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Case No. _____

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KIRNPAL GREWAL et al.,

Defendants and Appellants.

After a Decision By the Court of Appeal, Fifth Appellate District
Consolidated Case Nos. F065450/F065451/F065689

Kern County Superior Court Case Nos. CV-276959, CV-276958, CV-276961
William D. Palmer, Judge

PETITION FOR REVIEW

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TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Petitioner John Stidman ("Petitioner"), by and through his attorneys, respectfully submits this Petition for Review of the March 7, 2014, published decision of the Fifth Appellate District. A copy of the Fifth Appellate District's opinion is attached to this Petition.

ISSUES PRESENTED

1. Did the Court of Appeal err by rejecting established judicial interpretation of Penal Code Section 330b, thus creating a conflict with prior law?

2. Given the language of Penal Code Section 330b, is the aspect of "chance" in a gaming device relative to the user's subjective experience of the game, or is it, as found in *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1410-1411, something to be analyzed according to the device's actual operation?

3. Did the Court of Appeal exceed its authority in interpreting Penal Code Section 330b by injecting a subjective component into the determination of whether a particular device is an illegal slot machine?

4. Did the Court of Appeal err by eliminating the long-standing requirement of consideration in the determination of whether a device is an illegal slot machine under Penal Code Section 330b?

5. Did the Court of Appeal violate the rule of lenity by applying its new interpretation of Penal Code Section 330b against Petitioner even though that interpretation expressly conflicted with the interpretation set forth in prior, published appellate decisions?

WHY REVIEW SHOULD BE GRANTED

The People of the State of California, by and through the Kern County District Attorney (the "People"), filed civil actions under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), seeking to enjoin several Internet café businesses from continuing to engage in practices that allegedly violated the gambling prohibitions set forth at Penal Code sections 319 (unlawful lottery) and 330a, 330b and 330.1 (unlawful slot machines or devices). Generally speaking, the term "Internet café" depicts a café or similar establishment that sells computer use and/or Internet access, as well as other related retail products or services, on its premises. Some of those businesses promote the sale of their products and services by offering a sweepstakes giveaway that allows customers to ascertain their winnings, if any, by playing specialized game programs on the businesses'

own computer terminals. Petitioner utilized such a sweepstakes to promote his products and services.

When the People requested preliminary injunctions, the owners and operators of the Internet café businesses in question opposed such relief on the ground that their businesses did not conduct lotteries but instead offered lawful sweepstakes that promoted the sale of their products. Additionally, the owners and operators maintained that the required statutory elements of an unlawful slot machine or gambling device were not present. The trial court disagreed, and granted the preliminary injunctions as requested by the People. Defendants separately appealed from the orders granting such preliminary injunctions, and the Court of Appeal ordered those appeals consolidated. The Fifth Appellate District, in a published decision, affirmed the trial court, concluding that the People will likely prevail on its claims that defendants violated prohibitions against slot machines or gambling devices under section 330b.

Prior to the Court of Appeal's decision in this case, the law was clear that a device was not a slot machine within the meaning of Penal Code section 330b unless the device itself generates the element of chance in a game, through use of a random number generator or otherwise. [1] (*Trinkle v.*

[1] Section 330b makes it unlawful to own or possess a slot machine, and as relevant to the element of chance, defines a slot machine in pertinent part as any device that "by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or

California State Lottery (2003) 105 Cal.App.4th 1401, 1410-1411 ("*Trinkle II*").) In *Trinkle II*, the Third District Court of Appeal construed the language of Penal Code section 330b, and held: "Without the element of chance incorporated into the operation of the machine, the machine is nothing more than a vending machine which dispenses merchandise for consideration." (*Id.*)

Under the clear language of the California Penal Code and the previously-controlling cases such as *Trinkle II*, California businesses, including Internet cafés, had every right to use sweepstakes promotions provided they followed the rules. Those rules were relatively simple, and were set by statute. So long as the machine did not create the element of chance, but just distributed pre-determined prizes or entries in a pre-determined fixed order, then the machine did not meet the definition of a slot machine or gambling device under Penal Code section 330b *regardless* of whether a person using the machine understood how the machine worked or could predict whether he or she would win.

