and which position will maximize the player's score. A player who lacks the skill to recognize that the placement of a wild symbol in a particular position will lead to the completion of two or three rows, columns, or diagonals will not achieve as high a score as one who does recognize those patterns. Were the game one predominantly based on chance, one would reasonably expect that a skilled player and an unskilled player would stand to gain roughly the same score. However, a more skilled player is much more likely to achieve a greater score than an unskilled player, which augurs in favor of holding that the game is one of skill, not chance.

The Commonwealth places heavy emphasis on the fact that the device utilizes a random number generator to generate the puzzle itself. However, the fact that a machine utilizes a random generator, without more, is insufficient to push this game into the realm of chance. The function of the random number generator is not to determine whether player wins or loses, but merely to determine which puzzle within a finite pool of puzzles will be presented to the player. The random number generator simply constructs the field on which the player will be playing. It establishes the constraints in which the player must operate to receive the most points possible. Additionally, the generation of a puzzle is not a purely random event. Each puzzle presented to the player has the possibility of a win, and the player will not be presented with a puzzle that is already solved. Thus, the purpose of the random number generator is only to choose, at random, which of a large—yet finite—pool of puzzles to present to the player. Even if the presentation of the puzzle were a “substantial element of chance,” this, without more, is insufficient to a finding that the Tic-Tac-Toe game is a game of chance. *Com. v. Two Elec. Video Poker Game Machs.*, 465 A.2d 973, 977 (Pa. 1983).

Even more essential to the analysis than how the game is constructed and presented is the gameplay itself. During the course of play, the element of skill predominates and determines the outcome to a much higher degree than chance. It is up to the player to choose which spot to place the wild in order to achieve the most advantageous score. Our Superior Court's holding in *Dent* is instructive. There, the Court held that Texas Hold 'Em is predominantly a game of chance. *Com. v. Dent*, 992 A.2d 190 (Pa. Super. Ct. 2010). The Court placed great weight on the fact that while skill can determine the outcome in a Texas Hold 'Em poker game, "players are still subject to defeat at the turn of the cards." *Id.* at 196. In the Tic-Tac-Toe game at issue here, the players are not subject to victory or defeat at the spin of the reels. The game's code precludes automatic victories and automatic defeats. Unlike a traditional poker game, the players of the Pennsylvania Skill game are not at the mercy of the hand they are dealt. Every puzzle is winnable, and some have higher wins depending on whether the player has the skill to recognize the most advantageous spot to place the wild. In this game, the player's choices are the "instrumentality for victory"—in sharp contrast to the capricious nature of card dealing and shuffling present in a traditional game of Texas Hold 'Em. *See ibid*; *see also Am. Amusements Co. v. Neb. Dep't of Revenue*, 807 N.W.2d 492, 504 (Neb. 2011) (holding that where a puzzle is more controlled by the player than not, it is predominantly a game of skill).

This Tic-Tac-Toe puzzle is also different from the devices confiscated in *Two Electronic Poker Game Machines*. There, the Pennsylvania Supreme Court dealt with a coin-operated video game that simulated the events of five card draw poker. 465 A.2d 973 (Pa. 1983). The deck is "shuffled" by a random number generator, and the player is awarded points for various combinations of cards, ranging from one point for a pair of aces to fifty points for a straight flush. *Id.* at 976. The Court emphasized that chance was the predominant factor in the outcome

because chance determined the cards dealt and the cards from which one could draw. *Id.* at 978. The "skill" at issue was knowledge of probabilities. *Ibid.* This is different from the Tic-Tac-Toe game in this case for two reasons. First, the random number generator in the machine here does not determine a win or loss; rather, it merely chooses the puzzle that the player is presented with. Second, knowledge of statistics was the skill at issue in *Two Electronic Poker Game Machines*, whereas the skill at issue here is ability to play Tic-Tac-Toe. Knowledge of statistics was a skill wholly independent of the simulated poker game, and was not contemplated by or integral to the gameplay. It was a skill that was based on the nature of the player rather than the nature of the game. Here, skill at Tic-Tac-Toe and pattern recognition is fully integrated into the gameplay, and is demanded of the player for successful play. A player cannot beat the game with mere knowledge of probabilities; the player must choose the most advantageous spot to place the wild in the allotted time. The player exercises control over the game, and is not at the mercy of getting a lucky hand.

On balance, the outcome of the game is determined predominantly by skill rather than chance.

2. Bonus Game

This shooting-style game is predominantly a game of skill. The game requires that the player recognize, target, and touch the symbol within the allotted time frame. This requires hand-eye coordination and dexterity. Chance or luck has very little to do with the outcome of the game. Instead, the outcome is dependent almost wholly on a player's skill. That the bonus game presents itself only if certain conditions are fulfilled is immaterial to determining whether skill or chance dominates in the bonus game. Rather, the availability of the game is simply a

consequence of one possible puzzle that a player may be presented with in the Tic-Tac-Toe game.

3. "Follow-Me" Mini-Game

Successful play of the Follow-Me feature undoubtedly requires a great deal of skill on the part of the player. The game starts out easy, but becomes progressively more difficult with each recurrence of flashing dots. It is true that the average player cannot be expected to complete the Follow-Me feature successfully. After 10 to 15 sequences, most players would be unable to remember the sequence. The feature is immensely difficult and demands a much higher level of cognitive skill than the average player could muster. This immense difficulty does not, as the Commonwealth suggests, transform the game into a game of chance. The only chance involved in the game is the sequence in which the circles flash. The odds against randomly choosing the correct sequence for each of the forty rounds (a total of 820 flashing dots) are astronomical. Skill determines how well a player does.

IV. CONCLUSION

Each of the three games installed on the confiscated machine is predominantly a game of skill rather than a game of chance. Successful play at the Tic-Tac-Toe game depends mainly on a player's ability to recognize Tic-Tac-Toe patterns to maximize his or her score. The bonus game is essentially a shooting game, requiring a player to target and touch numerous symbols on the screen to achieve a high score. Finally, the Follow-Me mini-game, though immensely difficult for the average player, requires a great deal of cognitive ability for a player to remember the intricate sequence of flashing dots. Because the preponderance of the evidence fails to show that

the three games are games of chance, the Commonwealth has failed to prove that the property seized is a gambling device per se. The machine is therefore not contraband, and Petitioner's motion for return of property is granted.

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY
PENNSYLVANIA
CRIMINAL DIVISION

In re:

PACE-O-MATIC, INC. EQUIPMENT

M.D. 965-2013

TERMINAL I.D. NO. 142613

ORDER

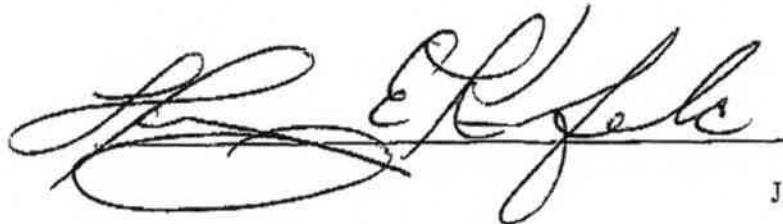
AND NOW, this 23rd of December, 2014, it is hereby
ORDERED and DECREED that Petitioner's Motion of Return of Property pursuant to
Pennsylvania Rule of Criminal Procedure 588 is GRANTED. The Commonwealth is ORDERED
to return the Pennsylvania Skill game to Pace-O-Matic, Inc.

BY THE COURT

BY THE COURT

2014 DEC 23 A 9 58

HARRY E. KNAFELC

A handwritten signature in black ink, appearing to read 'H. E. Knafelc', written over a horizontal line.

J.

EXHIBIT B

COPY

IN THE COURT OF COMMON PLEAS
BLAIR COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA
Plaintiff

vs.

No. CP-07-MD-599-2022

\$923.00 U.S. Currency, Three (3)
"Pennsylvania Skill" Video Gambling
Devices, Two (2) Banilla "Superior
Skills" Video Gambling Devices, and
Two (2) Banilla "Keystone Ultra Max"
Video Gambling Devices,
Defendant

ORDER

AND NOW, this 8th day of September, 2023, upon
consideration of the within Stipulation, IT IS HEREBY ORDERED as follows:

The Commonwealth's Petition for Forfeiture and Condemnation, solely as
it relates to the "Pennsylvania Skill" devices, is withdrawn and dismissed with
prejudice.¹

Given the Commonwealth's and Bureau of Liquor Control Enforcement's
agreement to return the "Pennsylvania Skill" devices pending appeals of related
matters in Commonwealth Court (707 CD 2023), Claimants L & M Music and
Pace-O-Matic, Inc.'s Motion to Return Property, which was included in their
Answer and New Matter filed on August 10, 2022, is granted. It is ordered that
the three (3) "Pennsylvania Skill" devices shall be returned to L & M Music
within five (5) days of this Order.

¹ The Commonwealth is still proceeding with forfeiture of the four (4) Banilla Games devices,
and it will be filing a motion for default once its service attempts are completed.

Lastly, the Motion to Suppress and Motion to Bifurcate included in the Claimants' Answer and New Matter are withdrawn and dismissed as moot.

BY THE COURT:

Walter A. Jones

J.

