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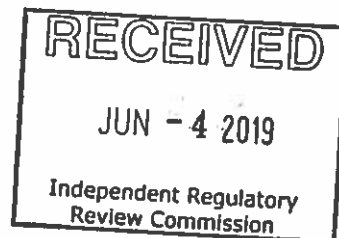
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June 3, 2019

Via E-Mail & First Class U.S. Mail

The Independent Regulatory Review Commission
333 Market Street
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Harrisburg, PA 17101
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Maria L. Miller
Regulatory Coordinator
Office of Chief Counsel
Department of Revenue
Dept. 281061
Harrisburg, PA 17128-1061
mariamil@pa.gov

Re: Department of Revenue Proposed Regulation #15-460 – iLottery Games

Dear Members of the Commission and Ms. Miller:

I am writing to you in my capacity as legal counsel to Penn National Gaming, Inc. and its two state-licensed Pennsylvania casinos: Hollywood Casino at Penn National Race Course (located in Grantville, Dauphin County) and the Meadows Racetrack and Casino (located in North Strabane Township, Washington County).

As an initial matter, we ask the Commission to take note of the fact that the legality of the Department of Revenue's ("DOR") iLottery games program is currently the subject of a legal challenge in the Commonwealth Court of Pennsylvania: *Greenwood Gaming and Entertainment, Inc., et al. v. Commonwealth of Pennsylvania Department of Revenue, et al.*, No. 571 MD 2018. Specifically, seven (7) Pennsylvania casino operators have filed an action seeking to halt DOR (acting through its Bureau, the Pennsylvania State Lottery) from violating Act 42 of 2017 (P.L.

419, No. 42)(4 Pa.C.S.A. § 501-503), which prohibits DOR from offering iLottery games that *simulate casino-style games*.¹

Accordingly, we contend that DOR's effort to seek approval of iLottery games regulations now – while litigation directly relating to the legality of the current structure of iLottery games program remains pending – is premature and weighs heavily in favor of the Commission rejecting the proposed regulations as not being in the public interest. This position is strengthened by the fact that the proposed regulations are not necessary. By DOR's own admission, "[t]he majority of jurisdictions operating iLottery do not have regulations specific to iLottery" and instead "implement their iLottery programs through the use of terms and conditions, terms of use, privacy policies etc. that establish players' rights and responsibilities as they relate to use of the iLottery platform and services." See DOR Regulatory Analysis Form, Section 12, page 3. Therefore, as an alternative to the Commission rejecting the proposed regulations, the public would be well-served by DOR voluntarily withdrawing the proposed regulations pending resolution of the above-referenced Commonwealth Court action.

Should the regulatory review process continue, however, we offer the following comments for the Commission's consideration.

1. The regulations should acknowledge that DOR (acting by and through the State Lottery) is prohibited from deploying purported iLottery games that use the same name, the same symbols, and have very similar play mechanics of actual slot machines that appear on gaming floors and/or in online casinos.
2. The regulations should acknowledge that DOR (acting by and through the State Lottery) is prohibited from deploying purported iLottery games that have been certified for compliance with gaming standards in other gaming jurisdictions, which apply only to casinos (for example, the United Kingdom's Gambling Commission or through New Jersey's Internet and Mobile Gaming regulations).
3. The regulations should make clear that DOR's iLottery games may not utilize or include features that aid in the simulation of casino-style games, including the following:
 - Payout percentages that match or exceed the minimum payout percentage for a slot machine or authorized interactive game that replicates the play of a slot machine. For example, all currently operational iLottery games have an average payout of 85%, which is the minimum payout percentage for a slot machine, 4 Pa.C.S. §

¹ On the same date as this letter (June 3, 2019), the petitioning casino operators filed with the Court an Application for Special Relief in the Nature of a Preliminary Injunction. Copies of the Application and Brief in support thereof are provided along with this letter.

1207(10). In contrast, the minimum payout percentage for traditional lottery games is 40%, 72 P.S. § 3761-311;²

- The same user interface as a slot machine, and the same interactive appearance, feel and play experience that a player would expect from land-based and online slot machines offered by state-licensed casinos. These features would include graphics, animation, suspenseful music, flashing lights, bells or sounds played when combinations are hit, and similar visual and auditory features;
- Price to play options in lower denominations, such as nickel or dime, which are typically offered in casino slot games and not in any other lottery products;
- The requirement that a player “Bet,” “Set Bet,” “Choose Bet,” “Select Bet Amount,” and/or press a “Bet” button, as is typically seen in casino-style games and slot machines;
- A spin prize wheel function, wheels or cascading tiles and symbols as found in casino-style games;
- Betting structures that are identical to a slot machine. For example, DOR’s iLottery games currently allow players to “bet up” to take advantage of multipliers, whereby they increase their bet and can win additional games or higher amounts of money, which is a classic slot machine element;
- Bonus games and free spins, which mirror the play mechanics of a slot machine;
- Pick bonuses, which are a common feature present in hundreds of varieties of slot machines;
- Dynamic change, whether in the amount of the prize or the number of plays, which is a feature consistent with casino-style, and not lottery, games;
- The traditional symbol matrix – whether 3x3, 4x4 or 5x5 – found in slot machines;
- “Scattered pay” or “Multi-way” game design as found in many contemporary slot machines;

² DOR has raised the minimum payout percentage for iLottery games (from 40% to 85%) for the clear purpose of making iLottery games competitive with actual slot machines that appear on gaming floors and/or in online casinos. Ironically, this results in the State Lottery receiving less revenue for senior citizen programs than it would have if the Lottery maintained its focus on offering authorized iLottery games.

- The illusion of choice or decision-making consistent with a slot machine;
 - The same backbone as a slot machine; specifically an outcome determined by a random number generator with animated graphics and computer operations used to provide a visual depiction of the outcome; and
 - Free play and casino-style patron loyalty programs designed to imitate casino gaming.
4. Other than iLottery vendor software and services costs of between \$6 million and \$8.5 million, DOR has indicated to the Commission that “[c]osts for the administration of iLottery are negligible” and that “[DOR] has determined that the permanent regulation will have no adverse fiscal impact on the Commonwealth.” See DOR Regulatory Analysis Form, Section 21, page 6, and Notice of Proposed Rulemaking, Fiscal Impact Section, page 15. Regrettably, however, DOR’s cost analysis is materially incomplete in that apparently no analysis was performed with respect to how iLottery conducted with broad disregard of the prohibition on the simulation of casino-style games would adversely impact Pennsylvania’s casino industry and its continuing ability to generate significant tax revenue for the Commonwealth.

As the Commission may be aware, in 2004, the General Assembly enacted the Pennsylvania Race Horse Development and Gaming Act (4 Pa.C.S. §§ 1101-1904) and vested the Commonwealth with a substantial share of all gaming revenue (specifically, 54% of land-based and interactive slot machine revenue and 16% of land based and interactive tables game revenue). 4 Pa.C.S. §§ 13A62-A63, 13B53-B53, 1403, 1405 and 1407. This has resulted in literally billions of dollars flowing into the Commonwealth’s coffers, which has been and continues to be used for important Legislative priorities such as: (i) property tax relief, (ii) rent rebates for senior citizens, (iii) economic development and tourism initiatives, (iv) support for agriculture, (v) support for host counties and communities, and (vi) the Commonwealth’s General Fund.

Critically, by incorporating into Act 42 the prohibition on DOR from offering iLottery games that simulate casino-style games, the General Assembly’s clear objective was to prevent competition between Lottery and Pennsylvania casinos in the online gaming market and the unintended negative impacts on the Commonwealth’s financial picture that could ensue. DOR is well aware of this. On February 21, 2017, in prepared comments before the House Appropriations Committee, then-DOR Secretary Eileen McNulty stated: “Pennsylvania’s private casino industry and the Lottery have been able to co-exist, in large part because we offer very different gaming experiences.”

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Maria L. Miller
June 3, 2019
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We appreciate the opportunity to provide the Commission and DOR with the comments on Proposed Regulation # 15-460 set forth above. If you have any questions, please do not hesitate to contact the undersigned at (215) 864-8622 or kinga@ballardspahr.com.

Very truly yours,



Adrian R. King, Jr.

ARK/

Enclosure

cc: **The Honorable Scott Hutchinson (via First Class Mail)**
 Majority Chair, Senate Committee on Finance
 The Honorable John P. Blake (via First Class Mail)
 Democratic Chair, Senate Committee on Finance
 The Honorable Michael Peifer (via First Class Mail)
 Majority Chair, House Committee on Finance
 The Honorable Jake Wheatley, Jr. (via First Class Mail)
 Democratic Chair, House Committee on Finance
 Laura Campbell, IRRC (via E-Mail)
 Fiona E. Cormack, IRRC (via E-Mail)
 Michelle L. Elliot, IRRC (via E-Mail)

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

GREENWOOD GAMING AND	:	
ENTERTAINMENT, INC., et al.,	:	
	:	
Petitioners,	:	No: 571 MD 2018
	:	
v.	:	
	:	
COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT	:	
OF REVENUE, et al.,	:	
	:	
Respondents.	:	
	:	

**PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE
NATURE OF A PRELIMINARY INJUNCTION**

Pursuant to Rules 123 and 1532 of the Pennsylvania Rules of Appellate Procedure, Petitioners respectfully submit this Application for Relief in the Nature of a Petition for Preliminary Injunction to enjoin the Pennsylvania Department of Revenue from offering, through the iLottery program, interactive online games that simulate slot machines and other casino-style games that are specifically prohibited by statute.

1. As more fully set forth in Petitioners' Petition for Review, the averments of which are incorporated herein by reference, the General Assembly enacted the Pennsylvania Race Horse Development and Gaming Act (the "Gaming Act") in 2004, authorizing for the first time the conduct of slot machine gaming in Pennsylvania. 4 Pa.C.S. §§ 1101-1904.

2. The Gaming Act established three categories of slot machine licensees – Category 1, 2 and 3 licensees – which would have the exclusive right to place and operate slot machines in the Commonwealth. *Id.* § 1301.