The undisputed evidence in the record before the trial court and Court of Appeal in this case demonstrates that the computer terminals used by patrons at Petitioner's place of business to reveal their sweepstakes results did *not* and technologically *could not* influence or alter the outcome

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become entitled to receive any piece of money, credit, allowance, or thing of value". (Penal Code § 330b(d).)

of the sweepstakes; the computer terminals had no random number generators, and were merely an entertaining way for customers to reveal the next available sweepstakes entry in the electronic stack of pre-determined entries. In other words, it was undisputed that there was no "element of chance incorporated into the operation of the machine" within the meaning of *Trinkle II*.

In its decision, however, the Court of Appeal expressly rejects the Third Appellate District's interpretation of Penal Code section 330b set forth in *Trinkle II*, and further finds that Petitioner's conduct violated that section based on its contrary interpretation of that statute. In reaching this conclusion, the Court of Appeal for the first time in this State injected a subjective "look and feel" test into the determination of whether a device is an illegal slot machine under Section 330b. That is, prior to the Court of Appeal's decision here, never before has any court purported to determine the legality of a particular machine under Penal Code section 330b based solely on the look and feel of that machine, or the end user's subjective understanding of the game. Indeed, the Court of Appeal broadly characterizes all sweepstakes promotions of the type utilized by Petitioner as illegal gambling because such devices have all the "trappings and experiences involved in playing traditional slot machines." (Opinion, at p.22.)

The Court of Appeal's approach violates well-established rules of statutory construction. An appellate court "has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 59 (noting that because the anti-SLAPP statute does not state or imply an "intent-to-chill" requirement, to judicially impose one "would violate the foremost rule of statutory construction") (internal quotations and citations omitted).) But that is exactly what the Court of Appeal did in this case. The Court of Appeal's decision conflicts with long-standing authority in this State, injects a new subjective test, and thus throws the law on its head. Review by this Court is necessary to resolve the resulting conflicts and confusion in the law.

Review in this case is also necessary to settle important questions of law. The operation of a sweepstakes has long been legal under California law, so long as the sweepstakes meets certain statutory requirements. (*See* Bus. & Prof. Code §§ 17539-17539.3, 17539.35.) What distinguishes a lawful sweepstakes from an illegal lottery or slot machine is the presence or absence of certain elements specified in the California Penal Code. Determining whether any particular digital sweepstakes promotion (such as the one used by Petitioner) complies with the detailed statutory requirements requires a precise and fact-specific analysis of how the particular sweepstakes software works and how it is used by a business.

The Court of Appeal's strained and unprecedented interpretation of Penal Code section 330b not only expressly contradicts and disagrees with previously controlling case law set forth in *Trinkle II* and other cases, but also misinterprets the relevant statutes in a way that calls into serious question the continued legality of many sweepstakes promotions utilized by retail establishments throughout California. In its opinion, the Court of Appeal for the first time in California found that a device may constitute an illegal slot machine even where no consideration is required to play the game on that device. Moreover, the Court of Appeal adopted an extremely broad definition of the term "apparatus" within the meaning of Penal Code Section 330b.

Those conclusions, in conjunction the Court of Appeal's rejection of the holding in *Trinkle II*, call into question the continued legality of many well-established and previously unquestioned sweepstakes promotions. Indeed, many of the highly popular and well-publicized sweepstakes operated in California, such as those utilized by McDonald's, Coca-Cola, and other established retailers, require the end user to enter a code on a device or machine in order to play the game. Under the Court of Appeal's opinion, those sweepstakes are now illegal, because the user's personal phone or computer is part of the "apparatus," and the element of chance is dictated not by operation of the game but rather by the end user's lack of

knowledge as to whether or not he or she will win a prize. The unintended and potentially far reaching impacts of the Court of Appeal's decision on long-standing, legitimate sweepstakes casts serious doubt on the correctness of the Court of Appeal's determination, and demonstrates that the Court of Appeal went far beyond its role as an adjudicative body tasked with interpreting statutes, not rewriting them.