EXHIBIT C

IN RE: THREE PENNSYLVANIA : IN THE COURT OF COMMON PLEAS OF
SKILL AMUSEMENT DEVICES, ONE : DAUPHIN COUNTY, PENNSYLVANIA
GREEN BANK BAG CONTAINING :
\$525.00 IN U.S. CURRENCY, AND : NO. 2022-CV-06333-MD
SEVEN RECEIPTS

MEMORANDUM OPINION

Presently pending before this Court is a Petition for Return of Property that was filed by Capital Vending Company, Inc. (“Capital Vending”) and Champions Sports Bar, LLC (“Champions”) (hereinafter referred to collectively as “Petitioners”). The background of the case is as follows: Capital Vending is a business that supplies games and other amusement equipment/devices to bars and restaurants in central Pennsylvania and elsewhere. Champions is a restaurant/bar located at 300 Second Street, Highspire, Pennsylvania. Champions holds a restaurant liquor license issued by the Pennsylvania Liquor Control Board. At all times relevant hereto, Champions had three Pennsylvania Skill Amusement Devices (hereinafter referred to collectively as the “POM Machines”) in its establishment that were supplied by Capital Vending.

On December 9, 2019, at approximately 4:45 p.m., agents from the Pennsylvania State Police, Bureau of Liquor Control Enforcement (BLCE), entered Champions and seized the three POM Machines, one green bank bag containing \$525.00 in U.S. currency (hereinafter “the Cash”), and seven receipts (hereinafter “the Receipts”). BLCE seized this property based on allegations that the POM Machines were gambling devices *per se*, and the Cash and Receipts were derivative contraband. No criminal charges were filed related to the seized property, but Champions was issued an administrative citation on April 22, 2020 for permitting gambling. This citation is still pending.

On August 23, 2022, Petitioners filed a Petition for Return of Property pursuant to 42 Pa. C.S. §5806 and Pa. R.Crim. P. 588. In their filing, Petitioners claim that the POM Machines that were seized by BLCE are not gambling devices but are instead predominately skill games. The Petition also challenged the lawfulness of the seizure.¹ On September 8, 2022, the Commonwealth of Pennsylvania filed an answer to the Petition and included a new matter in the nature of a Petition for Forfeiture and Condemnation pursuant to 42 Pa. C.S. §5805. In its response, the Commonwealth claims that the POM Machines are games of predominant chance and are therefore subject to seizure and forfeiture as *per se* illegal gambling devices.

This Court held a hearing on the Petition for Return of Property over three days: September 30, 2022; November 22, 2022; and December 2, 2022. The Commonwealth called three witnesses: Dan Wentsler (liquor enforcement officer); Peter Nikiper (expert witness); and David Schoppe (supervisory liquor enforcement officer/expert witness). Petitioners only called Olaf Vancura as an expert witness. After the Hearing concluded, the Court invited the parties to submit proposed findings of fact and conclusions of law, which they did. This matter is now ripe for disposition.

A Petition for the Return of Property is governed by Pennsylvania Rule of Criminal Procedure which states, in relevant part:

(A) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he or she is entitled to lawful possession thereof. Such motion shall be filed in the court of common pleas for the judicial district in which the property was seized.

(B) The judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property to be forfeited.

¹ We did not hear testimony about the lawfulness of the seizure, and Petitioners did not address this issue in their Proposed Findings of Fact and Conclusions of Law. As such, we will not discuss it herein.

Pa. R.Crim. P. 588(A)(B). Under this Rule, the moving party must first establish that it is entitled to lawful possession of the property by a preponderance of the evidence. Commonwealth v. Trainer, 287 A.3d 960, 964 (Pa.Cmwlth. 2022) (citations omitted). Once that is established, the burden then shifts to the Commonwealth to show, by a preponderance of the evidence, that the property is either contraband *per se* or derivative contraband and should not be returned to the moving party. Id. (citations omitted). Contraband *per se* is property that is unlawful to possess, and derivative contraband is property that can be lawfully possessed but is used in the perpetration of an unlawful act. Commonwealth v. Ireland, 153 A.3d 469, 473 (Pa.Cmwlth. 2017) (citations omitted).

In the instant matter, the parties stipulated that the three POM Machines are owned by Capital Vending. The parties further stipulated that Champions owns the Cash and the Receipts and has a possessory interest in the three POM Machines pursuant to an agreement with Capital Vending. As such, Petitioners are entitled to lawful possession of the three POM Machines, the Cash, and the Receipts unless the Commonwealth shows, by a preponderance of the evidence, that the POM Machines are contraband *per se* and the Cash and Receipts are derivative contraband. The Commonwealth claims that the POM Machines are illegal gambling devices, and the money and receipts that were seized were derivative of the illegal gambling devices.

The Crimes Code states that it is a misdemeanor of the first degree if a person “(1) intentionally or knowingly makes, assembles, sets up, maintains, sells, lends, leases, gives away, or offers for sale, loan, lease or gift, any punch board, drawing card, slot machine or any device to be used for gambling purposes, except playing cards.” 18 Pa. C.S.A. §5513(a)(1). Unlawful gambling is defined as “gambling not specifically authorized by the Commonwealth.” Com. v. Betres, 237 Pa.Super. 361, 368, 352 A.2d 495, 498 (1975). It is undisputed that the POM games

in the instant matter were not specifically authorized by the Commonwealth. However, the question remains as to whether these machines are gambling devices.²

“A machine is a gambling device *per se* if it can be used for no purpose other than gambling.” Com. v. Irwin, 535 Pa. 524, 527, 636 A.2d 1106, 1107 (1993) (citations omitted). “The three elements of gambling are (1) consideration; (2) a result determined by chance rather than skill; and (3) reward.” Id. (citations omitted). Where all three of these elements are present, the machine will be considered “‘so intrinsically connected with gambling’ as to be a gambling device *per se*.” Id. (citations omitted). The Commonwealth has the burden of showing that the machines are *per se* gambling devices. Id. (citations omitted).

In determining whether a machine is a gambling device, the court must examine the characteristics of the machine itself and whether the three elements are present. Com. v. Two Elec. Poker Game Machines, 502 Pa. 186, 194, 465 A.2d 973, 977 (1983). With respect to the element of chance versus skill, Pennsylvania courts have employed the “predominate-factor test” stating that “for a game to constitute gambling, it must be a game where chance predominates rather than skill.” Com. v. Dent, 992 A.2d 190, 193 (Pa. Super. Ct. 2010) (citations omitted). Simply because a machine involves a large element of chance, without more, is insufficient to find the machine to be a gambling device *per se*. Two Elec. Poker Game Machines, 502 Pa. 186 at 195, 465 A.2d at 977. Moreover, the outcome of a game does not need to be wholly determined by skill in order for the machine to fall out of the *per se* gambling device category. Id. Rather, courts must determine whether chance or skill predominates in any given machine.

² In its post-hearing submission, the Commonwealth argues that the POM Machines are illegal slot machines regardless of whether they are skill games or games of chance. However, this claim was not included in the Commonwealth’s Answer to the Petition for Return of Property, nor was it included in the Commonwealth’s Counterclaim for forfeiture of property. As such, the sole issue for this Court’s consideration is whether the POM Machines are gambling devices.

In the instant matter, there is no dispute as to the actual gameplay of the POM Machines. As set forth in Petitioners' Proposed Findings of Fact in Paragraphs 14 through 26, each of the POM Machines has a single game with multiple game themes available for selection, although the gameplay is the same regardless of theme. Gameplay on each of the POM Machines commences after the player has inserted cash into the machine. The cash is converted into points with \$1.00 being equal to 100 points. The player can adjust how many credits to commit to a given play, ranging from 8 credits, which is equal to \$0.08 up to 400 credits, which is equal to \$4.00. However, before initiating gameplay, the POM Machines allow a player to see the upcoming puzzle by pressing the "Next Puzzle" button, which allows the player the opportunity to see if the upcoming puzzle is a winning puzzle before committing any funds.

Once gameplay has commenced, the player is presented with nine symbols arranged in rows of three. The object is to match three like symbols in a row on as many pay lines as possible, arranged vertically, horizontally, and/or diagonally, similar to tic-tac-toe. Specifically, if possible, a player must turn one of the nine symbols wild by pressing it within thirty (30) seconds in order to complete three matching symbols in a row. Once the puzzle appears, one of three things can happen: 1) the puzzle can be correctly solved, resulting in an award equal to at least 105% of the points that were committed to play, known as a "win;" 2) the puzzle can be correctly solved, resulting in an award less than 105% of the points that were committed to play, known as a "hit;" or 3) the puzzle is incapable of being solved, known as a "loss."

If a player gets a hit or a loss, the player is always offered the opportunity to continue gameplay through the "Follow Me" feature of the game. The Follow Me feature does not require any additional points from the player but gives the player a chance to win back the money that they lost during the puzzle portion of the game plus an additional 5%. The Follow Me

feature requires the player to repeat a pattern of multiple, multi-colored circles in the same order in which the circles are displayed, similar to the electronic game “Simon.” If the player successfully completes the pattern, the player is awarded with a total of 105% of the points committed to play depending on whether the player received a hit or a loss in the puzzle portion. In other words, if a player bets \$4.00 and only wins \$2.00 in the puzzle portion, that player can play the Follow Me game and, if completed successfully, get \$2.20 in addition to the \$2.00 that they won on the puzzle portion for a total of \$4.20.

Once gameplay is complete, a player has the option of redeeming any remaining credits by pressing the Redeem button. Pressing this button will cause the POM Machine to dispense a ticket reflecting the dollar amount that is equivalent to the remaining credits. For instance, if a player has 1000 credits, pressing the Redeem button will result in the player getting a ticket for \$10.00 which they can then exchange for cash. The POM Machines only award whole dollar amounts. Thus, pressing the Redeem button rounds the player’s credits down to the nearest whole dollar and leaves any excess credits on the device. For instance, if a player has 1050 credits, pressing the Redeem button will result in a player getting a ticket for \$10.00. The excess 50 credits (worth \$0.50) then remain on the machine and may be used by that player or another player on future gameplay.

