

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

DOCKET NO. 418 MD 2018

POM OF PENNSYLVANIA, LLC,

Petitioner,

v.

**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF
REVENUE, and CITY OF PHILADELPHIA,**

Respondents,

and

PENNSYLVANIA GAMING CONTROL BOARD,

Intervenor.

**THE PENNSYLVANIA GAMING CONTROL BOARD'S
MEMORANDUM IN SUPPORT OF ITS APPLICATION TO INTERVENE
PURSUANT TO PA.R.CIV.P. 2327-2330**

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Dated: February 20, 2020

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STATEMENT OF THE CASE

This action presents a request for declaratory and injunctive relief brought by POM of Pennsylvania, LLC (POM) against the Commonwealth of Pennsylvania, Department of Revenue and the City of Philadelphia regarding the seizure of skill-based slot machines which are distributed throughout Pennsylvania including in Philadelphia by POM. POM asserts that it operates skill-based amusement devices throughout the Commonwealth of Pennsylvania including in taverns, restaurants and social clubs that serve alcohol under license from the LCB. POM asserts that some of its machines have been seized by the Philadelphia Police Department, and thereby, the PA Department of Revenue has been deprived of tax revenues. See Pet. For Review at ¶¶1-5, 12-37. POM seeks declaratory relief that POM's "Skill Game" is a legal game of skill under Pennsylvania law, and an injunction prohibiting seizures, arrests and prosecutions against those machines and their owners. *Id.* at ¶6, and Wherefore clause at pp. 16-17.

The Pennsylvania Gaming Control Board ("the Board"), has filed an application pursuant to Pa.R.Civ.P. 2327 – 2330, requesting this Court to grant it intervention as a Respondent in this action. The Board is the only entity in the Commonwealth granted general and sole regulatory authority over every aspect of the authorization, operation and play of slot machines in the Commonwealth, including of skill slot machines. This authority, conferred by the Pennsylvania Race

Horse Development and Gaming Act (the Gaming Act), 4 Pa.C.S. §§1101, et seq., (Part II), first enacted in July 2004 and subsequently amended in 2006, 2010 and 2017, established an intricate and all-encompassing regulatory model for a variety of gaming products in Pennsylvania, specifically including skill slot machines like those offered by POM which is occurring outside of the Board's regulatory oversight.

As the body with general and sole regulatory authority over slot machines and given the duty to protect the public through the regulation of gaming, the Board is the only governmental entity tasked with protecting the public through the regulation of gaming in the Commonwealth and therefore is uniquely situated to provide its perspective to the mandated statutory oversight of slot machines and the dangers to the public created by the wide distribution of POM games outside of a regulated context.¹

¹ The Board also regulates video gaming terminals in truck stop establishments pursuant to Title 4, Part III, Chapters 31-45. Those machines also meet the Gaming Act's definition of slot machines, like POM machines, but are specifically authorized by statute – unlike POM's machines.

STATEMENT OF FACTS

The Pennsylvania Race Horse Development and Gaming Act (“the Gaming Act”), 4 Pa.C.S. §§1101, et seq., was enacted July 5, 2004 with a primary objective, to which all other objectives and purposes are secondary, to protect the public through the regulation and policing of all activities involving gaming and practices that continue to be unlawful. 4 Pa.C.S. §1102(1). Other expressed intents of the Gaming Act relevant here include: to authorize the operation and play of slot machines, table games and interactive gaming under a single slot machine license issued to a slot machine licensee, 4 Pa.C.S. §1102(12), and to ensure the sustainability and competitiveness of the commercial gaming industry in this Commonwealth by authorizing interactive gaming, the operation of multistate wide-area progressive slot machines, skill and hybrid slot machines. 4 Pa.C.S. §1102(12.2).

The Gaming Act established the Pennsylvania Gaming Control Board as an independent board which shall be a body corporate and politic. 4 Pa.C.S. §1201(a). Section 1202 of the Gaming Act establishes the general and specific powers of the Board with Section 1202(a)(1) providing in part: The Board shall have sole and general regulatory authority over the conduct of gaming and related activities as described in this part. The Board shall ensure the integrity of the acquisition and operation of slot machines, and shall have the sole regulatory authority over every

aspect of the authorization, operation and play of slot machines. 4 Pa.C.S. §1202(a)(1).