3. The Gaming Act defines a "slot machine" as, in part:

Any mechanical or electrical contrivance which, upon ... payment of any consideration whatsoever ... is available to play or operate, the play or operation of which, whether by reason of skill or application of the element of chance or both, may deliver or entitle the person or persons playing or operating the contrivance ... to receive cash, billets, tickets, tokens or electronic credits to be exchanged for cash ... A slot machine: (1) May utilize spinning reels or video displays or both. (2) May or may not dispense coins, tickets or tokens to winning patrons. (3) May use an electronic credit system for receiving wagers and making payouts. The term shall include associated equipment necessary to conduct the operation of the contrivance, terminal, machine or other device.

4 Pa.C.S. § 1103.

4. With the tremendous success of slot machine gaming, the General Assembly enacted legislation in 2010 to expand gaming in Pennsylvania to include table games. Act of Jan. 7, 2010, P.L. 1, No. 1.

5. Act 1 of 2010 authorized slot machine licensees to obtain a table game operation certificate and entitled certificate holders to be the exclusive operators of such games in the Commonwealth. 4 Pa.C.S. § 13A11.

6. The General Assembly enacted a second major expansion of gaming in the Commonwealth with the passage of Act 42 of 2017. Act of Oct. 30, 2017, P.L. 419, No. 42.

7. As part of Act 42, the Commonwealth authorized the conduct of interactive gaming in Pennsylvania, with slot machine licensees having the exclusive right, in the first instance, to offer interactive games.¹

8. Slot machine licensees are entitled to apply for and obtain an interactive gaming certificate that will enable them to conduct peer-to-peer interactive games (*e.g.*, poker), non peer-to-peer games that simulate slot machines, and non peer-to-peer games that simulate table games. 4 Pa.C.S. §§ 13B11, 13B12.

¹ Act 42 defines “interactive game” as “[a]ny gambling game offered through the use of communications technology that allows a person ... to transmit electronic information to assist in the placement of a bet or wager and corresponding information related to the display of the game, game outcomes or other similar information. The term shall not include:

(1) A lottery game or Internet instant game as defined in the ... the State Lottery Law [or] (2) iLottery under Chapter 5 (relating to lottery)...” 4 Pa.C.S. § 1103. The Act defines “interactive gaming” as “[t]he placing of wagers with an interactive gaming certificate holder or interactive gaming operator using a computer network ... through which an interactive gaming certificate holder may offer authorized interactive games to registered players. The term shall include the placing of wagers through the use of a multi-use computing device.” *Id.*

9. Petitioners Parx Casino, Hollywood Casino, Harrah's Philadelphia Casino, Mohegan Sun Pocono, Stadium Casino, and Valley Forge Casino all submitted applications for, and were issued, an interactive gaming certificate.

10. On April 16, 2019, the Pennsylvania Gaming Control Board (the "PGCB") notified all interactive gaming certificate holders, via correspondence from its Executive Director Kevin O'Toole, that the agency would authorize certificate holders to commence interactive gaming operations during the week of July 15, 2019.

11. In 2014, the General Assembly amended the State Lottery Law. Act of Oct. 31, 2014, P.L. 3041, No. 201.

12. In doing so, the Legislature expressly prohibited the Lottery from offering "internet instant games" and from selling lottery products (including internet instant games) via Lottery's website or the website of any of its licensed retailers, absent further legislative authorization. 72 P.S. § 3761-303(a)(1) and (8).

13. In addition, the General Assembly added a new, express prohibition barring the Secretary of Revenue from offering "any Internet-based or monitor-based *interactive lottery game or simulated casino-style lottery game*, including video poker, video roulette, slot machines or video blackjack, through the State Lottery." *Id.* § 3761-303(a.1) (emphasis added).

14. The General Assembly provided the additional authorization needed in 2017, when, as part of Act 42, it permitted the Department to launch “iLottery” as a vehicle for the sale of Internet instant games and other lottery products via the Internet.

15. The iLottery authorization is codified at 4 Pa.C.S. § 503.

16. Pursuant to Act 42, “iLottery” is designated as the:

[S]ystem that provides for the distribution of *lottery products* through numerous channels that include, but are not limited to, web applications, mobile applications, mobile web, tablets and social media platforms that allow players to interface through a portal for the purpose of obtaining *lottery products* and ancillary services....

4 Pa.C.S. § 502 (emphasis added).

17. “Lottery products” are “plays, shares or chances offered by the State Lottery . . . [and] includes instant tickets, terminal-based tickets, raffle games, play-for-fun games, lottery vouchers, subscription services and gift cards *authorized for sale under the State Lottery Law.*” *Id.* (emphasis added).

18. Act 42 defines “iLottery Games” as “internet instant games and other *lottery products* offered through iLottery.” *Id.* (emphasis added).

19. Mirroring the express prohibition added to the State Lottery Law by the 2014 amendments, the term “iLottery” excludes “games that represent physical, Internet-based or monitor-based *interactive lottery games which simulate*

casino-style lottery games, specifically including poker, roulette, slot machines or blackjack.” Id.

20. Thus, in Act 42, the General Assembly authorized an online presence for both the Lottery and slot licensees, but created a clear distinction between the two: *iLottery may not offer casino-style games or games that simulate them.*

21. On May 22, 2018, the Department launched “iLottery,” offering games played online and on mobile devices. Respondents’ Answer to Pet. for Review ¶ 40.

22. Despite the clear prohibition contained in the State Lottery Law, Act 42, and the regulations promulgated and proposed by the Department, the Department has simply disregarded the statutory and regulatory restrictions on iLottery, and offers interactive lottery games that simulate slot machines and casino-style games through the iLottery program.

23. Indeed, *the Department has even advertised its iLottery offerings through affiliate marketing agreements as “Slot-Style Games” and “Casino Style Games.”*²

² (GREENWOOD.RES000433-000434).

24. In June of 2018, the Department publicly claimed that these advertisements were distributed by affiliates, and claimed that the advertisements were “inaccurate” and that they were immediately corrected.³

25. However, subsequent to the Department’s acknowledgment of inappropriate marketing and claimed rectification of the alleged inaccuracies, the Department *continued to market* its iLottery offerings using online advertisements that portray iLottery products as “instant win slot-style games,” as demonstrated in Exhibits A and B attached hereto.

26. True to its advertising, iLottery interactive games mimic the look, sounds, and feel of casino games.

27. Many of those games also meet the Gaming Act’s definition of a “slot machine.”

28. Specifically, and as summarized in the paragraphs that follow, the evidence that will be presented at the hearing on Petitioners’ application for an injunction will demonstrate by a preponderance of the evidence that the Department’s iLottery offerings run afoul of the legislative prohibition against games that simulate casino-style games and slot machines.

³ (GREENWOOD.RES000438-000439).

29. The Department has approved at least 47 games for the iLottery program.⁴

30. At least nine of the iLottery games use the same name, the same symbols, and have very similar play mechanics of actual slot machines that appear on gaming floors or in online casinos. Specifically, Gold Fish, Volcano Eruption, Robin Hood, A Dragon's Story, Foxin' Wins, Gorilla Go Wild, Slingo, Big Foot, and Monster Wins are similar to games that are offered on Petitioners' gaming floors, the gaming floors of other Pennsylvania casinos, and/or by online casino operators in jurisdictions outside of Pennsylvania. Lyons Aff. ¶ 12, a true and correct copy of which is attached hereto as Exhibit C.

31. At least 22 of the iLottery games are certified for compliance with *casino gaming* standards in other jurisdictions, including the United Kingdom's

⁴ (GREENWOOD.RES000402-000405; *see also* 2/5/17 Letter from K. Romano to A. Shienvold; All Games – PA iLottery, <https://www.pailottery.com/games/all-games> (last visited May 23, 2019)).

Gambling Commission,⁵ and New Jersey's Internet and Mobile Gaming regulations, N.J.A.C. 13:69O-1.1 to 13:69O-1.10, *which only apply to casinos*.⁶

32. Across *all iLottery games*, the Department increased the payout percentages to match the statutory minimum payout for slot machines in Pennsylvania. iLottery games have an average payout of 85.62%,⁷ and the minimum payout percentage for a slot machine or authorized interactive game that replicates the play of a slot machine is 85%, 4 Pa.C.S. § 1207(10). In contrast, the minimum payout percentage for a traditional lottery game is 40%, 72 P.S. § 3761-311.

33. The Department's own vendors admit that iLottery games simulate slot machines and casino-style games.⁸

⁵ (GREENWOOD.RES001835-001839 (Big Money Slingo); IWG000069-IWG000074 (Cash Buster Bonus); IWG000048-IWG000052 (Cash Buster Extreme); GREENWOOD.RES001840-001844 (Cash Buster Towers); SGI000204-SGI000215 (Cinna Money Match); GREENWOOD.RES001845-001850 (Crossword Cash); IWG000031-IWG000037 (Fast Buck Lucky); GREENWOOD.RES001851-001855 (Genie Jackpot); SGI000216-SGI000227 (Hex-Pop Payday); IWG000013-IWG000018 (Merry Multiplier); IWG000058-IWG000063 (Rainbow Fortunes); IWG000001-IWG000006 (Slingo); GREENWOOD.RES001856-001863 (Super Cash Buster); GREENWOOD.RES001864-001868 (Super Gems); IWG000019-IWG000024 (Treasure 7x7); IWG000064-IWG000068 (Volcano Eruption)).

⁶ (GREENWOOD.RES001669-001673 (Bigfoot); GREENWOOD.RES001674-001678 (Foxin Wins); SGI000196-SGI000199 (Gorilla Go Wild); GREENWOOD.RES001679-001683 (Monster Wins); GREENWOOD.RES001684-001688 (Robin Hood); GREENWOOD.RES001689-001693 (Volcano Eruption); SGI000200-SGI000203 (Wild Run)).

⁷ (GREENWOOD.RES001715; GREENWOOD.RES001758-001760).

⁸ (GREENWOOD.RES001669-001673).

34. The Department required that its game supplier covenant not to sell the same games to Pennsylvania casinos – effectively admitting that the iLottery games are, in fact, casino games that would otherwise be sold to and offered by casino operators such as Petitioners.⁹

35. Nearly all of the iLottery games feature the same user interface as a slot machine, and have the same interactive appearance, feel, and play experience that a player would expect from land-based and online slot machines. These features include graphics, animation, suspenseful music, flashing lights, bells or sounds played when combinations are hit, and similar visual and auditory features. Lyons Aff. ¶ 15.