As stated above, in order for the POM Machines to be gambling devices *per se*, they must have the three elements of gambling, namely: 1) consideration; 2) chance; and 3) reward. We find that the first and third elements are present in the POM Machines. Specifically, you cannot play the POM Machines without depositing money and committing some of that money to a game. Additionally, a player has the opportunity to win more than they bet, thus obtaining a reward. However, the question remains as to whether the POM Machines in the instant matter are

predominately games of skill or are predominately games of chance. Based on the evidence that was presented at the Hearing, we find that the POM Machines at issue in this case are predominately games of skill.

All three of the Commonwealth witnesses opined that the three POM Machines were predominately games of chance. However, we do not find these opinions to be persuasive for a number of reasons. Initially, it is this Court's belief that the Commonwealth's investigation shows case bias. The Commonwealth is seeking to make all machines like the POM Machines into illegal gambling devices, and their whole approach and intent is to shut down the games regardless of the actual gameplay. The fact that Officer Wentsler never played the Follow Me feature while undercover is indicative of this. Thus, the Commonwealth as a whole is biased against the games, and their approach lacks case credibility.

Additionally, Officer Wentsler also showed case bias. He testified that he has conducted hundreds of investigations into these types of devices, and it is his opinion that every single machine that he investigated was a game of chance. This is not credible and shows that Officer Wentsler is biased towards finding that these machines are illegal gambling devices. It also shows that he was not objective in his investigation of the subject POM Machines. As such, we did not find his opinion persuasive.

We did find the opinion of Petitioners' expert, Olaf Vancura, to be persuasive. Dr. Olaf has worked as a consultant, author, and inventor in the gaming industry since 1995. He testified that a skillful player that plays the POM Machines can win, which is defined as making a net profit, on each and every play of the game. Furthermore, he opined that there is no feature or functionality of the game that could prevent a skillful and patient player from achieving that result in every single play. This opinion was rendered with 100% mathematical certainty.

Most importantly to our decision, all of the witnesses who testified, including the Commonwealth's expert witness, agreed that a patient and skillful player could win at least 105% of the amount played on each and every play by utilizing the Follow Me feature. The puzzle portion of the game is predominately reliant on chance. Although a player has the opportunity to interact with the game to place a wild symbol, there is nothing that a player can do to ensure that the reels show a puzzle that can be correctly solved. However, it cannot be disputed that the Follow Me feature can only be completed by a skillful player, and it does not depend at all on chance. Additionally, the Follow Me feature shows up every time a player wins less than 105% of the amount played. This eliminates the element of chance that is present in the puzzle portion by giving a player the opportunity to win back the money that they lost by utilizing skill.

The Commonwealth argues that this Court should not look at the machines as a whole but should instead consider how players actually utilize the machines. The Commonwealth directs this Court's attention to the case of Commonwealth v. Lund, 15 A.2d 839 (Pa. Super. 1940) as supporting this argument.

In Lund, a theater operator held a "bank night" at his two theaters wherein the theater operator would maintain a register with a list of the names of those persons who would like to win a cash prize with a corresponding number next to their names. Id. at 841. It did not cost anything to have your name placed on this register. Id. The theater then held a drawing where a number was picked out of a hopper. Id. If the person whose number was chosen was present at the theater at the time of the drawing, that person would win a cash prize. Id. If that person was not present at either theater, then no winner was chosen, and the cash prize would roll over into the next week. Id. People could also purchase proxy cards in the afternoon of the day of the drawing and could win the cash by proxy even if they were not present at the theater when their

number was chosen. Id. at 842. The theater owner and managers occasionally gave out free proxy cards to people, but they did not advertise this feature. Id.

The question that the Superior Court had to answer was whether the element of consideration was present for these so-called bank nights.³ Id. at 843. In reviewing this question, the Court stated:

The primary question in these “bank night” cases is not whether any individual attending a theatre on “bank night,” paying for admission, or admitted free, present in person or by proxy, is acting in concert with the owner in operating a lottery, but rather whether the owner is maintaining and operating a lottery. This is to be determined by the character and practical operation of the scheme as a whole, and not by rare instances of departure from the general scheme and practice. The general character of the system is not to be determined by splitting it up into individual contracts between the theater owner and his patrons. This theory applied in the cases hereinbefore considered is a misleading one, since it diverts attention from the general public effect of the practice which is the evil the law seeks to prevent. It is an impractical one in that it would render extremely difficult, if not impossible, the control of the practice, though manifestly a public nuisance in its operation and effect, by permitting a few exceptional instances of free admissions and free chances to afford immunity to the whole.

Id. at 845. The Court thus determined that the element of consideration was present, and that the theater owner was operating an illegal lottery. Id. at 850.

We find that Lund is inapposite to the instant matter. In Lund, the owner of the theater was the one who was attempting to legitimize his “bank night” by giving away free tickets and attempting to remove the necessary element of consideration. However, in the instant matter, neither Petitioner has any control over how a player utilizes a subject machine. To hold that a machine is either an illegal gambling machine when a player chooses not to engage with the Follow Me feature or is a skill game when a player plays the Follow Me feature is untenable. For instance, if a player plays the Follow Me feature once, does that make the entire machine a skill game for

³ The elements of chance and reward were conceded by the parties. Id.

that player? Or does it require the player to play Follow Me on every occasion? If the player starts playing Follow Me and then stops playing it, does it go from a game of skill to a game of chance while that same player is playing? The questions that would need to be asked to determine how the game is played by various players are endless. Furthermore, Petitioners do not have any control over how a given player plays the game. Rather, the chance is with the player rather than with the machine. For this reason, we specifically find that the question of whether these machines are games of skill or games of chance depends solely on the machines themselves and not on how a player plays them.

Even if we were to find Lund persuasive, the Commonwealth did not provide sufficient evidence to support a finding that the majority of players do not play the Follow Me feature. Officer Schoppe testified that there are approximately 10,000 of these types of machines in Pennsylvania. He observed approximately 100 people playing the subject POM Machines. Although we believe that Officer Schoppe did not observe any of those players playing the Follow Me Feature, we find that this is too small a sample size to make any determination as to how the average player plays these machines. As such, we find that the POM Machines are not gambling devices *per se*, and Petitioners are entitled to have the POM Machines returned to them. Additionally, since the Cash and Receipts are derivative of the legal POM Machines, they should also be returned to Petitioners.

For these reasons, we hereby enter the following Order:

Copies Distributed
Date 3-7-23 Initials h

ORIGINAL

IN RE: THREE PENNSYLVANIA : IN THE COURT OF COMMON PLEAS OF
SKILL AMUSEMENT DEVICES, ONE : DAUPHIN COUNTY, PENNSYLVANIA
GREEN BANK BAG CONTAINING :
\$525.00 IN U.S. CURRENCY, AND : NO. 2022-CV-06333-MD
SEVEN RECEIPTS

ORDER

AND NOW, this 23rd day of March, 2023, upon consideration of the

Petition for Return of Property that was filed by Petitioners Capital Vending Company, Inc. and Champions Sports Bar, LLC, and any responses thereto, and having held a Hearing on September 30, 2022, November 22, 2022, and December 2, 2022, it is hereby ORDERED as follows:

For the reasons set forth in the attached Memorandum Opinion, it is hereby ORDERED and DECREED that the Petition for Return of Property is GRANTED. It is further ORDERED that, within five (5) days of the date of this Order, the Pennsylvania State Police, Bureau of Liquor Control Enforcement shall return to Champions Sports Bar, LLC the following:

1) three Pennsylvania Skill Amusement Devices, 2) one green bag containing \$525.00 in U.S. Currency, and 3) seven receipts in the condition in which they were seized.

BY THE COURT:


Andrew H. Dowling, Judge

Distribution:

The Honorable Andrew H. Dowling
Christopher D. Carusone, Esquire, COHEN SEGLIAS PALLAS GREENHALL & FURMAN,
P.C., 525 William Penn Place, Suite 3005, Pittsburgh, PA 15217
Matthew H. Haverstick, Esquire & Edward T. Butkovitz, Esquire, KLEINBARD, LLC, Three
LoganSquare, 5th Floor, 1717 Arch Street, Philadelphia, PA 19103
Andrew J. Jarbola, IV, Esquire, OFFICE OF ATTORNEY GENERAL, 6400 Flank Drive, Suite
1300, Harrisburg, PA 17112

EXHIBIT D

IN THE COURT OF COMMON PLEAS
LUZERNE COUNTY, PENNSYLVANIA

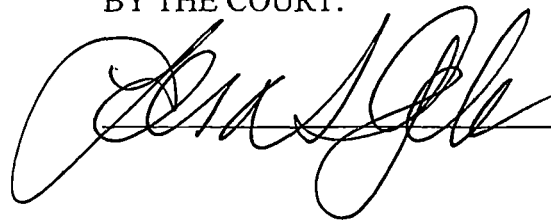
IN RE: FOUR PENNSYLVANIA SKILL
AMUSEMENT DEVICES

No. 2022-08552

AND NOW, this 5th day of JUNE, 2022³, upon consideration of Movants Mack Novelty, Inc. and Claire's Bar, LLC's Motion for Return of Property, and any response thereto, it is hereby **ORDERED** and **DECREED** that said Motion is **GRANTED**. It is further **ORDERED** that, within five (5) days of this Order, the Pennsylvania State Police, Bureau of Liquor Control Enforcement, shall return to Claire's Bar, LLC, the four Pennsylvania Skill Amusement Devices and the contents thereof in the same condition in which they were seized.

THE OFFICES OF JUDICIAL RECORDS
& SERVICES OF LUZERNE COUNTY,
PENNSYLVANIA SHALL GIVE NOTICE
OF THIS ORDER TO ALL PARTIES
PURSUANT TO PA R.C.P. 236.