By amendment through Act 42 of 2017, the General Assembly specifically added terms and definitions of “hybrid slot machine” and “skill slot machine” to Section 1103 of the Gaming Act. Specifically, the General Assembly amended the definition of “slot machine” to include “A skill slot machine, hybrid slot machine and the devices or associated equipment necessary to conduct the operation of a skill slot machine or hybrid slot machine.”

The Board’s duty to protect the public includes the Board’s gaming laboratory’s testing and certification of slot machines which meet statutory and regulatory criteria, and which are linked to a central control computer” to provide auditing program capacity and individual terminal information. §1323(a). In addition, the Gaming Act provides, in part: the Board shall have the power and its duties shall be to require that no slot machine may be set to pay out less than the theoretical payout percentage which shall be no less than 85%. §1207(10).

The Gaming Act provides for the operation of slot machines in Category 1, 2, 3 and 4 slot machine licensed facilities, and does not provide for slot machines to be operated or otherwise subject to regulation in any location in the Commonwealth other than a Board licensed facility. Slot machines operated outside of a Board licensed facility are not subject to the same public protections as commanded for slot

machines in Board licensed facilities. There is no Pennsylvania statute that expressly authorizes the operation of slot machines in Pennsylvania which are not under the Board's regulatory authority pursuant to the Gaming Act, and no Commonwealth agency other than the PGCB is vested with "general and sole regulatory authority" to regulate slot machine gaming in Pennsylvania.

The Pennsylvania Gaming Control Board was not named as a respondent in this action. The Board has consulted with counsel from the Office of Attorney General who represents the Pennsylvania Department of Revenue in this matter and that Office has no objection to the Board seeking to intervene in this matter on its own behalf.

STANDARD FOR INTERVENTION

Applications for intervention in matters which lie in this Court's original jurisdiction are to be considered under Pennsylvania Rules of Civil Procedure 2327 through 2330. Rule 2327 prescribes who may intervene in an action as follows:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if:

- (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
- (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or

(3) such person could have joined as an original party in the action or could have been joined therein; or

(4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

In turn, Rule 2329 provides:

Upon the filing of the petition and after hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused if:

(1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or

(2) the interest of the petitioner is already adequately represented; or

(3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

In *LaRock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa Commonwealth Ct. 1999), the Court addressed these rules, stating:

“Considering Rules 2327 and 2329 together, the effect of Rule 2329 is that if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present. Equally, if the petitioner does not show himself to be within one of the four classes described in Rule 2327, intervention must be denied, irrespective of whether any of the grounds for refusal in Rule 2329 exist. See *In re Pennsylvania Crime Comm'n*, 453 Pa. 513, 524 n. 11, 309 A.2d 401, 408 n. 11 (1973); 7 Goodrich Amram 2d *Intervention* § 2329:3 (1992). Thus, the court is given the discretion

to allow or to refuse intervention only where the petitioner falls within one of the classes enumerated in Rule 2327 and only where one of the grounds under Rule 2329 is present which authorizes the refusal of intervention.”

The Gaming Control Board meets the requirements of Section 2327 for who may intervene on two basis. First, the Board could have been joined as an original party in the action as the entity with regulatory authority over slot machines in the Commonwealth. Clearly by the October 2017 amendments to the Gaming Act, which specifically added skill slot machines into the arena of regulated gaming in the Commonwealth, the fact that a conflict existed between the operation of skill machines in a licensed facility and those in a wholly unregulated field was foreseeable. The Board certainly could have been named as a party at the outset to have all stakeholders present to resolve the question now before this Court in this litigation.

Second, the determination of this action would likely affect the legally enforceable interests of the Board and the Board will certainly be bound by the result. As cited above, the Gaming Act’s primary objective, to which all other objectives and purposes are secondary, to protect the public through the regulation and policing of all activities involving gaming and practices that continue to be unlawful. 4 Pa.C.S. §1102(1). Secondary intents of the Gaming Act include: to authorize the operation and play of slot machines, ... under a single slot machine license. 4 Pa.C.S. §1102(12); and to ensure the sustainability and competitiveness of the

commercial gaming industry in this Commonwealth by authorizing interactive gaming, the operation of multistate wide-area progressive slot machines, **skill and hybrid slot machines**. 4 Pa.C.S. §1102(12.2).