36. Games are offered in lower denominations, such as a nickel or dime, which are typically offered in casino slot games and not in any other Lottery products. Lyons Aff. ¶ 16.

37. Several of the iLottery games require the player to “Bet,” “Set Bet,” “Choose Bet,” “Select Bet,” “Select Bet Amount,” or press a “Bet” button, as is typically seen in casino-style games and slot machines, whereas traditional Lottery products do not use the term “bet” or other betting terminology. Lyons Aff. ¶ 17.

38. Multiple iLottery games feature a spin prize wheel function, wheels or cascading tiles and symbols as found in casino-style games. Lyons Aff. ¶ 18.

⁹ (GREENWOOD.RES000340-000401).

39. The betting structure of the iLottery games is identical to a slot machine. Players can “bet up” to take advantage of multipliers, whereby they increase their bet and can win higher amounts of money, which is a classic slot machine element. Several games even feature a prize table or payable with the bet multiplier showing the prize increasing in conjunction with the bet. Lyons Aff. ¶ 19.

40. Several iLottery games offer bonus games and free spins, again mirroring the play mechanic of a slot machine. Lyons Aff. ¶ 20.

41. Several games include “pick bonuses,” which are a common feature present in hundreds of varieties of slot machines. Lyons Aff. ¶ 21.

42. The presence of dynamic change, whether in the amount of the prize or the number of plays, is consistent with casino-style, and not lottery, games. Lyons Aff. ¶ 22.

43. Numerous iLottery games adopt the traditional symbol matrix – whether 3x3, 4x4, or 5x5 – found in slot machines. Players win by aligning various symbols horizontally, vertically and diagonally, and win bonus spins or games when the same symbols align. Petitioners operate slot machines with the same 3x3, 4x4, and 5x5 symbol matrix found in their licensed casinos. In multiple iLottery games, the reveal is also made across the columns, which is a common slot machine style reveal. Lyons Aff. ¶ 23.

44. As an alternative to the line configuration, some iLottery games utilize a “scattered pay” or “Multi-way” game design featured in many contemporary slot machines. A player wins by achieving the requisite number of particular symbols in a scattered or non-linear pattern, with the same bonus opportunities as payline designed slot machines. Lyons Aff. ¶ 24.

45. The winner of all lottery games is predetermined; however, certain iLottery games, such as Big Eats Little, gives the illusion of choice or decision-making consistent with a slot machine. Other iLottery games, such as Cash Buster Towers and Super Cash Busters, give the illusion of randomness, which is inconsistent with a lottery game. iLottery games like Jungle Tumble, Volcano Eruption, and Super Gems give the illusion of extended play by matching a certain number of symbols to keep winning and playing, which is typical of a slot machine and inconsistent with a typical lottery product. Lyons Aff. ¶ 25.

46. Overall, the games have the same backbone as a slot machine; an outcome that is determined by a random number generator with animated graphics and computer operations used to provide a visual depiction of that outcome. Lyons Aff. ¶ 26.

47. The Department has chosen to make these casino-style betting games available to patrons under the age of 21, in direct contrast to the limitations imposed on Petitioners for interactive gaming.

48. To further simulate a casino-style gaming experience, the Department is employing two key casino tools – free play and a casino-style patron loyalty program – that further emphasize that the iLottery is in every way imitating casino gaming.

49. Individually and collectively, the games offered by the Department through iLottery mimic the look, feel, and player experience of casino games, even emulating the marketing and promotion styles used by the gaming industry to compete against other gaming operators.

50. At trial, Petitioners will present undeniable evidence that will demonstrate that the games offered by the Department through iLottery violate the prohibitions of Act 42 and the State Lottery Law against “interactive lottery games which simulate casino-style lottery games.” Consequently, Petitioners will satisfy each of the essential elements for injunctive relief.

51. First, Petitioners are likely to succeed on the merits of their claims, because the games being offered by the Department in many instances are indistinguishable from land-based and Internet slot machines and, in all cases, are interactive casino-style games that are specifically prohibited by the enabling legislation.

52. The Legislature plainly intended to maintain the historical distinction between casino gaming and the lottery, and the iLottery program simply ignores that intentional distinction.

53. The Lottery's unlawful conduct is therefore a direct incursion by the State into the exclusive interactive gaming market of the licensed gaming operators like Petitioners, and such blatant disregard by the Department of its enabling legislation cannot be tolerated.

54. Second, Petitioners will suffer immediate and irreparable harm if a preliminary injunction is not issued.

55. The PGCB has established a launch date for Petitioners' interactive gaming operations of mid-July, 2019.

56. In all likelihood, this will leave less than one month between the Court's hearing on the instant Application and Petitioners' planned introduction of their interactive gaming products into a market illegally occupied by the Lottery.

57. This proximity is sufficient to satisfy the immediacy standard for the issuance of a preliminary injunction.

58. The fact that the Department is offering interactive simulated casino-style games through iLottery that are proscribed by statute is *per se* irreparable harm. *PUC v. Israel*, 52 A.2d 317, 321 (Pa. 1947)); *see also Philips Bros. Elec.*

Contractors, Inc. v. Valley Forge Sewer Auth., 999 A.2d 652, 657 (Pa. Cmwlth. 2010).

59. Moreover, if it were determined that the Department, as a Commonwealth agency, is immune from liability for monetary damages pursuant to the doctrine of sovereign immunity, 42 Pa.C.S. § 8521, it still can be sued for declaratory and injunctive relief, and government immunity, by definition, makes the injury caused by unlawful government action irreparable. *Marcellus Shale Coalition v. DEP*, 185 A.3d 985, 997 (Pa. 2018); *see Boykins v. City of Reading*, 562 A.2d 1027, 1029 (Pa. Cmwlth. 1989).

60. Third, the equities weigh in favor of issuing a preliminary injunction.

61. There can be no harm to the Lottery in forcing it to comply with the enabling legislation for the iLottery program (Act 42) or the enabling legislation for the Lottery as a whole (the State Lottery Law).

62. Indeed, Lottery must act within the strict constraints of such enabling authority. *Pa. Human Relations Comm'n v. St. Joe Minerals Corp.*, 382 A.2d 731, 736 (Pa. 1978); *see also City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984).

63. Petitioners, on the other hand, will suffer irreparable harm if a preliminary injunction is not issued, for the reasons explained above.

64. Moreover, Petitioners collectively have invested hundreds of millions of dollars in this Commonwealth to secure the right to offer online gaming entertainment in a highly-regulated market.

65. Allowing the Department to continue to offer competing games – in violation of Act 42 and the State Lottery Law – significantly impairs the property rights that Petitioners enjoy pursuant to their respective licenses and certificates.

66. Finally, with the PGCB-sanctioned launch of casino interactive gaming imminent, Petitioners will suffer further irreparable harm to this exclusive right to offer such games in Pennsylvania.

67. Fourth, the public interest is served by the entry of an injunction, because the General Assembly established the policy of prohibiting the Department from offering games that simulate slot machines and casino-style games through the iLottery program, 4 Pa.C.S. § 502; 72 P.S. § 3761-303(a.1), and “[w]hen the Legislature declares certain conduct to be unlawful[,] it is tantamount in law to calling it injurious to the public.” *PUC v. Israel*, 52 A.2d 317, 321 (Pa. 1947).

68. Fifth, the requested injunction is reasonably suited to abate the offending activity, because it does not prohibit the Department from operating the iLottery program, but instead, merely bars the Department from offering interactive lottery games that simulate slot machines and casino-style games

through the iLottery program – which is exactly what Act 42 and the State Lottery Law require. 4 Pa.C.S. § 502; 72 P.S. § 3761-303(a.1).

69. Sixth, the preliminary injunction sought by Petitioners will properly restore the parties to their status quo before the Department violated Act 42 and the State Lottery Law, by prohibiting them from doing what they were not permitted to do in the first place.

70. In sum, injunctive relief is necessary and appropriate to remedy the immediate and irreparable harm caused by the Lottery's violation of its own enabling legislation, violation of the public policy of the Commonwealth, and its usurpation of Petitioners' exclusive right to conduct casino-style interactive gaming in the Commonwealth.

WHEREFORE, Petitioners respectfully request that this Court grant their Application for Special Relief in the Nature of a Preliminary Injunction and immediately enjoin the Pennsylvania Department of Revenue from offering interactive lottery games that simulate slot machines and casino-style games, including all games currently offered through iLottery, and to award such further relief as is just and equitable.

Respectfully submitted,

/s/ Adam M. Shienvold

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Date: June 3, 2019

Attorneys for Petitioners

VERIFICATION

I, Thomas Bonner, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to falsification to authorities.

Date: _____

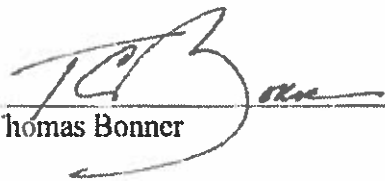

Thomas Bonner

EXHIBIT A

PA ONLINE CASINOS ARE STILL NOT HERE, BUT WILL HAVE COMPETITION FOR PA LOTTERY

ONLINE POKER REPORT

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Why Pennsylvania iLottery Could Give Online Casinos A Run For Their Money

Steve Rubin | Jul 10, 2018 05:32 PDT | [Steve Rubin's](#)



The Pennsylvania Lottery launched instant win online tickets a little more than a month ago, and so far the games are performing well.

According to the PA Lottery, 45,000 players registered online accounts during its first month. Those players collectively wagered \$21.6 million, with the online lottery games generating \$2.9 million in revenue.

Those numbers are impressive considering the PA online lottery is still in what can best be described as a soft-launch phase.

Get Notified When PA Online Casinos Launch

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Pennsylvania online lottery is ahead of schedule

The PA iLottery generated \$21.6 million in sales despite offering only a dozen or so instant-win games. For comparison, the Michigan online lottery, the current gold standard by which all other US online lotteries are measured, offers 58 instant win games, as well as online draw games, pull tabs and Keno.

But Michigan didn't come out guns blazing.

It took the MI iLottery from its launch in August 2014 until January 2015 to register 87,000 accounts and generate \$27 million in revenue. As one of the first states to launch an online lottery, Michigan held off on marketing until November, a decision that helps explain the slow start and subsequent growth.