BY THE COURT:


_____, J.

Distribution:

Christopher D. Carusone, Esquire ccarusone@cohenseglias.com
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Case ID: 240302568

Joseph May, Esquire
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Scranton, PA 18503

Marc F. Lovecchio, Esquire
835 West Fourth Street
Williamsport, PA 17701

EXHIBIT E

IN THE COURT OF COMMON PLEAS OF MONROE COUNTY
FORTY-THIRD JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

IN RE: FOUR PENNSYLVANIA SKILL : No. 6673 Civil 2021
AMUSEMENT DEVICES AND ONE :
TICKET REDEMPTION TERMINAL :
CONTAINING \$18,692.00 IN U.S. :
CURRENCY :

ORDER

AND NOW, this 8th day of February, 2023, after hearing on L&M Music Company, Inc. and Smokin' Joe's Tobacco Shop, Inc.'s (Petitioners) Joint Omnibus Petition to Return Seized Property and to Suppress Evidence, it is **ORDERED** as follows:

1. Petitioners' Petition to Suppress Evidence is **GRANTED**. The court finds that the Commonwealth improperly withheld and misrepresented material evidence relative to the issuance of the search warrant in this matter, and that such conduct warrants the suppression of the seized property.

2. Petitioners' Petition to Return Seized Property is **GRANTED**. The court finds that the devices at issue are legal games of skill, and that the Commonwealth has failed to establish that the devices, as designed, are games of chance.

3. The Commonwealth shall, within 48 hours of the issuance of this Order, **RETURN** the seized Skill Games and TRT to Petitioners. Petitioners shall retain the monies previously returned to them pursuant to prior order of court.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Jennifer Harlach Sibum, J.", is positioned above the printed name.

JENNIFER HARLACHER SIBUM, J.

cc: District Attorney
George Westervelt, Esq.
Matthew Haverstick, Esq.
Edward Butkovitz, Esq.
Marc Lovecchio, Esq.
James Gorman, III, Esq.
Court Administration

EXHIBIT F

COURT OF COMMON PLEAS OF MONROE COUNTY
43rd JUDICIAL DISTRICT
COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. 1771 CRIMINAL 2022
:
v. :
:
L&M MUSIC COMPANY, INC., :
Defendant :

ORDER GRANTING MOTION TO DISMISS

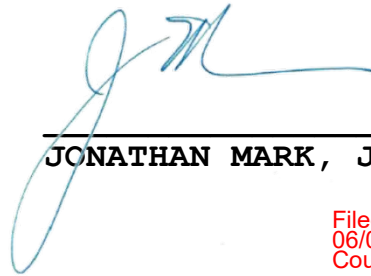
AND NOW, this 1st day of June, 2023, for the reasons summarized today on the record and under the law set forth in the hearing addendum, **IT IS ORDERED** that Defendant's Motion to Dismiss based on collateral estoppel is **GRANTED** and the charges in this case are **DISMISSED**. The Court finds that the Commonwealth is estopped by findings made in the parallel return of property case from proceeding with the charges in this matter and that the parties and the Court are estopped from re-litigating the finding set forth in a final order issued in the return of property case that the subject devices are games of skill and not games of chance.

The preservation of evidence protocol set forth in the order dated December 13, 2022 is made final and shall continue in effect unless and until the subject devices are returned to Defendants or until further order of this Court or an appellate court.

The Commonwealth's oral motion for recusal of the undersigned is **DENIED**.

The remaining motions are **DISMISSED** as moot and the subpoenas issued for today's hearing are discharged.

BY THE COURT:

A handwritten signature in blue ink, appearing to be 'J. Mark', is written over a horizontal line.

JONATHAN MARK, JUDGE

Filed
06/02/2023 11:07AM
Court of Common Pleas

cc: District Attorney (MTR, CR, AT)
Matthew Haverstick, Esquire
Edward Butkovitz, Esquire
Marc Lovecchio, Esquire
George Westervelt, Esquire
Steven P. Trialonas, Esquire
Court Administration (LF)

EXHIBIT G

IN THE COURT OF COMMON PLEAS
YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF
PENNSYLVANIA

v.

\$14,611.00 U.S. Currency and Six (6)
"Pennsylvania Skill" Video Gambling
Devices,

Defendant

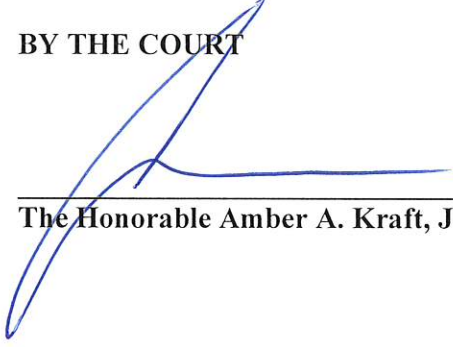
: NO. CP-67-MD-2529-2022
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ORDER

AND NOW, this 17th day of April, 2023, it is hereby ORDERED that the Commonwealth's Praecipe to Withdraw Petition for Forfeiture and Condemnation, filed on Friday, April 14, 2023, at 12:45 p.m., is **STRICKEN**. Pursuant to Pa.R.C.P. 229(a), a discontinuance is the exclusive method of the voluntary termination of the petition. Discontinuance of the petition would prejudice the rights of the claimants, who were present in Court and prepared to proceed with the hearing on April 17, 2023. Granting a discontinuance at this late stage would prejudice the rights of the claimants, who are entitled to a merits determination in order to protect them against further seizures and enforcement actions by the Pennsylvania State Police, Bureau of Liquor Control Enforcement.

It is **FURTHER ORDERED**, in light of the Commonwealth's inability to proceed with the evidentiary hearing scheduled for April 17-18, 2023, that the Commonwealth's Petition for Forfeiture and Condemnation is hereby **DENIED** on the merits. The Court finds, due to the absence of any evidence to the contrary, that the Pennsylvania Skill Game devices programmed by Pace-O-Matic, Inc., which are owned by claimant Starlight Sales & Vending, Inc., and were seized from claimant Colletti, Inc. (d/b/a Brewer's Outlet) on October 2, 2020, are not gambling devices *per se*, and shall be returned to Colletti, Inc. within five (5) days of the date of this Order. This Order shall include the return of the \$14,611.00 in U.S. Currency that was seized along with the devices at issue.

BY THE COURT



The Honorable Amber A. Kraft, Judge

CLERK OF COURTS-YORK
PR 17:23 AM 11:24

EXHIBIT H

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Three Pennsylvania Skill :
Amusement Devices, One Green :
Bank Bag Containing \$525.00 in : No. 707 C.D. 2023
U.S. Currency, and Seven Receipts : Argued: October 11, 2023
:
Appeal of: Commonwealth of :
Pennsylvania :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge
HONORABLE LORI A. DUMAS, Judge
HONORABLE STACY WALLACE, Judge

OPINION

BY JUDGE DUMAS

FILED: November 30, 2023

The Office of the Attorney General of the Commonwealth of Pennsylvania (the Commonwealth) appeals from the order entered in the Court of Common Pleas of Dauphin County (trial court) on March 23, 2023, granting the petition for return of property filed by Capital Vending Company, Inc. (Capital Vending) and Champions Sports Bar, LLC (Champions Bar) (collectively, Appellees). After careful review, we affirm.

I. BACKGROUND¹

On December 9, 2019, agents of the Pennsylvania State Police, Bureau of Liquor Control Enforcement (BLCE), seized three amusement devices (POM

¹ We base the statement of facts on the trial court's opinion, which is supported by the record. *See* Trial Ct. Op., 3/23/23, at 1-2.

machines),² a green bag containing \$525.00 in currency, and seven receipts from Champions Bar. According to BLCE, the POM machines were gambling devices *per se*, and the \$525.00 and receipts were derivative contraband.

The POM machines have a single game with multiple themes. Gameplay commences when a player inserts money into the machine. The money is converted into points/credits,³ with \$1 equaling 100 points. Following completion of gameplay, the player may redeem any remaining credits by pressing the “redeem” button, which generates a ticket that the player can exchange for currency. The player can decide how many points to commit to a play, from 8 to 400 points, and can preview the upcoming puzzle before committing the points. The first phase of the game is a “tic-tac-toe” type puzzle with nine symbols arranged in rows of three. The object of the game is for the player to match three similar symbols in a row on as many pay lines as possible, arranged horizontally, vertically, and/or diagonally.

There are three outcomes: (1) the puzzle can be solved, resulting in an award equal to 105% of the committed points (a win); (2) the puzzle can be solved, resulting in an award less than 105% of the committed points (a hit); and (3) the puzzle cannot be solved (a loss). After a hit or loss, the player is offered an opportunity to recoup lost points with the “Follow Me” feature. During the “Follow Me” portion of the game, the player tries to repeat a pattern of multiple, multi-colored circles. If the player repeats the pattern correctly, the game restores the points lost, plus an additional five percent.

² The devices are electronic games developed by Pace-O-Matic, Inc. Notes of Testimony (N.T.), 11/22/22, at 305. Generally, these games have a “reel” or “tic tac toe” puzzle phase, as well as a secondary memory skill game in which the player can win back any money lost during the puzzle phase. *See id.* at 305-20. The devices at issue were supplied to Champions Bar by Capital Vending.

³ The trial court uses both terms interchangeably.

No criminal charges were filed related to the seizure, but the Commonwealth issued Champions Bar an administrative citation for permitting gambling. Appellees filed a petition for return of property pursuant to 42 Pa.C.S. § 5806 and Pennsylvania Rule of Criminal Procedure 588, Pa.R.Crim.P. 588, arguing that the POM machines are not gambling devices *per se* but are predominantly games of skill.

The trial court held evidentiary hearings after which the trial court invited the parties to submit proposed findings of fact and conclusions of law. On March 23, 2023, the trial court issued an opinion and order granting Appellees' petition for return of property. The trial court further ordered the Commonwealth to return the seized property within five days. The Commonwealth timely appealed to the Superior Court of Pennsylvania, which transferred the matter to this Court.