Finally, the Court of Appeal's decision raises an important issue of law with respect to application of the rule of lenity. The rule of lenity comes into play when a statute defining a crime is susceptible of two reasonable interpretations. In such circumstances, the rule of lenity requires that the statute be strictly construed and applied in the defendant's favor. The rule of lenity applies here because, prior to the Court of Appeal's decision, the prevailing authority on the issue of whether a machine constituted an illegal slot machine under Penal Code section 330b**Error! Bookmark not defined.** was set forth in *Trinkle II*. Based on the undisputed evidence in the record, if Petitioner's conduct was measured under Penal Code section 330b as interpreted in *Trinkle II*, then Petitioner's conduct would be legal. But the Court of Appeal rejected *Trinkle II's* interpretation of Section 330b, and found Petitioner's conduct illegal based on the Court of Appeal's contrary interpretation of that Section. The Court of Appeal's "if it walks like a duck" interpretation of Penal Code Section 330b, which runs directly counter to prior judicial interpretation of the same

statute, and retroactive application of that new interpretation to a defendant, violates the rule of lenity.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Defendant Stidman owns and operates a business known as the I Zone Internet Café (I Zone) in Bakersfield, California. I Zone sells Internet time to the public at a price of $20 per hour, which time may be used on a system of computer terminals located on the I Zone premises. In addition, I Zone sells copying services, packaging services and refreshments. To promote the sale of Internet time and other products, I Zone offers a sweepstakes to customers whenever they make a purchase. According to the sweepstakes rules, noncustomers may also enter the sweepstakes; that is, no purchase is necessary to enter.

Under the sweepstakes operated by Petitioner, a person who purchases Internet time or other products receives sweepstakes points for each dollar spent. A customer is also given sweepstakes points for his first purchase of the day as well as for being a new customer. A white plastic card with a magnetic strip is provided to the customer, which card is activated by an employee at the register. When the customer swipes the

[2] The factual background is a summary of the facts as stated in the Court of Appeal's published decision for the Court's convenience. This Petition challenges the Court of Appeal's legal conclusions based on the undisputed facts, not the factual findings made by the trial court and adopted by the Court of Appeal.

card at an open computer terminal, he is given the option of using the Internet function or playing sweepstakes computer games. If he chooses the latter, the time spent playing sweepstakes computer games does not reduce the amount of Internet time available. Both options are touch-screen activated and do not require a keyboard or mouse. A customer could also reveal a sweepstakes result by other means, such as by using a special function on the computer terminal or by asking an employee at the register to print out a result on paper.

In playing the sweepstakes computer games, customers use their sweepstakes points in selected increments on a choice of games, with each game representing a separate sweepstakes. Participants in the sweepstakes have a chance to win cash prizes in various amounts ranging from small sums to a top prize of $3,000.

In opposing the motion for preliminary injunction, Petitioner presented undisputed evidence regarding how the sweepstakes functioned. Petitioner presented evidence of the inner-workings of the sweepstakes and computer terminals showing that the sweepstakes games played on the computer terminals were merely an entertaining way for customers to reveal a sweepstakes result. As described in Petitioner's opposition, and unrefuted by the People, "[e]ach time a customer reveals the results of a sweepstakes entry, [regardless of the means used], the next available sweepstakes entry in the 'stack' is revealed," in sequence, from a

prearranged stack of entries. The "next available sweepstakes entry" contains a predetermined result that would be the same regardless of which method was used to reveal it. Thus, when the customer engages the sweepstakes computer games, the outcome is determined by the particular sweepstakes entry that is being revealed at that time, not by the workings of the game itself. That is, the game simply *reveals* the predetermined result of the next sequential sweepstakes entry. In other words, the computers did not include a random number generator and in no way altered or influenced whether an particular sweepstakes entry revealed by a customer would result in a prize or not.