The Stars Group is Now The Largest Public Online Gaming Company After Completing Sky Betting Deal



What's Behind The Recent Rise In WSOP Main Event Attendance?



New Technology That Streamlines Online Gambling Self-Exclusion Gains Support Of National Group



Record-Setting Summer For WSOP Sets A New Bar For US Online Poker



PokerStars' US Poker Tour Commemorates 15th Anniversary Of Moneymaker's WSOP Win



New Jersey's Online Poker Sites: A Poker Player's Review

By Steve Rubin

[All Online Casino List, News, FAQs](#)



WSOP.com Online Poker For Real Money In Nevada



Bet365 Poker Bonus Code 2018

7/11/2018

Why PA iLottery Could Give Online Casinos A Run For Their Money

Michigan's product has grown by leaps and bounds in each of its first three years

- FY 2014-2015: \$18.5 million in net online profit off of \$146,189,761 in sales.
- FY 2015-2016: \$48 million in net online profit off of \$384,992,537 in sales.
- FY 2016-2017: \$77.9 million in net online profit off of \$613,382,462 in sales.

If Pennsylvania can replicate Michigan's unfettered growth, the state could have online lottery sales of \$100 million per month.

Nine-figure months for PA iLottery?

Pennsylvania has several factors working in its favor that should get it to \$100-million months:

- PA will eventually match Michigan's robust online lottery offerings.
- PA is a larger state with a population of around 13 million, compared to Michigan's population of ten million.
- Michigan and the other online lottery states provide a model.
- The lottery has already partnered with Income Access to run its affiliate program and promote the PA iLottery.
- Several major population centers in neighboring states sit just over the PA borders.

That said, Pennsylvania's online lottery will have to deal with something not found in Michigan: Competition.

In addition to its online lottery, Pennsylvania is also preparing to roll out online casino games. Those games will be run by the state's land-based casinos.

Casinos are unhappy with the PA online lottery

Not surprisingly, the possibility of the PA online lottery doing \$1.2 billion per year in online sales isn't sitting well with the state's casinos. In late June, the 12 of them banded together and sent a letter to Gov. Tom Wolf, asking him to shut down the state's nascent online lottery.

The casinos claim online instant win tickets are online slot machines by another name.

"In virtually every way imaginable, Lottery's iLottery program mimics a casino operation offering simulated casino-style games in direct contravention of (the law's) express prohibition on Lottery offering 'interactive lottery games which simulate casino-style games.'"


Per the law that legalized online lottery products, the definition of online lottery games

"[Does] not include games that represent physical, Internet-based or monitor-based interactive lottery games which simulate casino-style lottery games, specifically including poker, Roulette, slot machines and Blackjack."

Based on the language of the gaming reform law, and the lottery's own use of the word slots in its marketing, the casinos have a legitimate gripe.

Unfortunately, the result of the letter wasn't a rollback of online lottery games, rather the lottery has simply agreed to stop using the word "slots" in its advertising.

What makes the resemblance more problematic for the casinos is the age requirement to play online lottery games is 18 years old. Conversely, players will need to be 21 to play at online casinos.

 **\$5 Free** when you sign-up

Visit PA iLottery

PA iLottery Review

- ✓ Instant win slot-style games
- ✓ \$5 free on signup!
- ✓ 100% legal in Pennsylvania

It all circles back to the absurd PA tax rate

This probably wouldn't be such a hot topic issue if it weren't for the onerous 54 percent tax Pennsylvania slapped on online slots.

The hefty tax rate will ensure online slots have a return to player (RTP) in the same neighborhood as the online lottery's instant win games. Pennsylvania's online lottery instant win tickets had an RTP of nearly 87 percent in June.

Even though the 87 percent RTP is low by casino slot standards (particularly online slots), it's extremely high for a lottery product. By comparison, slots at Pennsylvania's casinos have an average RTP in the 88-90 percent range. Online slots tend to have an RTP of 95 percent-plus, but because of the tax burden, that might not be the case in PA.

Casinos are already concerned they can't profitably run an online casino, regardless of the RTP they offer, because of the rate.

To overcome the lottery's built-in advantages, casinos are going to need to beat the lottery's RTP by more than a few percentage points. The tax rate makes that highly unlikely.

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SEARCH

Steve Huddock - Steve covers nearly every angle of online poker in his job as a full-time freelance poker writer. His primary focus for OPR is the developing legal and legislative picture for regulated US online poker and gambling.

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What's Behind The Recent Rise In WSOP Main Event Attendance?

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7/11/2018

Why PA Lottery Could Give Online Casinos A Run For Their Money

Self-Exclusion Gains Support Of National Group



Online Poker Report

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EXHIBIT B



The Pennsylvania Lottery
has launched online instant
win (slot-style) games at
PALottery.com!

If you register today, get

\$5 FREE*

No Deposit Required

YES Account open by 11/1/11

WIN **\$100**

Offer valid for new players only. See terms and conditions for details.



EXHIBIT C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

GREENWOOD GAMING AND :
ENTERTAINMENT, INC., et al., :
 :
Petitioners, : No: 571 MD 2018
 :
v. :
 :
COMMONWEALTH OF :
PENNSYLVANIA, DEPARTMENT :
OF REVENUE, et al., :
 :
Respondents. :

AFFIDAVIT OF DAVID LYONS

I, David Lyons, being of sound mind and the age of majority, do swear and affirm as follows:

1. My name is David Lyons, and I am over eighteen years of age and am fully competent to make this affidavit.
2. I have served as an associate with Spectrum Gaming Group since 2008.

3. I currently serve as the Senior Slot Associate for Spectrum.
4. I also serve as the President and Owner of DCL Slot Consulting, a New Jersey-based consulting firm I founded in 2007.
5. Prior its merger with Harrah's Entertainment in 2005, I spent 25 years with Caesars Entertainment, one of the world's largest casino companies.
6. During my career with Caesars, which culminated with me rising to the position of Vice President of Slot Operations for the Eastern Division, I was instrumental in expanding Caesars from a single casino with 1,200 slot machines to the largest casino company with 21 casinos and more than 35,000 slot machines.
7. I was part of the corporate slot development team and created many exclusive slot games for Caesars Entertainment.
8. I also served on the slot marketing committee at Bally's Atlantic City casino hotel.
9. My Curriculum Vitae is attached as "Exhibit 1" to this Declaration.
10. As a consultant for Petitioners in this litigation, I am very familiar with the facts and discovery in this case, including the games that are offered through the Pennsylvania Department of Revenue's "iLottery" program.
11. The Department has approved at least 47 games for the iLottery program.

12. At least nine of the iLottery games use the same name, the same symbols, and have very similar play mechanics of actual slot machines that appear on gaming floors or in online casinos. Specifically, Gold Fish, Volcano Eruption, Robin Hood, A Dragon's Story, Foxin' Wins, Gorilla Go Wild, Slingo, Big Foot, and Monster Wins are similar to games that are offered on Petitioners' gaming floors, the gaming floors of other Pennsylvania casinos, and/or by online casino operators in jurisdictions outside of Pennsylvania.

13. At least 22 of the iLottery games are certified for compliance with casino gaming standards in other jurisdictions, including the United Kingdom's Gambling Commission and New Jersey's Internet and Mobile Gaming regulations.

14. Across all iLottery games, the Department increased the payout percentages to match the statutory minimum payout for slot machines in Pennsylvania. iLottery games have an average payout of 85.62%, and the minimum payout percentage for a slot machine or authorized interactive game that replicates the play of a slot machine is 85%. In contrast, the minimum payout percentage for a traditional lottery game is 40%.

15. Nearly all of the iLottery games feature the same user interface as a slot machine, and have the same interactive appearance, feel, and play experience that a player would expect from land-based and online slot machines. These

features include graphics, animation, suspenseful music, flashing lights, bells or sounds played when combinations are hit, and similar visual and auditory features.

16. Games are offered in lower denominations, such as a nickel or dime, which are typically offered in casino slot games and not in any other Lottery products.

17. Several of the iLottery games require the player to “Bet,” “Set Bet,” “Choose Bet,” “Select Bet,” “Select Bet Amount,” or press a “Bet” button, as is typically seen in casino-style games and slot machines, whereas traditional Lottery products do not use the term “bet” or other betting terminology.

18. Multiple iLottery games feature a spin prize wheel function, wheels or cascading tiles and symbols as found in casino-style games.

19. The betting structure of the iLottery games is identical to a slot machine. Players can “bet up” to take advantage of multipliers, whereby they increase their bet and can win higher amounts of money, which is a classic slot machine element. Several games even feature a prize table or payable with the bet multiplier showing the prize increasing in conjunction with the bet.

20. Several iLottery games offer bonus games and free spins, again mirroring the play mechanic of a slot machine.

21. Several games include “pick bonuses,” which are a common feature present in hundreds of varieties of slot machines.

22. The presence of dynamic change, whether in the amount of the prize or the number of plays, is consistent with casino-style, and not lottery, games.

23. Numerous iLottery games adopt the traditional symbol matrix – whether 3x3, 4x4, or 5x5 – found in slot machines. Players win by aligning various symbols horizontally, vertically and diagonally, and win bonus spins or games when the same symbols align. Petitioners operate slot machines with the same 3x3, 4x4, and 5x5 symbol matrix found in their licensed casinos. In multiple iLottery games, the reveal is also made across the columns, which is a common slot machine style reveal.

24. As an alternative to the line configuration, some iLottery games utilize a “scattered pay” or “Multi-way” game design featured in many contemporary slot machines. A player wins by achieving the requisite number of particular symbols in a scattered or non-linear pattern, with the same bonus opportunities as payline designed slot machines.

25. The winner of all lottery games is predetermined; however, certain iLottery games, such as Big Eats Little, gives the illusion of choice or decision-making consistent with a slot machine. Other iLottery games, such as Cash Buster Towers and Super Cash Busters, give the illusion of randomness, which is inconsistent with a lottery game. iLottery games like Jungle Tumble, Volcano Eruption, and Super Gems give the illusion of extended play by matching a certain

number of symbols to keep winning and playing, which is typical of a slot machine and inconsistent with a typical lottery product.