II. ISSUES

The Commonwealth raises two issues for our review. First, the Commonwealth contends that the POM machines are “slot machines,” which are prohibited under the Crimes Code, 18 Pa.C.S. § 5513(a). Second, the Commonwealth argues that the POM machines are gambling devices *per se*.⁴

⁴ The Commonwealth purports to raise a third issue, namely, that the Pennsylvania Race Horse Development and Gaming Act (Gaming Act), 4 Pa.C.S. §§ 1101-1904, provides a sufficient basis for seizure of the POM machines. *See* Commonwealth's Br. at 37. We have rejected this exact argument previously and decline to revisit it. *See POM of Pa., LLC v. Dep't of Revenue*, 221 A.3d 717, 735 (Pa. Cmwlth. 2019) (*en banc*) (*POM*). Further, this argument was not raised before the trial court and is waived. *See* Pa.R.A.P. 302(a) (issues not raised before the trial court may not be raised for the first time on appeal).

III. DISCUSSION⁵

A. Introduction

1. Section 5513 of the Crimes Code

In this case, the parties dispute the proper interpretation of Section 5513 of the Crimes Code, which was relied upon by BLCE in seizing the POM machines. A person is guilty of a first-degree misdemeanor if he “intentionally or knowingly makes, assembles, sets up, maintains, sells, lends, leases, gives away, or offers for sale, loan, lease or gift, any punch board, drawing card, slot machine or any device to be used for gambling purposes, except playing cards.” 18 Pa.C.S. § 5513(a). Electronic versions of these devices that offer simulated gambling programs are also prohibited. *See* 18 Pa.C.S. § 5513(a.1). Any gambling device that is used in violation of the provisions of the statute shall be seized and forfeited to the Commonwealth. 18 Pa.C.S. § 5513(b).

⁵ “Our review on this appeal [from a motion to return property] is limited to examining whether the trial court’s factual determinations were supported by [substantial] evidence and whether the trial court abused its discretion or committed an error of law.” *Commonwealth v. Morelli*, 55 A.3d 177, 179 (Pa. Cmwlth. 2012). The trial court as a factfinder is “the ultimate judge of credibility and resolves all conflicts in the evidence.” *See Lodge v. Robinson Twp. Zoning Hr’g Bd.*, 283 A.3d 910, 925 (Pa. Cmwlth. 2022). As with any other witness, the factfinder “is free to accept or reject the credibility of expert witnesses, and to believe all, part, or none of the evidence.” *City of Phila., Bd. of Pensions & Ret. v. Clayton*, 987 A.2d 1255, 1262 (Pa. Cmwlth. 2009). As long as sufficient evidence exists in the record, “which is adequate to support the [factfinder’s] determination, an appellate court is precluded from overturning these determinations.” *See id.* “On a motion for return of property, it is the movant’s burden to establish by a preponderance of the evidence that he is entitled to lawful possession of the property at issue.” *Morelli*, 55 A.3d at 180.

2. Forfeiture Proceedings in General

Anyone aggrieved by the seizure of property may move for the return of the property by motion. 42 Pa.C.S. § 5806(a)(1); *see also* Pa.R.Crim.P. 588(A). If the motion is granted, “the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property to be forfeited.” Pa.R.Crim.P. 588(B).

“[T]he moving party must establish by a preponderance of the evidence entitlement to lawful possession. Once that is established, unless there is countervailing evidence to defeat the claim, the moving party is entitled to the return of the identified property.” *Singleton v. Johnson*, 929 A.2d 1224, 1227 (Pa. Cmwlth. 2007). A claim can be defeated if an opposing party can establish that it is entitled to lawful possession of the property or if the Commonwealth can establish that the property is contraband. *See id.* at 1227 (citing *Commonwealth v. Crespo*, 884 A.2d 960 (Pa. Cmwlth. 2005)). “If the Commonwealth seeks to defeat the claim, it bears the burden to prove, by a preponderance of the evidence, that the items are either ‘contraband *per se*’ or ‘derivative contraband,’ and therefore should not be returned to the moving party.” *Commonwealth v. Trainer*, 287 A.3d 960, 964 (Pa. Cmwlth. 2022).

“To meet its burden to defeat the motion for return of property, the Commonwealth must make out more than simply demonstrating that the property was in the possession of someone who has engaged in criminal conduct. It must establish a specific nexus between the property and the criminal activity.” *Singleton*, 929 A.2d at 1227 (citations omitted). “When the Commonwealth sustains that burden, the burden of proof shifts to the property owner to disprove the Commonwealth’s evidence or establish statutory defenses to avoid forfeiture.” *See*

id. (citing *Commonwealth v. 1992 Chevrolet*, 844 A.2d 583, 585 (Pa. Cmwlth. 2004)).

B. Whether the POM Machines are Slot Machines⁶

1. The Parties' Arguments

The Commonwealth contends that there are four distinct categories of devices prohibited under the Crimes Code: punch cards, drawing cards, slot machines, and “any device to be used for gambling purposes.” Commonwealth’s Br. at 15 (citing 18 Pa.C.S. § 5513(a)(1)). According to the Commonwealth, the first three are inherently gambling devices and *per se* illegal. *Id.* The final category, the Commonwealth suggests, is a catch-all category that requires proof of use because it may include objects that are not inherently created for gambling purposes. *Id.*

Within this framework, the Commonwealth asserts that the seized POM machines are plainly slot machines and, thus, illegal. *See id.* at 17-24. Noting that the Crimes Code has not defined the term “slot machine,” the Commonwealth relies

⁶ Prior to discussing the merits of this issue, we first address the trial court’s assertion that the Commonwealth did not preserve this claim because it was not included in the Commonwealth’s answer to the petition for return of property or the Commonwealth’s counterclaim for forfeiture of property. *See* Trial Ct. Op. at 4 n.2. The trial court observed that the first time the Commonwealth brought the claim was in its post-hearing submission. In response, the Commonwealth states that its answer to the return of property petition stated that the seizure was premised on a violation of 18 Pa.C.S. § 5513 and that throughout the answer, the Commonwealth relied on both the fact that the machines were slot machines and that they were games of chance and, thus, devices used for gambling purposes. *See* Commonwealth’s Br. at 24. An examination of the Commonwealth’s answer reveals that the Commonwealth did not clearly state this issue in a manner that would have alerted the trial court and Appellees of its argument and, accordingly, risks waiver. *See* Pa.R.A.P. 302(a). However, because the answer does repeatedly discuss “simulated slot machine games,” we hold this is sufficient preservation of the issue for purposes of our appellate review, and we will address the merits of the Commonwealth’s argument.

on a standard dictionary definition but further directs our attention to a definition provided in the Gaming Act. *See id.* at 17-18.

According to the Commonwealth, it is appropriate to read the Crimes Code *in pari materia* with the Gaming Act because these acts “necessarily go hand-in-hand” and because the Gaming Act serves as a limited legislative exception to conduct otherwise deemed illegal. *See id.* 18-20. Thus, the Commonwealth argues, the definition of a slot machine under the Crimes Code must be the same as, or perhaps even broader than, the Gaming Act definition. According to the Commonwealth, a narrow definition of “slot machine” would undermine the “primary objective” of the General Assembly “to protect the public through regulation and policing of all activities involving gaming and practices that continue to be unlawful. *Id.* at 21 (quoting 4 Pa.C.S. § 1102(1)).

For these reasons, the Commonwealth urges that the POM machines are subject to seizure and forfeiture under 18 Pa.C.S. § 5513(b).

In response, Appellees reject the Commonwealth’s interpretation of Section 5513(a). *See Appellees’ Br.* at 35. According to Appellees, the statute does not proscribe slot machines in the abstract but only those slot machines manufactured or sold for gambling purposes. *See id.* at 35-38. Nevertheless, Appellees maintain that the POM machines are not slot machines under the Crimes Code, because they are games of skill with an additional “Follow Me” feature absent from slot machines. *See id.* at 61, 70. Further, Appellees contend that it is inappropriate to consider any principles of statutory interpretation because the Commonwealth has not alleged an ambiguity in the statute. *See id.* at 44-47. Finally, Appellees assert that it is inappropriate to read the Crimes Code and Gaming Act *in pari materia*, because they relate to different classes of things: the Crimes Code is

concerned with illegal gambling, while the Gaming Act regulates licensed, legal gambling. *See id.* at 47-48.

2. The POM Machines are not Slot Machines

“The touchstone of interpreting statutory language is to ascertain and effectuate the intent of the legislature.” *Summit Sch., Inc. v. Dep’t of Educ.*, 108 A.3d 192, 196 (Pa. Cmwlth. 2015); 1 Pa.C.S. § 1921(a). It is a “guiding principle of statutory construction that when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” *Summit Sch., Inc.*, 108 A.3d at 196; 1 Pa.C.S. § 1921(b).

“Words and phrases shall be construed . . . according to their common and approved usage.” 1 Pa.C.S. § 1903(a). “In giving effect to the words of the legislature, we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear.” *Giant Eagle, Inc. v. Workers’ Comp. Appeal Bd. (Givner)*, 39 A.3d 287, 290 (Pa. 2012).

If a statute is unclear or ambiguous, then the courts may apply further principles of statutory construction to ascertain the intent of the legislature. *Summit Sch., Inc.*, 108 A.3d at 197; *see, e.g.*, 1 Pa.C.S. §§ 1921(c) (enumerating further considerations), 1922(1) (presuming, *inter alia*, that the legislature does not intend a result that is absurd), 1932 (providing that statutes relating to the same things or class of things, *i.e.*, *in pari materia*, “shall be construed together . . . as one statute”). A statute is ambiguous if there are two or more reasonable interpretations of the statutory language. *Herold v. Univ. of Pittsburgh - of Commonwealth Sys. of Higher Educ.*, 291 A.3d 489, 501 (Pa. Cmwlth. 2023), *appeal granted*, (Pa. No. 94 WAL 2023, filed Oct. 13, 2023).