Despite the Board being granted general and sole regulatory authority over the conduct of gaming, operators of so-called skill machines, like those operated by POM, have continued to operate their machines outside the regulatory structure established by the Gaming Act. The significance of the skill game debate became much more clear when the Commonwealth Court held, in its November 20, 2019 Opinion in this action (*POM v. DOR*, 418 MD 2018), that the skill games at issue fall within the definition of a “slot machine” under the Gaming Act.² Given that the legislation gave the Board **general and sole authority to regulate all gaming in Pennsylvania including the sole regulatory authority over every aspect of the authorization, operation and play of slot machines**, the legislation clearly demonstrates an intent to regulate the entire field of slot machines in Pennsylvania and to eliminate opportunities for two classes of slot machines: those with player protections and fairness, and those without.

Despite the clear direction in the Gaming Act which seeks to fully occupy the field of permissible slot machine gaming in the Commonwealth, the Petition for

² The Court also noted that the Gaming Control Board had not sought to intervene at that point in time. See Opinion in 418 MD 2018 at p. 5, and *POM v. PSP*, Opinion, 503 MD 2018 at p.5.

Declaratory Relief would permit two classes of slot machines in Pennsylvania: those regulated under the strict environment for casino gaming, and those thousands of slot machines in the Community without player safeguards similar to those commanded by the Gaming Act. This scenario, if permitted to exist, directly undermines the Board's actions to oversee the creation of the industry and strictly regulate in a manner to protect the public, generate revenues at the statutory rates for the Commonwealth and to ensure the sustainability and competitiveness of the commercial gaming industry. Indeed, the unregulated machines at issue in this action do nothing but undermine the Board's statutory powers and duties.

Finally, the disqualifiers from intervention in Section 2329 do not exist as to the Gaming Control Board. As the only entity with general and sole regulatory authority over slot machine operation in Pennsylvania, no other entity or party could represent the Board's interest in this matter. The Board has a substantial interest in this matter discernible from the interests of the public and of the other respondents.³ Indeed, the Department of Revenue represents the collection of taxes for the Commonwealth and not the much broader responsibilities of the Board. The City of Philadelphia, and the State Police in *POM v. PSP*, No. 503 MD 2018, have law enforcement authority under the crimes code but not regulatory authority and

³ See *MEC Pa. Racing v. Pa State Horse Racing Comm.*, 827 A.2d 580, 588 (Pa Commonwealth Ct. 2003).

responsibility to administer the Gaming Act for the protection of the public and promotion of the integrity of the gaming product, and the other proposed intervenor casinos have their own financial interests at stake which are not the same as the Board's interests.

Finally, the Board has not unduly delayed in filing this application. The issue of the machines actually being classified as slot machines and thus within the Board's statutory oversight was just decided November 20, 2019.⁴ Discovery has not yet commenced and therefore there is no delay in the litigation to be occasioned by the Board's intervention.

The Board's interest in this matter is direct and the impact of the Court's decision will effect the Board's ability to fulfill its statutory duties and obligations. Moreover, as the entity with the obligation to administer the Gaming Act, the Board is uniquely positioned to represent to the Court the intent of the Gaming Act's all-encompassing regulatory scheme for slot machines which does not provide for a secondary class of slot machines outside the Board's oversight.

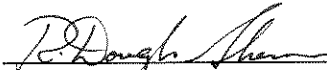
⁴ There was a period of delay following the November 20, 2019 Opinion but that was a result of Respondent filing in this court seeking certification of the issue under 42 Pa.C.S. 702(b) for an interlocutory appeal to the Supreme Court.

CONCLUSION

For the foregoing reasons, the Pennsylvania Gaming Control Board meets the requirements to intervene in this matter. It has multiple statutory obligations under the Gaming Act which will be undermined if POM slot machines are permitted to operate throughout the Commonwealth. The Board's interest are different than those of other parties and it is thereby entitled to intervene. As such, the Pennsylvania Gaming Control Board respectfully requests this Court to grant its Application to Intervene in this action.

Respectfully submitted,

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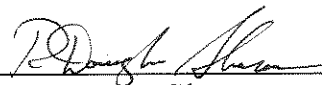
Dated: February 20, 2020

*Attorneys for Pennsylvania Gaming
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CERTIFICATE OF COMPLIANCE

I certify 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: February 20, 2020



R. Douglas Sherman
Chief Counsel

CERTIFICATE OF SERVICE

I, R. Douglas Sherman, hereby certify that on this 20th day of February 2020, caused a true and correct copy of the foregoing Memorandum to be served by depositing same in the United States Mail, first class mail, postage prepaid, in Harrisburg, Pennsylvania, upon the following:

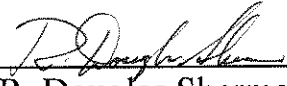
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