26. Overall, the games have the same backbone as a slot machine; an outcome that is determined by a random number generator with animated graphics and computer operations used to provide a visual depiction of that outcome.

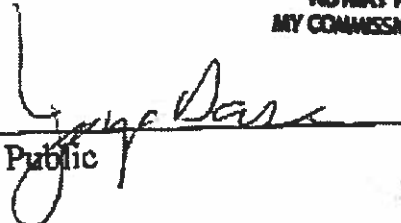
I verify that the statements made in this affidavit are true and correct to the best of my personal knowledge or information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

By: 
David Lyons

Dated: May 30, 2019

Sworn to and subscribed before
me this 30 day of May, 2019.

SONCE DASE
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MAR. 27, 2021


Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I am this 3rd day of June, 2019, serving a copy of the foregoing PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION upon the person indicated below, via this Court's electronic filing system, which service satisfies the requirements of Pa. R.A.P. 121, as follows:

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/s/Adam M. Shienvold

Adam M. Shienvold, Esquire

Counsel for Petitioners

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

GREENWOOD GAMING AND :
ENTERTAINMENT, INC., et al., :
 :
Petitioners, : No: 571 MD 2018
 :
v. :
 :
COMMONWEALTH OF :
PENNSYLVANIA, DEPARTMENT :
OF REVENUE, et al., :
 :
Respondents. :

**BRIEF IN SUPPORT OF PETITIONERS' APPLICATION FOR SPECIAL
RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION**

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Date: June 3, 2019

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I. INTRODUCTION

Petitioners come before this Court seeking to compel the Pennsylvania Department of Revenue to comply with the Pennsylvania Lottery's enabling legislation and to stop offering online games that simulate casino-style games that are specifically prohibited by statute.

Traditionally, the Lottery has offered three types of games: (1) jackpot games (*e.g.*, Powerball); (2) sweepstakes or draw-style games (*e.g.*, Pick 3); and (3) instant or scratch-off style games. In 2017, however, the Legislature passed Act 42 of 2017, which amended Title 4 of the Pennsylvania Consolidated Statutes to, among other things, allow Pennsylvania casinos to offer online gaming and to permit the Lottery to offer "iLottery" as a separate and distinct type of online amusement.

In its authorization of internet games and iLottery, the General Assembly did not itemize everything that the Lottery could offer on that platform, but it clearly and consistently identified those types of products that the Lottery could *not* offer. Specifically, and mirroring a similar prohibition contained in the State Lottery Law, the Legislature barred the Lottery from offering iLottery games that *simulate casino-style games*.

In direct contravention of this explicit statutory prohibition, in May of 2018, the Lottery launched "iLottery," exclusively featuring interactive lottery games

that simulate slot machines and casino-style games. In addition to being specifically proscribed by statute, the Lottery's unlawful conduct is a direct incursion by the State into the exclusive interactive gaming market of the licensed gaming operators like Petitioners. As aptly stated by former Representative Paul Clymer during the floor debate on the 2014 amendments to the State Lottery Law: "[T]he Secretary of Revenue does not have the authority to place Internet gambling or other defined games in the lottery without the consent of the General Assembly." 2014 Legislative Journal – House, 1645.

On April 16, 2019, the Pennsylvania Gaming Control Board (the "PGCB") advised Petitioners and other casino operators preparing to offer interactive gaming that PGCB anticipated authorizing the commencement of interactive gaming during the week of July 15, 2019. With a launch date for Petitioners' online games now established by the PGCB, the immediacy of the harm that Lottery's illegal operations will cause to Petitioners becomes apparent.

Petitioners therefore seek injunctive relief to halt the Lottery's unlawful conduct. Injunctive relief is necessary and appropriate to remedy the immediate and irreparable harm caused by the Lottery's violation of its own enabling legislation, violation of the public policy of the Commonwealth, and its usurpation of Petitioners' exclusive right to conduct casino-style interactive gaming in the Commonwealth.

II. BACKGROUND

A. **Development of Slot Machines, Table Games, and Interactive Gaming in Pennsylvania**

In 2004, the General Assembly enacted the Pennsylvania Race Horse Development and Gaming Act (the “Gaming Act”), authorizing for the first time the conduct of slot machine gaming in Pennsylvania. 4 Pa.C.S. §§ 1101-1904. The Gaming Act established three categories of slot machine licensees – Category 1, 2 and 3 licensees – which would have the exclusive right to place and operate slot machines in the Commonwealth. *Id.* § 1301.¹ Notably, the Gaming Act defines a “slot machine” as, in part:

Any mechanical or electrical contrivance which, upon ... payment of any consideration whatsoever ... is available to play or operate, the play or operation of which, whether by reason of skill or application of the element of chance or both, may deliver or entitle the person or persons playing or operating the contrivance ... to receive cash, billets, tickets, tokens or electronic credits to be exchanged for cash.... A slot machine: (1) May utilize spinning reels or video displays or both. (2) May or may not dispense coins, tickets or tokens to winning patrons. (3) May use an electronic credit system for receiving wagers and making payouts. The term shall include associated equipment necessary to conduct the operation of the contrivance, terminal, machine or other device.

4 Pa.C.S. § 1103.

With the tremendous success of slot machine gaming, the General Assembly enacted legislation in 2010 to expand gaming in Pennsylvania to include table

¹ In 2017, the Legislature authorized an additional category of slot machine licensee, Category 4. 4 Pa.C.S. § 1305.1.

games. Act of Jan. 7, 2010, P.L. 1, No. 1. Act 1 of 2010 authorized slot machine licensees to obtain a table game operation certificate and entitled certificate holders to be the exclusive operators of such games in the Commonwealth. 4 Pa.C.S. § 13A11.

The General Assembly enacted a second major expansion of gaming in the Commonwealth with the passage of Act 42 of 2017. Act of Oct. 30, 2017, P.L. 419, No. 42. As part of Act 42, the Commonwealth authorized the conduct of interactive gaming in Pennsylvania,² with slot machine licensees having the exclusive right to conduct such interactive gaming in the first instance. Slot machine licensees are entitled to apply for and obtain an interactive gaming certificate that will enable them to conduct peer-to-peer interactive games (*e.g.*, poker), non peer-to-peer games that simulate slot machines, and non peer-to-peer games that simulate table games. 4 Pa.C.S. §§ 13B11, 13B12.

Petitioners Parx Casino, Hollywood Casino, Harrah's Philadelphia Casino, Mohegan Sun Pocono, Stadium Casino, and Valley Forge Casino all submitted

² Act 42 defines "interactive game" as "[a]ny gambling game offered through the use of communications technology that allows a person ... to transmit electronic information to assist in the placement of a bet or wager and corresponding information related to the display of the game, game outcomes or other similar information. The term shall not include:

(1) A lottery game or Internet instant game as defined in the ... the State Lottery Law [or] (2) iLottery under Chapter 5 (relating to lottery)..." 4 Pa.C.S. § 1103. The Act defines "interactive gaming" as "[t]he placing of wagers with an interactive gaming certificate holder or interactive gaming operator using a computer network ... through which an interactive gaming certificate holder may offer authorized interactive games to registered players. The term shall include the placing of wagers through the use of a multi-use computing device." *Id.*

applications for, and were issued, an interactive gaming certificate. Pet. ¶ 9. On April 16, 2019, the PGCB notified all interactive gaming certificate holders, via correspondence from its Executive Director Kevin O’Toole, that the agency would authorize certificate holders to commence interactive gaming operations during the week of July 15, 2019. *Id.* ¶ 10.

B. Development of Internet Instant Games and iLottery in Pennsylvania

In 2014, the General Assembly amended the State Lottery Law. Act of Oct. 31, 2014, P.L. 3041, No. 201. In doing so, the Legislature expressly prohibited the Lottery from offering “internet instant games” or keno, and from selling lottery products (including internet instant games) via Lottery’s website or the website of any of its licensed retailers, absent further legislative authorization. 72 P.S. § 3761-303(a)(1) and (8). In addition, the General Assembly added a new, express prohibition barring the Secretary of Revenue from offering “any Internet-based or monitor-based *interactive lottery game or simulated casino-style lottery game*, including video poker, video roulette, slot machines or video blackjack, through the State Lottery.” *Id.* § 3761-303(a.1) (emphasis added).

The General Assembly provided the additional authorization needed in 2017, when, as part of Act 42, it permitted the Department to offer keno and to launch “iLottery” as a vehicle for the sale of Internet instant games and other

lottery products via the Internet. The iLottery authorization is codified at 4 Pa.C.S.

§ 503. Pursuant to Act 42, “iLottery” is designated as the:

[S]ystem that provides for the distribution of *lottery products* through numerous channels that include, but are not limited to, web applications, mobile applications, mobile web, tablets and social media platforms that allow players to interface through a portal for the purpose of obtaining *lottery products* and ancillary services....

4 Pa.C.S. § 502 (emphasis added). “Lottery products” are “plays, shares or chances offered by the State Lottery . . . [and] includes instant tickets, terminal-based tickets, raffle games, play-for-fun games, lottery vouchers, subscription services and gift cards *authorized for sale under the State Lottery Law.*” *Id.*

(emphasis added). Act 42 defines “iLottery Games” as “internet instant games and other *lottery products* offered through iLottery.” *Id.* (emphasis added).

Mirroring the express prohibition added to the State Lottery Law by the 2014 amendments, the term “iLottery” excludes “games that represent physical, Internet-based or monitor-based *interactive lottery games which simulate casino-style lottery games*, specifically including poker, roulette, slot machines or blackjack.” *Id.* Thus, in Act 42, the General Assembly authorized an online presence for both the Lottery and slot licensees, but created a clear distinction between the two: *iLottery may not offer casino-style games or games that simulate them.*

On March 30, 2018, the Department promulgated temporary regulations relating to internet instant games offered through iLottery at 48 Pa.B. 1829, and codified at 61 Pa. Code, Chapter 876. Consistent with the statutory prohibition, the temporary regulations exclude “interactive lottery games” and “simulated casino-style lottery games” from the definition “iLottery game.” 61 Pa. Code § 876.2.