Statutes are *in pari materia* “when they relate to the same persons or things or to the same class of persons or things.” *See* 1 Pa.C.S. § 1932(a). However, “the rule requiring statutes *in pari materia* to be construed together is only a rule of construction to be applied as an aid in determining the meaning of a doubtful statute, and [it] cannot be invoked where the language of a statute is clear and unambiguous.” *Goodwin v. Goodwin*, 280 A.3d 937, 948 n.7 (Pa. 2022) (citing *In re McFarland’s Est.*, 105 A.2d 92, 95-96 (Pa. 1954)).

Additionally, we note that there is a statutory mandate that penal statutes “shall be strictly construed.” *See Commonwealth v. McCoy*, 962 A.2d 1160, 1168 (Pa. 2009); *see also* 1 Pa.C.S. § 1928(b)(1). This does not override the “general principle that the words of a statute must be construed according to their common and approved usage and does not require this Court to give the words of a penal statute their “narrowest possible meaning.” *See McCoy*, 962 A.2d at 1168 (cleaned up). However, where there is ambiguity in the language of a statute, it should be interpreted in “the light most favorable to the accused.” *See id.*

With these principles in mind, we readily reject the Commonwealth’s arguments. The Crimes Code does not define “slot machine” or the other specific categories of proscribed devices.⁷ However, a slot machine is commonly construed as a “coin-operated gambling machine that pays off according to the matching of symbols on wheels spun by a handle.” *See* <https://www.merriam-webster.com/dictionary/slot%20machine> (last visited Nov. 29, 2023). Although

⁷ Section 5513 does provide definitions for other, related terms, *e.g.*, “consideration associated with a related product, service, or activity,” “electronic video monitor,” and “simulated gambling program.” 18 Pa.C.S. § 5513(f).

originally a mechanical device, the definition includes “electronic version[s] of the machine.” *Id.*⁸

This definition does not adequately describe the POM machines. While the first stage in gameplay may be analogous to the experience that a slot machine offers, the POM machines also integrate a memory game into the overall gameplay experience that requires a player to focus on a sequence of multicolored shapes and then recall the sequence correctly. *See, e.g.*, N.T. at 305-20. This additional feature of the POM machines distinguishes them from the common definition of a slot machine. *Cf.* <https://www.merriam-webster.com/dictionary/slot%20machine> (last visited Nov. 29, 2023); <https://www.britannica.com/dictionary/slot-machine> (last visited Nov. 29, 2023); <https://www.thefreedictionary.com/slot+machine> (last visited Nov. 29, 2023).

We further reject the Commonwealth’s assertion that the Crimes Code must be read *in pari materia* with the Gaming Act, thus importing its broad definition of “slot machine” in order to give effect to the General Assembly’s objective in the Gaming Act of protecting the public. Such an interpretation is inappropriate. Statutes are *in pari materia* “when they relate to the same persons or things or to the same class of persons or things.” *See* 1 Pa.C.S. § 1932(a). Here, the statutes do not

⁸ Here, we rely on the dictionary definition provided by the Commonwealth. *See* Commonwealth’s Br. at 17-18. It is unclear from the Commonwealth’s brief what edition or version of the Merriam-Webster Dictionary the Commonwealth cites here. However, the definition is identical to that provided on Merriam-Webster’s website. <https://www.merriam-webster.com/dictionary/slot%20machine> (last visited Nov. 29, 2023). Appellees have provided additional dictionary definitions, including the Britannica Dictionary (defining slot machine as “a machine used for gambling that starts when you put coins into it and pull the handle or press a button”) and the Free Dictionary (defining “slot machine” as “a gambling machine operated by inserting coins into a slot and often by pulling down on a long handle.”). *See* Appellees’ Br. at 46 (citing <https://www.britannica.com/dictionary/slot-machine> (last visited Nov. 29, 2023) and <https://www.thefreedictionary.com/slot+machine> (last visited Nov. 29, 2023)).

relate to the same class of things: the Crimes Code regulates illegal gambling devices, and the Gaming Act regulates licensed gambling in the Commonwealth.

Additionally, the rule requiring *in pari materia* statutory construction applies only in instances of ambiguous statutory language. *See Goodwin*, 280 A.3d at 948 n.7. The Commonwealth does not allege that Section 5513 is ambiguous, nor do we discern any ambiguity therein. *See Commonwealth's Br.* at 18-24. Thus, we decline to employ this principle of statutory construction.⁹ *See Goodwin*, 280 A.3d at 948 n.7; *In re McFarland's Est.*, 105 A.2d at 95-96. Further, even if there did exist an ambiguity, the Crimes Code is a penal statute that should be construed strictly, and any ambiguities resolved in favor of the accused. *See, e.g., McCoy*, 962 A.2d at 1168.

In summary, the POM machines are not slot machines as commonly defined, and we decline to import a broad definition used to regulate legal gambling into this criminal statute. *See Goodwin*, 280 A.3d at 948 n.7; *In re McFarland's Est.*, 105 A.2d at 95-96; *see also Pinnacle Amusement, LLC v. Bureau of Liquor Control Enf't*, 298 A.3d 447, 452 (Pa. Cmwlth. 2023), *reargument denied* (Aug. 21, 2023).

⁹ The Commonwealth also relies upon *Commonwealth v. Dent*, 992 A.2d 190 (Pa. Super. 2010), to argue that we should read the Crimes Code and Gaming Act *in pari materia*. In *Dent*, the Superior Court was asked to determine whether the playing of Texas Hold 'Em poker, in an unlicensed garage, constituted unlawful gambling under the Crimes Code. *See id.* at 192. The Superior Court looked to the Gaming Act for the definition of "unlawful gambling" and determined that there would be no reason for the legislature to authorize the playing of poker in certain facilities if playing did not constitute unlawful gambling prior to that authorization. *See id.* We may rely on Superior Court decisions as persuasive authority where they address analogous issues, but they are not binding precedent. *See Lerch v. Unemployment Comp. Bd. of Rev.*, 180 A.3d 545, 550 (Pa. Cmwlth. 2018). In our view, *Dent* is unpersuasive on this point, particularly in light of this Court's decision in *POM*, which declined to apply the Gaming Act to POM games similar to those at issue here and held that the Gaming Act is *solely* intended to regulate licensed gambling and not to supplant the Crimes Code. *POM*, 221 A.3d at 735.

Finally, as noted, the parties also dispute the proper interpretation of the phrase “to be used for gambling purposes.” The Commonwealth asserts that it modifies only the catch-all category in Section 5513(a), whereas Appellees suggest it necessarily modifies each category. In light of our conclusion that the POM machines are not slot machines under the Crimes Code, we need not resolve this further dispute of the parties. Regardless of which interpretation is proper, because the POM machines are not slot machines, the POM machines are not illegal *per se*.

C. Whether the POM Machines are Gambling Devices *Per Se*

In forfeiture proceedings, if an item is not *per se* illegal, it may be considered derivative contraband, or “property innocent by itself, but used in the perpetration of an unlawful act.” *See Commonwealth v. Irland*, 153 A.3d 469, 473 (Pa. Cmwlth. 2017), *aff’d*, 193 A.3d 370 (Pa. 2018). Essentially, the Commonwealth must establish a specific nexus between the property and alleged criminal activity. *Pinnacle*, 298 A.3d at 450-41 (citing *Irland*, 153 A.3d at 473).

Here, we consider the POM machines under the catch-all category defined at Section 5513(a) of the Crimes Code. Thus, we must determine whether they are devices “used for gambling purposes.” *See* 18 Pa.C.S. § 5513(a). In other words, in order for the Commonwealth to prove that the POM machines are derivative contraband, it must establish a specific nexus between the POM machines and illegal gambling. *See Irland*, 153 A.3d at 473; *Pinnacle*, 298 A.3d at 450-51.

1. The Parties’ Arguments

The Commonwealth contends that the seized POM machines are devices “used for gambling purposes” and thus prohibited under Section 5513(a) of the Crimes Code. *See* Commonwealth’s Br. at 25. According to the Commonwealth, players use these machines to obtain a result determined by chance,

and any element of skill “tacked on to the game is *de minimus* [sic].” *See id.* The Commonwealth points to a number of reasons in support of this assertion, including (1) the game is advertised as a slot machine; (2) the “Follow Me” feature is secondary, insignificant, and hidden by the game’s designers; (3) Appellees allegedly do not track game data¹⁰ other than the slot machine play, indicating that the “Follow Me” feature is secondary in importance; (4) “Follow Me” is so tedious and difficult that anyone interested in playing a slot machine would never play it; and (5) chance far outweighs skill when the game in its entirety is considered. *See id.* at 25-36.

Appellees reply that substantial evidence supports the trial court’s legal conclusion that skill predominates over chance. *See Appellees’ Br.* at 64-68. Appellees argue that the POM games are not slot machines and are not advertised as such. *See id.* at 68-72. Appellees further respond that the “Follow Me” phase is not secondary, insignificant, or hidden, and that the Commonwealth’s arguments about this phase are factually untrue. *See id.* at 72-80. Further, Appellees argue that the Commonwealth produced no competent evidence that “Follow Me” is not tracked. *See id.* at 80-83. Appellees argue that this Court should ignore the Commonwealth’s speculative argument regarding what a hypothetical player of the “Follow Me” feature may think or do. *See id.* at 83-87.

2. The Predominate Factor Test

Recently, this Court clarified the appropriate analysis in resolving whether alleged contraband constitutes a gambling device *per se*. *Pinnacle*, 298

¹⁰ The Commonwealth implies that this lack of tracking data means that the “Follow Me” game is an “insignificant aspect” of the game as a whole. *See Commonwealth’s Br.* at 33-34. Appellees argue that the Commonwealth did not conclusively prove, one way or another, that the game does not track “Follow Me” data. *See Appellees’ Br.* at 26-27.

A.3d at 451-52. In *Pinnacle*, investigators from BLCE seized numerous electronic gaming machines following a cross-county investigation in liquor-licensed establishments. *Id.* at 449-50. However, following an evidentiary hearing, the trial court disagreed with BLCE's contention that the machines were gambling devices *per se* and ordered their return. *Id.* at 451. Upon further review and relying on precedent from our Supreme Court, the *Pinnacle* Court applied the predominate factor test to ascertain the nature of the alleged contraband. *Id.* at 451-52 (citing *Commonwealth v. Two Electronic Poker Game Machines*, 465 A.2d 973 (Pa. 1983)).

The fundamental inquiry in the predominate factor test is whether the machine is so “intrinsically connected with gambling” that it constitutes a gambling device *per se*. *Id.* To answer this, a reviewing court must look to “the characteristics of the machine when read against” the elements necessary to gambling: consideration, chance, and reward.¹¹ *Id.* To constitute a gambling machine, the *Pinnacle* Court focused on the element of chance.¹² *See id.* The Court instructed that a reviewing court must consider “the relative amount of chance and skill present in the game; and if the element of chance predominates, the game is a gambling game.” *Id.*

¹¹ The Crimes Code defines consideration associated with a related product, service, or activity, in the context of the statute, as “[m]oney or other value collected for a product, service or activity which is offered in any direct or indirect relationship to playing or participating in the simulated gambling program. The term includes consideration paid for computer time, Internet time, telephone calling cards and a sweepstakes entry.” *See* 18 Pa.C.S. § 5513(f). The Pennsylvania Supreme Court has observed that tokens and prizes do not necessarily rise to the level of a reward, but that players must be able to “win an amount of equal or greater value than the amount he played in the machine.” *Commonwealth v. Irwin*, 636 A.2d 1106, 1109 (Pa. 1993). The definitions of neither consideration nor reward are central to our disposition of this matter.

¹² Additionally, it should be noted that the courts have not defined “chance.” Black’s Law Dictionary defines “chance” as (1) “a hazard or risk,” (2) “the unforeseen, uncontrollable, or unintended consequences of an act,” or (3) “an accident.” *Chance*, Black’s Law Dictionary (11th ed. 2019).

Applying this test, the *Pinnacle* Court observed first that gameplay had elements of both skill and chance: while the initial stage of the game was random and chance-based, the latter stage included a memory game feature that allowed a player to “beat” the game every time. *See Pinnacle*, 298 A.3d at 454. The *Pinnacle* Court reasoned that if a player could exercise skill to obtain a winning result with every play, the game was a predominantly skill-based game. *See id.* Therefore, based upon the credited evidence, the *Pinnacle* Court concluded that the electronic gaming machines were not gambling devices *per se*. *See id.* at 455.

3. The POM Machines are not Gambling Devices *Per Se*

The *Pinnacle* Court’s analysis is instructive.¹³ Similar to the games therein, the POM machines include multiple stages of gameplay incorporating elements of both chance and skill. *See id.* at 449-50. Therefore, we consider the evidence credited by the trial court and review its legal determination that the POM machines are not gambling devices *per se* and should be returned to Appellees. *See id.* at 455.

¹³ The Commonwealth’s brief, filed more than a month after the publication of *Pinnacle*, did not cite or discuss that case. When questioned about this lapse at oral argument, the Commonwealth’s attorney, Susan Affronti, Esq., stated to the Court, “First off, if we go with the statutory analysis, *Pinnacle* didn’t address that point. So, that’s simple, if we go in that direction. And the second point, respectfully [to the Court,] we believe *Pinnacle* was wrongly decided. And we will continue to argue that as we did in our allocator. They are substantially similar cases” The Commonwealth’s opinion of the Court’s analysis in *Pinnacle* aside, if the Commonwealth was aware of adverse legal authority, it was required to cite and distinguish it. *See Off. of the Dist. Att’y of Phila. v. Bagwell*, 155 A.3d 1119, 1142 n.21 (Pa. Cmwlth. 2017); Pa.R.P.C. 3.3(a)(2) (stating that a lawyer shall not fail to disclose directly adverse authority). Instead, Attorney Affronti admitted that she was aware of the authority but intentionally omitted it from the arguments filed with this Court. We caution the Commonwealth that the Pennsylvania Rules of Professional Conduct require candor toward the tribunal and, specifically, the disclosure of directly adverse authority. *See Bagwell*, 155 A.3d at 1142 n.21.

The Commonwealth presented the testimony of Dan Wentsler, a BLCE officer who conducts investigations in licensed establishments related to alcohol and gambling crimes. *See* N.T.¹⁴ at 29-30. At the hearing, Wentsler brought in one of the POM machines to demonstrate gameplay for the trial court’s observation. *See id.* at 30-72.

Wentsler testified that he has participated in hundreds of investigations and inspected over a hundred gaming machines. *See id.* at 76. In the course of those inspections, he has observed approximately a hundred people playing POM machines. *See id.* at 88. In his opinion, all of those machines were gambling machines *per se*. *See id.* at 78. Wentsler also testified to the specifics of this investigation. *See id.* at 30. While undercover, he visited the Champions Bar and played the POM machines. *See id.* at 73. However, Wentsler conceded that he did not play the “Follow Me” feature on the machines. *See id.* at 103-04.

The Commonwealth also presented expert testimony from Peter Nikiper, a computer engineer and the director of technical compliance for BMM Testlabs. *See* N.T. at 141-43, 149. BMM is an accredited game testing facility and as part of his duties, Nikiper conducts gaming equipment testing and analysis. *See id.* at 143, 149. Generally, his reviews are limited to machines regulated under the Gaming Act. *See id.* at 195.

Nikiper examined the POM gaming machines, both the machines seized from Champions Bar as well as others. *See id.* at 163-65. According to Nikiper, the initial phase of the game requires “less than 50[%]” skill, but the “Follow Me” feature “take[s] skill to complete[.]” *Id.* at 212, 248. Nikiper testified

¹⁴ Although the evidentiary hearing was held over the course of three days, the pages are numbered contiguously throughout.

that he could not say with 100% certainty that the games were predominantly skill. *See id.* at 268.

David Schoppe, a BLCE enforcement officer, testified on behalf of the Commonwealth. *See* N.T. at 363-443. He is part of the compliance, auditing, and gambling enforcement unit. *See id.* at 363-64. Schoppe testified that he has participated in about 100 investigations involving POM machines. *See id.* at 367.

In the course of his investigations, Schoppe has observed people playing the POM machines and also engaged in gameplay himself.¹⁵ *See id.* at 369, 503. In Schoppe's opinion, these are games of chance because he is "not getting better at these games" despite playing them frequently. *See id.* at 462. Schoppe testified that he does not play the "Follow Me" feature because, in his opinion, most players utilize rapid play, which does not offer the "Follow Me" option. *See id.* at 463-64. Nevertheless, Schoppe agreed that "Follow Me" is determined by skill and can be won on every single play by a skillful player. *See id.* at 497-98.

Dr. Olaf Vancura, a gaming industry consultant, testified on behalf of Appellees. *See id.* at 298-321. He described the testing that he performed on the particular POM machines at issue, which included both personal play as well as the simulation of 10 million games. *See id.* at 305-16. In his expert opinion, the POM machines were predominantly games of skill. *See id.* at 304-05, 308. Specifically, Dr. Vancura opined, a skillful player can "win" by making a net profit on each and every play of the game. *See id.* at 310, 317-18. Additionally, a player that wishes to learn and improve his play on a POM machine can do so. *See id.* at 318.

Considering this evidence, the trial court made several findings and credibility determinations. The trial court did not credit the Commonwealth's

¹⁵ None of the players Schoppe witnessed playing the games testified at the evidentiary hearing. *See* N.T. at 503.

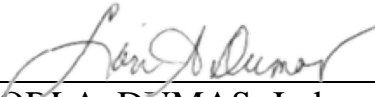
experts as persuasive. *See* Trial Ct. Op. at 7. Specifically, the trial court noted that the Commonwealth’s investigation and Wentsler’s testimony both showed case bias. *See id.* Regarding the Commonwealth’s investigation, the trial court opined that the “whole approach and intent is to shut down the games regardless of game play.” *See id.* The trial court also pointed to Wentsler’s testimony that he had not played the “Follow Me” feature while undercover. *See id.* Additionally, the trial court expressed concern that Wentsler had conducted hundreds of investigations into the devices and had never found one to be a game of skill: to the trial court, this showed a bias towards finding the games were illegal gambling devices. *See id.* On the contrary, the trial court found Dr. Vancura’s testimony persuasive. *See id.*

Finally, the trial court concluded that all of the witnesses who had testified, including the Commonwealth’s expert, agreed that “a patient and skillful player could win at least 105% of the amount played on each and every play by utilizing the Follow Me feature.” *See id.* at 8. Therefore, even though the puzzle portion of the game was predominantly a game of chance, the fact that the Follow Me feature could be won every time and showed up every time a player won less than 105% of the amount played eliminated the chance element. *See id.*

These findings and credibility determinations are supported by the record. We will not overturn them. *Lodge*, 283 A.3d at 925; *Clayton*, 987 A.2d at 1262. Further, based on this evidence, we discern no legal error in the trial court’s determination that the POM machines are primarily games of skill and, thus, not gambling devices *per se*. *See Pinnacle*, 298 A.3d at 450-52. Finally, because the Commonwealth was unable to establish that the POM machines constitute derivative contraband, the trial court properly ordered the Commonwealth to return Appellees’ property. *See id.* at 455; *Singleton*, 929 A.2d at 1227; Pa.R.Crim.P. 588(B).