On May 4, 2019, the Department published proposed permanent regulations for the iLottery program at 49 Pa.B. 2242. The proposed permanent regulations contain an entirely new section that allows the Department to offer “traditional lottery products” through the iLottery program and define “traditional lottery products” as “[l]ottery products offered by the Bureau under 61 Pa. Code Chapters 801-875.” *Id.* (proposed 61 Pa. Code §§ 876.2, 876.2(b)).

C. iLottery Program

On May 22, 2018, the Department launched “iLottery,” offering games played online and on mobile devices. Pet. ¶ 21. Despite the clear prohibition contained in the State Lottery Law, Act 42, and the regulations promulgated and proposed by the Department, the Department has simply disregarded the statutory and regulatory restrictions on iLottery, and offers interactive lottery games that simulate slot machines and casino-style games through the iLottery program. *Indeed, the Department has even advertised its iLottery offerings through affiliate marketing agreements as “Slot-Style Games” and “Casino Style Games.”*³ Pet. ¶ 23.⁴

True to its advertising, iLottery interactive games mimic the look, sounds, and feel of casino games. Many of those games also meet the Gaming Act’s definition of a “slot machine.” Specifically, the evidence that Petitioners will present at the hearing on their application for an injunction will show:

³ In June of 2018, the Department publicly claimed that these advertisements were distributed by affiliates, and claimed that the advertisements were “inaccurate” and that they were immediately corrected. (GREENWOOD.RES000438-000439). However, subsequent to the Department’s acknowledgment of inappropriate marketing and claimed rectification of the alleged inaccuracies, the Department *continued to market* its iLottery offerings using online advertisements that portray iLottery products as “instant win slot-style games.” Pet., Ex. A & B.

⁴ (GREENWOOD.RES000433-000434).

- The Department has approved at least 47 games for the iLottery program. *Id.* ¶ 29.⁵
- At least nine of the iLottery games use the same name, the same symbols, and have very similar play mechanics of actual slot machines that appear on gaming floors or in online casinos. *Id.* ¶ 30.⁶
- At least 22 of the iLottery games are certified for compliance with *gaming* standards in other jurisdictions, including the United Kingdom’s *Gambling Commission*,⁷ and New Jersey’s Internet and Mobile Gaming regulations, N.J.A.C. 13:69O–1.1 to 13:69O–1.10, *which only apply to casinos*. Pet. ¶ 31.⁸
- Across *all iLottery games*, the Department increased the payout percentages to match the statutory minimum payout for slot machines in Pennsylvania. iLottery games have an average payout of 85.62%,⁹ and the minimum payout percentage for a slot machine or authorized

⁵ (GREENWOOD.RES000402-000405; *see also* 2/5/17 Letter from K. Romano to A. Shienvold; All Games – PA iLottery, <https://www.pailottery.com/games/all-games> (last visited May 23, 2019)).

⁶ Gold Fish, Volcano Eruption, Robin Hood, A Dragon’s Story, Foxin’ Wins, Gorilla Go Wild, Slingo, Big Foot, and Monster Wins are similar to games that are offered on Petitioners’ gaming floors, the gaming floors of other Pennsylvania casinos, and/or by online casino operators in jurisdictions outside of Pennsylvania. Pet. ¶ 30.

⁷ (GREENWOOD.RES001835-001839 (Big Money Slingo); IWG000069-IWG000074 (Cash Buster Bonus); IWG000048-IWG000052 (Cash Buster Extreme); GREENWOOD.RES001840-001844 (Cash Buster Towers); SGI000204-SGI000215 (Cinna Money Match); GREENWOOD.RES001845-001850 (Crossword Cash); IWG000031-IWG000037 (Fast Buck Lucky); GREENWOOD.RES001851-001855 (Genie Jackpot); SGI000216-SGI000227 (Hex-Pop Payday); IWG000013-IWG000018 (Merry Multiplier); IWG000058-IWG000063 (Rainbow Fortunes); IWG000001-IWG000006 (Slingo); GREENWOOD.RES001856-001863 (Super Cash Buster); GREENWOOD.RES001864-001868 (Super Gems); IWG000019-IWG000024 (Treasure 7x7); IWG000064-IWG000068 (Volcano Eruption)).

⁸ (GREENWOOD.RES001669-001673 (Bigfoot); GREENWOOD.RES001674-001678 (Foxin Wins); SGI000196-SGI000199 (Gorilla Go Wild); GREENWOOD.RES001679-001683 (Monster Wins); GREENWOOD.RES001684-001688 (Robin Hood); GREENWOOD.RES001689-001693 (Volcano Eruption); SGI000200-SGI000203 (Wild Run)).

⁹ (GREENWOOD.RES001715; GREENWOOD.RES001758-001760).

interactive game that replicates the play of a slot machine is 85%, 4 Pa.C.S. § 1207(10). In contrast, the minimum payout percentage for a traditional lottery game is 40%, 72 P.S. § 3761-311. *Pet.* ¶ 32.

- The Department’s own vendors admit that iLottery games simulate slot machines and casino-style games. *Id.* ¶ 33.¹⁰
- The Department required that its game supplier covenant not to sell the same games to Pennsylvania casinos – effectively admitting that the iLottery games are, in fact, casino games that would otherwise be sold to and offered by casino operators such as Petitioners. *Id.* ¶ 34.¹¹
- Nearly all of the iLottery games feature the same user interface as a slot machine, and have the same interactive appearance, feel, and play experience that a player would expect from land-based and online slot machines. These features include graphics, animation, suspenseful music, flashing lights, bells or sounds played when combinations are hit, and similar visual and auditory features. *Id.* ¶ 35.
- Games are offered in lower denominations, such as a nickel or dime, which are typically offered in casino slot games and not in any other Lottery products. *Id.* ¶ 36.
- Several of the iLottery games require the player to “Bet,” “Set Bet,” “Choose Bet,” “Select Bet,” “Select Bet Amount,” or press a “Bet” button, as is typically seen in casino-style games and slot machines, whereas traditional Lottery products do not use the term “bet” or other betting terminology. *Id.* ¶ 37.
- Multiple iLottery games feature a spin prize wheel function, wheels or cascading tiles and symbols as found in casino-style games. *Pet.* ¶ 38;
- The betting structure of the iLottery games is identical to a slot machine. Players can “bet up” to take advantage of multipliers, whereby they increase their bet and can win additional games or higher amounts of money, which is a classic slot machine element.

¹⁰ (GREENWOOD.RES001669-001673).

¹¹ (GREENWOOD.RES000340-000401).

Several games even feature a prize table or paytable with the bet multiplier showing the prize increasing in conjunction with the bet. *Id.* ¶ 39;

- Several iLottery games offer bonus games and free spins, again mirroring the play mechanic of a slot machine. *Id.* ¶ 40.
- Several games include “pick bonuses,” which are a common feature present in hundreds of varieties of slot machines. *Id.* ¶ 41.
- The presence of dynamic change, whether in the amount of the prize or the number of plays, is consistent with casino-style, and not lottery, games. *Id.* ¶ 42.
- Numerous iLottery games adopt the traditional symbol matrix – whether 3x3, 4x4, or 5x5 – found in slot machines. Players win by aligning various symbols horizontally, vertically and diagonally, and win bonus spins or games when the same symbols align. Petitioners operate slot machines with the same 3x3, 4x4, and 5x5 symbol matrix found in their licensed casinos. In multiple iLottery games, the reveal is also made across the columns, which is a common slot machine style reveal. *Id.* ¶ 43;
- As an alternative to the line configuration, some iLottery games utilize a “scattered pay” or “Multi-way” game design featured in many contemporary slot machines. A player wins by achieving the requisite number of particular symbols in a scattered or non-linear pattern, with the same bonus opportunities as payline designed slot machines. *Pet.* ¶ 44.
- The winner of all lottery games is predetermined. However, certain iLottery games, such as Big Eats Little, gives the illusion of choice or decision-making consistent with a slot machine. Other iLottery games, such as Cash Buster Towers and Super Cash Busters, give the illusion of randomness, which is inconsistent with a lottery game. iLottery games like Jungle Tumble, Volcano Eruption, and Super Gems give the illusion of extended play by matching a certain number of symbols to keep winning and playing, which is typical of a slot machine and inconsistent with a typical lottery product. *Id.* ¶ 45.

- Overall, the games have the same backbone as a slot machine; an outcome that is determined by a random number generator with animated graphics and computer operations used to provide a visual depiction of that outcome. *Id.* ¶ 46.
- The Department has chosen to make these casino-style betting games available to patrons under the age of 21, in direct contrast to the limitations imposed on Petitioners for interactive gaming. *Id.* ¶ 47.
- To further simulate a casino-style gaming experience, the Department is employing two key casino tools – free play and a casino-style patron loyalty program – that further emphasize that the iLottery is in every way imitating casino gaming. *Pet.* ¶ 48.

Individually and collectively, the games offered by the Department through iLottery mimic the look, feel, and player experience of casino games, even emulating the marketing and promotion styles used by the gaming industry to compete against other gaming operators.

III. QUESTION PRESENTED

- A. Whether this Court should enjoin the Department from offering interactive lottery games and games that simulate slot machines and other casino-style games through the iLottery program?

Suggested answer: Yes.

IV. ARGUMENT

- A. **Legal Standard for Preliminary Injunction.**

The standard for preliminary injunctive relief is well-established. The Court may enter an injunction where the moving parties establishes that: (1) it is likely to prevail on the merits; (2) an injunction is necessary to prevent immediate and

irreparable harm; (3) the equities weigh in favor of issuing an injunction – specifically, that greater injury would result from refusing an injunction than from granting it and that issuance of an injunction will not substantially harm other interested parties in the proceedings; (4) a preliminary injunction will not adversely affect the public interest; (5) the injunction is reasonably suited to abate the offending activity; and (6) the requested injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. *See, e.g., Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 8282 A.2d 995, 1001 (Pa. 2003). As set forth below, Petitioners are able to demonstrate each of these elements by a preponderance of the evidence, and the requested injunction should be granted.

B. Petitioners’ Evidence Meets All Elements For Injunctive Relief.

Petitioners will present evidence at trial that the Department simply cannot deny, and which will demonstrate beyond any doubt, that the games offered by the Department through iLottery violate the clear prohibitions of Act 42 and the State Lottery Law against “interactive lottery games which simulate casino-style lottery games” and, consequently, satisfy each of the essential elements for injunctive relief. The evidence is virtually undisputed, and the application of law and common sense to those undisputed facts yields only a single result – the iLottery

games are unlawful, and an injunction is appropriate to stop the Department's unlawful conduct.