IV. CONCLUSION

The POM machines at issue in this case are not slot machines as commonly defined. Accordingly, these electronic games are not illegal *per se*. Further, applying the predominant factor test adopted by this Court in *Pinnacle*, these POM machines are not gambling devices *per se* and, therefore, do not constitute derivative contraband. For these reasons, the trial court's order entered March 23, 2023, and granting Appellees' petition for return of property, is affirmed.



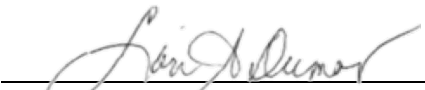
LORI A. DUMAS, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

In re: Three Pennsylvania Skill :
Amusement Devices, One Green :
Bank Bag Containing \$525.00 in : No. 707 C.D. 2023
U.S. Currency, and Seven Receipts :
:
Appeal of: Commonwealth of :
Pennsylvania :

ORDER

AND NOW, this 30th day of November, 2023, the order entered March 23, 2023, in the Dauphin County Court of Common Pleas granting the motion for return of property filed by Champions Sports Bar, LLC and Capital Vending, Inc., is AFFIRMED.



LORI A. DUMAS, Judge

EXHIBIT I



CITY OF PHILADELPHIA

LAW DEPARTMENT
One Parkway
1515 Arch Street
Philadelphia, PA 19102-1595

DIANA P. CORTES
Philadelphia City Solicitor

Jason Greenspon, Esq.
Deputy City Solicitor
Code & Public Nuisance Lit.
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February 1, 2022

Matthew H. Haverstick, Esq.
Kleinbard LLC
One Liberty Place, 46th Floor 1650 Market Street
Philadelphia, PA 19103

RE: *POM of Pa., LLC v. Dep't of Revenue*
Commonwealth Court No. 418 M.D. 2018

Dear Mr. Haverstick:

I am writing in response to your request that the City of Philadelphia stay its enforcement of Bill No. 21092300 (hereinafter the "Ordinance") to the Pace-O-Matic game.

The City takes the position that the Pace-O-Matic game at issue in the litigation is regulated by the State as an unlawful gambling device pursuant to 18 Pa. C.S. § 5513. The Ordinance, as currently drafted, is not currently operative to the Pace-O-Matic game because the Ordinance only prohibits games that are "not regulated by the State."

If it is determined that the Pace-O-Matic game is not regulated by the State, the Ordinance would immediately become operative against the Pace-O-Matic game.

The City continues to believe strongly that POM is not entitled to the relief it requests in this litigation.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason R. Greenspon".

Jason R. Greenspon, Esq.

Counsel for the City of Philadelphia

Case ID: 240302568

EXHIBIT J



City of Philadelphia

City Council
Chief Clerk's Office
402 City Hall
Philadelphia, PA 19107

BILL NO. 230699

Introduced October 12, 2023

**Councilmembers Jones, Gilmore Richardson, Phillips, Lozada, Harrity, Bass,
Gauthier and O'Neill**

**Referred to the
Committee on Public Safety**

AN ORDINANCE

Amending Chapter 9-5900 of The Philadelphia Code, entitled "Prohibition on Certain Gambling Machines and Skills Games," to add additional prohibitions and provide for remedies, all under certain terms and conditions.

THE COUNCIL OF THE CITY OF PHILADELPHIA HEREBY ORDAINS:

SECTION 1. Chapter 9-5900 of The Philadelphia Code is hereby amended as follows:

TITLE 9. REGULATION OF BUSINESSES, TRADES AND PROFESSIONS

* * *

CHAPTER 9-5900. PROHIBITION ON CERTAIN [GAMBLING MACHINES AND SKILLS GAMES] *GAMING AND SKILL-BASED DEVICES*

§ 9-5901. Prohibition on Certain [Gambling Machines and Skills Games] *Gaming and Skill-Based Devices*.

[It shall be unlawful for a business to operate any casino-style or skill game that accepts cash payment for the chance of a cash reward and is not otherwise regulated by the State of Pennsylvania.]

(1) Definitions.

City of Philadelphia

BILL NO. 230699 continued

(a) “Gambling or skill-based cash payout device.” Means a device that accepts cash payment for the chance of a cash reward in connection with playing one or more casino-style game, one or more skill-based game, or a combination of such games.

(b) “Cash.” Means currency or any cash equivalent, such as a debit card, credit card, ticket, token or other type of card, any of which can be exchanged for currency.

(2) Except at licensed facilities as authorized and defined in the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S § 1103, it is unlawful to operate a gambling or skill-based cash payout device or to allow the operation of such a device at a business location.

(3) No person may operate a business at which a gambling or skill-based cash payout device is present.

(4) Violation of this Section shall be subject to a fine of \$1,000 per device present at the business or other location. Each day of violation shall constitute a separate offense for which a fine may be imposed.

(5) Upon a determination that a gambling or skill-based cash payout device is present at a business location, any person authorized to enforce ordinances shall issue a notice of violation of this Section, which notice shall include a warning that, upon a second determination that such a device is present at the same location, a notice of intent to cease operations of such business may be issued. Such second determination shall be made no less than 5 from the date of the initial determination.

(6) Upon determination that such a device is present at the business location at any time thereafter, a cease operations order may be issued in connection with the location pursuant to the procedures set forth in Section A-505 of this Code (Cease Operations Order), until such time as the person in charge of the business location demonstrates, to the satisfaction of the issuing department, that the business has demonstrated that it has established a means to ensure that the business will be operated without the presence of any gambling or skill-based cash payout devices.

(7) Any business in operation that has a gambling or skill-based cash payout device present shall be deemed a public nuisance pursuant to §19-2602 of this Code and any remedies thereunder shall apply, including but not limited to, revocation of the business’s Commercial Activity License.

City of Philadelphia

BILL NO. 230699 continued

(8) Any appeal filed to the Board of License and Inspection Review in connection with a violation of this Section shall not constitute grounds for lifting or staying a Cease Operations Order issued pursuant to this Section.

* * *

SECTION 2. This Ordinance shall be effective immediately.

Explanation:

[Brackets] indicate matter deleted.
Italics indicate new matter added.

City of Philadelphia

BILL NO. 230699 continued

EXHIBIT K

Legislation Text

File #: 240010, **Version:** 0

Amending Chapter 9-5900 of The Philadelphia Code, entitled “Prohibition on Certain Gambling Machines and Skills Games,” to add additional prohibitions and provide for remedies, all under certain terms and conditions.

THE COUNCIL OF THE CITY OF PHILADELPHIA HEREBY ORDAINS:

Section 1. Chapter 9-5900 of The Philadelphia Code is hereby amended as follows:

TITLE 9. REGULATION OF BUSINESSES, TRADES AND PROFESSIONS

* * *

CHAPTER 9-5900. PROHIBITION ON CERTAIN

[GAMBLING MACHINES AND SKILLS GAMES]

GAMING AND SKILL-BASED DEVICES

§ 9-5901. Prohibition on Certain [Gambling Machines and Skills Games] *Gaming and Skill-Based Devices.*

[It shall be unlawful for a business to operate any casino-style or skill game that accepts cash payment for the chance of a cash reward and is not otherwise regulated by the State of Pennsylvania.]

(1) *Definitions.*

(a) “Gambling or skill-based cash payout device.” Means a device that accepts cash payment for the chance of a cash reward in connection with playing one or more casino-style game, one or more skill-based game, or a combination of such games.

(b) “Cash.” Means currency or any cash equivalent, such as a debit card, credit card, ticket, token or other type of card, any of which can be exchanged for currency.

(2) *Except at the locations identified in subsection (c) below, it is unlawful to:*

(a) *to operate a gambling or skill-based cash payout device or to allow the operation of such a device at a business location; or*

(b) *operate a business at which a gambling or skill-based cash payout device is present.*

(c) *Exceptions:*

(.1) *licensed facilities as authorized and defined in the Pennsylvania Race Horse*

Development and Gaming Act, 4 Pa.C.S § 1103;

(2) any location operating under a valid Commonwealth license to sell alcohol that has 20 or more seats readily available and in place for regular use by customers to consume food and beverages; and

(3) Violation of this Section shall be subject to a fine of \$1,000 per device present at the business or other location. Each day of violation shall constitute a separate offense for which a fine may be imposed.

(4) Upon a determination that a gambling or skill-based cash payout device is present at a business location, any person authorized to enforce ordinances shall issue a notice of violation of this Section, which notice shall include a warning that, upon a second determination that such a device is present at the same location, a notice of intent to cease operations of such business may be issued. Such second determination shall be made no less than 5 from the date of the initial determination.

(5) Upon determination that such a device is present at the business location at any time thereafter, a cease operations order may be issued in connection with the location pursuant to the procedures set forth in Section A-505 of this Code (Cease Operations Order), until such time as the person in charge of the business location demonstrates, to the satisfaction of the issuing department, that the business has demonstrated that it has established a means to ensure that the business will be operated without the presence of any gambling or skill-based cash payout devices.

(6) Any business in operation not subject to an exception under subsection (2)(c) above that has a gambling or skill-based cash payout device present shall be deemed a public nuisance pursuant to §19-2602 of this Code and any remedies thereunder shall apply, including but not limited to, revocation of the business's Commercial Activity License.

(7) Any appeal filed to the Board of License and Inspection Review in connection with a violation of this Section shall not constitute grounds for lifting or staying a Cease Operations Order issued pursuant to this Section.

* * *

SECTION 2. This Ordinance shall be effective immediately.