1. Petitioners are likely to succeed on the merits of their claims

The crux of the Petitioners' claim is that the Department is offering interactive lottery games that simulate casino-style games in direct contravention of the General Assembly's clear proscription in Act 42 and the State Lottery Law. The evidence that Petitioners will present at the hearing, and as outlined above, is that the games being offered by the Department in many instances are indistinguishable from land-based and Internet slot machines and, in all cases, are interactive games that are specifically prohibited by the enabling legislation. The Legislature plainly intended to maintain the historical distinction between casino gaming and the lottery, and the iLottery program simply ignores that intentional distinction.

Such blatant disregard by the Department of its enabling legislation cannot be tolerated. As the Pennsylvania Supreme Court has instructed, an agency "should act within the strict and exact limits defined" in its enabling act. *Pa. Human Relations Comm'n v. St. Joe Minerals Corp.*, 382 A.2d 731, 736 (Pa. 1978). In a decision relating to the Public Utility Commission that is equally applicable to the Lottery, the Supreme Court further cautioned that the enabling act's authorization must be clear: "[T]he authority of the Commission must arise

either from the express words of the pertinent statutes or by strong and necessary implication therefrom. . . . [T]he Commission’s power is statutory; and the legislative grant of power to act in any particular case must be clear.” *City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984). Here, the Department’s enabling authority – both in Act 42 and in the State Lottery Law – includes a clear and express limitation on the types of games that can be offered by the Lottery via the Internet and iLottery. As the cited precedent demands, Lottery must operate within the “strict and exact limits” of those constraints.

In terms of applying the simulated casino-style game restriction in Act 42 and the State Lottery Law, the objective of any statutory interpretation is to ascertain and effectuate the General Assembly’s intent, and when the words of a statute are clear and free from ambiguity, that intent is to be gleaned from those very words. *Id.* § 1921(a), (b). *See, e.g., In re Erie Golf Course*, 992 A.2d 75, 85 (Pa. 2010). Resort to the rules of statutory construction – codified at 1 Pa.C.S. § 1921(c)¹² – only is to be made when an ambiguity exists or the language is not explicit. *See, e.g., Oliver v. City of Pittsburgh*, 11 A.3d 960, 964 (Pa. 2011).

¹² *See* 1 Pa.C.S. § 1921(c) (“When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters: (1) [t]he occasion and necessity for the statute[;] (2) [t]he circumstances under which it was enacted[;] (3) [t]he mischief to be remedied[;] (4) [t]he object to be attained[;] (5) [t]he former law, if any, including other statutes upon the same or similar subjects[;] (6) [t]he consequences of a particular interpretation[;] (7) [t]he contemporaneous legislative history[; and] (8) Legislative and administrative interpretations of such statute.”).

Still, there are certain principles that apply when ascertaining legislative intent in any circumstance, including that: (a) words and phrases must be construed according to rules of grammar, 1 Pa.C.S. § 1903(a); (b) words and phrases must be construed according to their common and approved meaning, *id.*; (c) every word, sentence, or provision of a statute must be given meaning (because the Legislature is presumed to have intended to avoid mere surplusage), *id.* § 1922(2); *see, e.g., Allegheny Cnty. Sportsmen's League v. Rendell*, 860 A.2d 10, 19 (Pa. 2004); and (d) the General Assembly does not intend an absurd result. *Id.* § 1922(1).

When the General Assembly authorized the Department to launch “iLottery” as a separate and distinct type of online amusement, it did not attempt to itemize everything that could be offered on that platform, but it consistently identified those types of products that the Department could *not* offer. Specifically, and mirroring a similar prohibition contained in the State Lottery Law, the General Assembly barred the Department from offering iLottery games that represent “physical, Internet-based or monitor-based interactive lottery games which simulate *casino-style lottery games*.” 4 Pa.C.S. §§ 502-503 (emphasis added).

The Legislature did not define the terms “interactive lottery game” or “casino-style lottery game” in Act 42 or in the State Lottery Law. Presumably, this is because these words and phrases, in context and in common sense, are easily understood and applied to the provisions of the Act. The Act defines “interactive

game” and “interactive gaming” as, essentially, online (whether at a computer or mobile device) wagering and play of games designed for such mobile play.

4 Pa.C.S. § 1103. Critically, the Act specifically excludes iLottery and lottery products (including “internet instant games”) from the definition of “interactive game.” *Id.* Thus, in the restrictive portion of the iLottery authorization, the insertion of the word “lottery” (also not defined, but generally understood) into the phrase “interactive game” logically can have only one meaning: a wagering game that a patron plays via iLottery.

Similarly, the phrase “casino-style lottery game” has an easily understood meaning in context and in common usage: a lottery game that mimics the look, sounds, and playing experience of a casino game. 1 Pa.C.S. § 1903(a).¹³ When the entire restrictive phrase is read together, in context with the remainder of the statute, the common sense definition is clear: an “interactive lottery game which simulates a casino-style lottery game” is a wagering game, played via iLottery, that has the look, feel, or consumer experience of an online casino game or slot machine. Indeed, the U.S. District Court for the Middle District of Pennsylvania implicitly reached this precise conclusion in *Telesweeps of Butler Valley, Inc. v. Kelley*, No. 3:12-CV-1374, 2012 WL 4839010 (M.D. Pa. Oct. 2012). In that case,

¹³ The Department apparently shares that same view, as it did not provide a definition of “casino-style lottery game” in its temporary regulations or proposed permanent regulations for iLottery games. 61 Pa. Code § 876.2; 49 Pa.B. 2242.

the federal district court held that the game at issue constituted a “simulated gambling program” for purposes of 18 Pa.C.S. § 5513(a.1), and the reasoning applied by the court in reaching that conclusion applies with full force here:

[T]he games are set up in such a way that customers are led to believe that their choices may affect the outcome of the game. The exhibits presented at the evidentiary hearing show that the games look like the very same slot machines or video poker games one would find in a casino. Plaintiffs attempt to draw a distinction between the randomization at work in slot machines and the randomization used by Telesweeps through the predetermination of a finite pool of entries does not change the fact that both methods present to the player a game of chance. The only real difference is that there are no state regulations governing Plaintiffs payout percentage in its sweepstakes. What is demonstrably the same, however, and deliberately so, is the simulated gambling program “does give the participant the, if you will, the look and feel of participating in actual poker.” For Plaintiff to argue that its sweepstakes is not gambling when it works to create a player experience which mimics casino-style games as closely as possible is too much for this Court to accept.

Telesweeps, 2012 WL 4839010, at *10 (citation and footnote omitted).

This common-sense understanding of the term is further supported by the Legislature’s use of the word “simulate” – which means to “assume the outward qualities or appearance of often with the intent to deceive: IMITATE,” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1099 (1988) – immediately before the phrase “casino-style lottery games” in Act 42. 4 Pa.C.S. § 502. The words appear in the same sequence in the State Lottery Law. 72 P.S. § 3761-303(a.1).

Indeed, to interpret “casino-style lottery game” to mean something other than a lottery game that mimics the look, sounds, and playing experience of a

casino game would render the words of Act 42 and the State Lottery Law meaningless and lead to an absurd result. 1 Pa.C.S. § 1922(1), (2); *see, e.g., Allegheny Cnty. Sportsmen's League*, 860 A.2d at 19. Consequently, the General Assembly's intent with regard to the meaning of the term "casino-style lottery games" in Act 42 can be gleaned from the words of the statute. 1 Pa.C.S. § 1921(b).

Even if the Court were to conclude that the definition of "casino-style lottery games" is not clear from the text of the statute and resort to the rules of statutory construction is required, the result remains the same. Act 42 – which was then-known as House Bill No. 271 of 2017 – was first introduced in the General Assembly on January 31, 2017. As originally drafted, House Bill 271 was narrow; it only proposed amendments to a single provision of Title 4 of the Pennsylvania Consolidated Statutes, 4 Pa.C.S. § 1509 (compulsive and problem gambling program). H.B. No. 271 of 2017, Printer No. 229. It was not until the fourth draft of the bill that the Legislature proposed amending Title 4 to authorize the Department to launch "iLottery" as a separate and distinct type of online amusement. H.B. No. 271 of 2017, Printer No. 1821. That draft, however, did not contain the prohibition against offering "casino-style lottery games." H.B. No. 271 of 2017, Printer No. 1821 § 702.

Representative Mustio proposed an amendment to the subsequent draft of House Bill 271 which, for the first time, recommended that the term “iLottery” exclude “games that represent physical, Internet-based or monitor-based interactive lottery games which simulate casino-style lottery games, specifically including poker, roulette, slot machines or blackjack.” Amendments to H.B. No. 271 of 2017, Printer No. 1839. Representative Mustio’s amendment was incorporated into the next draft of the bill, and ultimately, into Act 42 itself, at least with regard to the prohibition against offering “casino-style lottery games” through iLottery.

The addition of this prohibition to Act 42 appears to be tied to two goals: (1) to maintain consistency between Act 42 and the State Lottery Law as to the simulated casino-style game prohibition; and (2) to prevent competition between the Lottery and Pennsylvania casinos in the online gaming market. *See* 1 Pa.C.S. § 1921(c)(1), (2), (4), (7). The second, more practical concern, was enunciated by the Department in its testimony to the General Assembly. Revenue Secretary Eileen McNulty testified to the House Appropriations Committee that “Pennsylvania’s private casino industry and the Lottery have been able to co-exist, in large part because we offer very different gaming experiences.” (GREENWOOD.RES000593-000597).

Drew Svitko, Executive Director of the Lottery, advocated for the adoption of the iLottery program, while acknowledging the need to develop ways to “guard

against cannibalization” of casinos. (GREENWOOD.RES000453-000592). The concern over cannibalization becomes even more acute when considering the fact that the Legislature vested the Commonwealth with a substantial share of all gaming revenue (54% of land-based and interactive slot machine revenue; 16% of land-based and interactive table game revenue). 4 Pa.C.S. §§ 13A62-A63, 13B52-B53, 1403, 1405, and 1407.

The only way to ensure that such competition does not occur is to interpret “casino-style lottery games” as meaning lottery games that mimic the look, sounds, and playing experience of casino games. 1 Pa.C.S. § 1921(c)(3), (6). In applying that definition, casino games must be construed broadly. This is because the Legislature used the term “casino-style,” as opposed to the standalone word “casino,” which necessarily connotes something *beyond traditional or actual casino games*. 1 Pa.C.S. § 1903(a). This is reinforced by the General Assembly’s use of the phrase “specifically including” immediately before the words “poker, roulette, slot machines or blackjack,” signaling that “poker,” “roulette,” “slot machines,” and “blackjack” are part of a non-exhaustive list of the types of games which cannot be emulated under Act 42.

In short, regardless of whether this Court believes the term “casino-style lottery games” is ambiguous, there can be no dispute that the General Assembly

did not intend for the Department to offer iLottery games that mimic the look, sounds, and playing experience of slot machines and other casino games.

Here, and as noted above, the evidence is undisputable that the Department currently is offering interactive lottery games that simulate slot machines and casino-style games through the iLottery program. Pet. ¶¶ 29-49. Indeed, numerous iLottery games use the same name, the same symbols, and have very similar play mechanics of actual slot machines that appear on gaming floors or in online casinos. *Id.* ¶ 30. The remaining iLottery games offered by the Department are analogous to the sweepstakes game at issue in *Telesweeps* which was designed to simulate a slot machine. *Telesweeps*, 2012 WL 4839010, at *3.

Just like the sweepstakes game in *Telesweeps*, the Department is offering iLottery games that look, feel, and sound like the slot machines or other games one would find in a casino. For the Department to argue that such games are not “casino-style lottery games” when it worked to create a player experience that closely simulated those games – even going so far as offering some of the *exact same* titles and/or themes offered on Petitioners’ gaming floors, the gaming floors of other Pennsylvania casinos, and/or by online gaming operators (not state

lotteries) in jurisdictions outside of Pennsylvania, Pet. ¶ 30 – should be too much for this Court to accept.¹⁴

2. Petitioners will suffer immediate and irreparable harm if a preliminary injunction is not issued

The PGCB has established a launch date for Petitioners’ interactive gaming operations of mid-July 2019. In all likelihood, this will leave less than one month between the Court’s hearing on the instant Application and Petitioners’ planned introduction of their interactive gaming products into a market illegally occupied by the Lottery. This proximity is sufficient to satisfy the immediacy standard for the issuance of a preliminary injunction, and the simulated casino-style of iLottery’s games will cause irreparable harm to Petitioners and their exclusive right to offer interactive games in Pennsylvania.

Petitioners each have paid tens of millions of dollars to be among the certificate holders possessing that exclusive right, and invested further substantial sums to employ persons and build the infrastructure necessary to operate interactive gaming. Beginning July 15th, if Lottery is permitted to continue

¹⁴ To the extent that the Department argues that it is offering traditional lottery products as part of its iLottery program, rather than “casino-style lottery games,” that position is foreclosed by the proposed permanent regulations recently circulated by the Department at 49 Pa.B. 2242. This is because the proposed permanent regulations contain an entirely new section that allows the Department to offer “traditional lottery products” through the iLottery program and define “traditional lottery products” as “[l]ottery products offered by the Bureau under 61 Pa. Code Chapters 801-875.” *Id.* (proposed 61 Pa. Code §§ 876.2, 876.2b). That new section would be superfluous if the Department was currently offering traditional lottery products through the iLottery program.

offering its illegal iLottery games, Petitioners will face a loss of business, potential loss of customers, and loss of market share. Each wager placed on an unlawful iLottery game is an opportunity for Petitioners that is gone forever. *See, e.g., Sovereign Bank v. Harper*, 674 A.2d 1085, 1092 (Pa. Super. 1996) (holding that, “[i]n the commercial context, the impending loss of a business opportunity or market advantage may aptly be characterized as an ‘irreparable injury’” for purposes of a preliminary injunction).

The fact that the Department is offering interactive simulated casino-style games through iLottery that are proscribed by statute is also *per se* irreparable harm. The Pennsylvania Supreme Court long ago declared that, where the Legislature declares certain conduct to be unpermitted and unlawful, engaging in such conduct is *per se* irreparable harm. *PUC v. Israel*, 52 A.2d 317, 321 (Pa. 1947); *see also Philips Bros. Elec. Contractors, Inc. v. Valley Forge Sewer Auth.*, 999 A.2d 652, 657 (Pa. Cmwlth. 2010) (reaffirming *Israel* and stating clearly that “a party need not establish irreparable harm when a statute sets forth specific conduct that is unlawful”).

Moreover, if it were determined that the Department, as a Commonwealth agency, is immune from liability for monetary damages pursuant to the doctrine of sovereign immunity, 42 Pa.C.S. § 8521, and that Petitioners thus could not recover the losses they have sustained from the Department’s illegal iLottery games, the

Department still can be sued for declaratory and injunctive relief. *See, e.g., Legal Capital, LLC v. Med. Prof'l Liability Catastrophe Loss Fund*, 750 A.2d 299, 302-303 (Pa. 2000) (explaining that the sovereign immunity doctrine does not shield the Commonwealth or a Commonwealth agency from declaratory relief or prohibitory injunctive relief). Government immunity, by definition, makes the injury caused by government action irreparable. *Marcellus Shale Coalition v. DEP*, 185 A.3d 985, 997 (Pa. 2018); *see Boykins v. City of Reading*, 562 A.2d 1027, 1029 (Pa. Cmwlth. 1989) (holding that “[t]he inability to be adequately compensated by an award of damages [based on government immunity] constitutes irreparable harm”).¹⁵

3. The equities weigh in favor of issuing a preliminary injunction

On balance, the equities weigh in favor of issuing a preliminary injunction. There can be no harm to the Lottery in forcing it to comply with the enabling legislation for the iLottery program (Act 42) or the enabling legislation for the Lottery as a whole (the State Lottery Law). Indeed, as noted above, Lottery must act within the strict constraints of such enabling authority. *St. Joe Minerals*, 382 A.2d at 736.

¹⁵ *See generally Stuart v. Gimbel Bros., Inc.*, 131 A. 728, 730 (Pa. 1926) (“As applied in equity, ‘irreparable injury’ is, in fact, nothing more than the antithesis of ‘an adequate remedy at law’; where the latter does not exist, . . . the former does.”).

Petitioners, on the other hand, will suffer irreparable harm if a preliminary injunction is not issued, for the reasons explained above. Moreover, Petitioners collectively have invested hundreds of millions of dollars in this Commonwealth to secure the right to offer online gaming entertainment in a highly-regulated market.

Such investments include, but are not limited to:

- Combined, Pennsylvania's licensed casinos, including Petitioners, have invested over \$2 billion dollars in their casino, entertainment, and resort destinations, and employ more than 18,000 Pennsylvanians;
- Each of the Petitioners obtained a table game operation certificate and invested tens of millions of dollars to expand their facilities and hire additional employees to enable them to conduct table gaming;
- Each Petitioner holding a Category 1 or 2 license paid a \$50 million slot machine license fee, while Petitioner Valley Forge Casino Resort, a Category 3 licensee, paid an initial license fee of \$5 million;
- Petitioners holding a Category 1 or 2 slot machine license paid the Commonwealth a table game operation certificate fee of between \$16,500,000 and \$24,750,000, depending on when they secured their certificate, while Category 3 licensees, like Petitioner Valley Forge Casino Resort, paid a certificate fee of between \$7,500,000 and \$11,250,000, depending on when their certificate was secured; and
- Each Petitioner paid an interactive gaming certificate fee between \$8 and \$10 million, depending on which types of interactive games they intend to conduct.

Allowing the Department to continue to offer competing games – in violation of Act 42 and the State Lottery Law – significantly impairs the property rights that Petitioners enjoy pursuant to their respective licenses and certificates.

Finally, allowing the Department to offer unlawful, competing casino-style games places at risk the Commonwealth's major revenue share in interactive and land-based gaming revenue, and undermines the Legislature's important priorities that such funds support, including, but not limited to, property tax relief, rent rebates for senior citizens, economic development and tourism initiatives, support for agriculture, support for host counties and communities, and revenue for the Commonwealth's General Fund. Additionally, with the PGCB-sanctioned launch of casino interactive gaming imminent (the week of July 15th), iLottery's presence in the interactive gaming market, in which it is precluded by law from operating, will only serve to sow confusion among consumers.

4. The public interest would be served by issuing a preliminary injunction

The public interest is served by the entry of an injunction, because the General Assembly established the policy of prohibiting the Department from offering games that simulate slot machines and casino-style games through the iLottery program, 4 Pa.C.S. § 502; 72 P.S. § 3761-303(a.1), and “[w]hen the Legislature declares certain conduct to be unlawful[,] it is tantamount in law to calling it injurious to the public.” *Israel*, 52 A.2d at 321.

5. The requested injunction is reasonably suited to abate the offending activity

The requested injunction is reasonably suited to abate the offending activity, because it does not prohibit the Department from operating the iLottery program. Instead, the injunction merely bars the Department from offering interactive lottery games that simulate slot machines and casino-style games through the iLottery program – which is exactly what Act 42 and the State Lottery Law require. 4 Pa.C.S. § 502; 72 P.S. § 3761-303(a.1).

6. The requested injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct

The preliminary injunction sought by Petitioners will properly restore the parties to their status quo before the Department violated Act 42 and the State Lottery Law, by prohibiting them from doing what they were not permitted to do in the first place.

V. CONCLUSION

For the foregoing reasons and those set forth in Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction, Petitioners respectfully request that this Court immediately enjoin the Department from offering interactive lottery games that simulate slot machines and casino-style games,

including all games currently offered through iLottery, and to award such further relief as is just and equitable.

Respectfully submitted,

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Date: June 3, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I am this 3rd day of June, 2019, serving a copy of the foregoing BRIEF IN SUPPORT OF PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE NATURE OF A PRELIMINARY INJUNCTION upon the person indicated below, via this Court's electronic filing system, which service satisfies the requirements of Pa. R.A.P. 121, as follows:

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