Petitioner provided a further operational description of how the software system he utilized conducted the sweepstakes. The descriptive information was primarily based on declarations from Petitioner's expert. That undisputed testimony demonstrated that the computer terminal simply acted as a reader and displayed the results of the next sequential sweepstakes entry in the stack—it was never the object of play. In fact, exactly the same results would be displayed for a specified sweepstakes entry whether the customer chose to have the results displayed in paper format from the cashier or in electronic format at the computer terminal. Finally, it was undisputed that none of the computers used by Petitioner had a random number generator and could not influence or alter the result of a particular sweepstakes entry, but merely displayed that result.

Based on Petitioner's use of the sweepstakes system, the Kern County District Attorney sought the injunctions under California's unfair competition laws, which prohibit unlawful, unfair, or fraudulent business practices. (Bus. & Prof. Code, § 17200 *et seq.*) The Fifth Appellate District held that the networks of terminals, software, and servers delivering the sweepstakes games at Petitioner's business likely amount to an unlawful slot machine under California Penal Code section 330b, stating that the "integrated system" has all of the "trappings and experiences involved in playing traditional slot machines." (Opinion, at p.22.) According to the Court of Appeal, "if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck." (Opinion, at p. 20 fn. 24.) The Court of Appeal did not reach the issue of whether the sweepstakes system was an illegal lottery under Penal Code section 319. (Opinion, at p.26.)

LEGAL ARGUMENT

A. Review is Appropriate Because the Court of Appeal's Decision Creates a Conflict in the Law Regarding the Proper Definition of a Slot Machine in California

In *Trinkle II*, the Third District Court of Appeal interpreted Penal Code section 330b, and found that elements of a slot machine under that section "are (1) the insertion of money or other object which causes the machine to operate, (2) the operation of the machine is unpredictable and governed by chance, and (3) by reason of the chance operation of the

machine, the user may become entitled to receive a thing of value." (*Trinkle II*, *supra*, 105 Cal.App.4th at 1410.)

With respect to the third element – often referred to as the "chance" element – the court in *Trinkle II* found that "[b]y using the words 'such operation,' the Legislature linked the element of chance to the operation of the machine, requiring that the *machine itself* determine the element of chance and become the object of play." (*Id.* at 1410 (Italics added).)[3] Thus, the element of "chance" that must exist for a device to be a slot machine is not determined by the user's subjective experience of the game, but rather, as explained in *Trinkle II*, is something to be analyzed according to the machine's operation in itself. The mere fact that the user does not know whether he or she will win does not convert a sweepstakes game into a slot machine. (*Id.* at 1411-1412.)

This conclusion is illustrated by the facts and holding in *Trinkle II*. At issue there were the vending machines used by the California State Lottery to sell Scratchers tickets. The vending machines vended Scratchers tickets in the order the tickets were stacked in the bins inside the machine. The purchasers inserted the purchase price and received the next ticket(s) in line. The court found that the element of chance for the game came from

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[3] *Trinkle II* interpreted Penal Code section 330b prior to its amendment, which amendment removed the word "such" prior to the word "operation." Nothing in the legislative history of the amendment or subsequent case law exists to indicate that removal of the word "such" changed the meaning of the statue in any way material to the issues in this case.

the printing of the winning tickets and the placement of those tickets in a predetermined sequence among the other tickets. The element of chance was therefore built into the game at the time of manufacture and placement in the bins, not at the time of purchase or play. Because the operation of the vending machines did not in any way affect the game's element of chance, the court held that the vending machines were not illegal slot machines. *Id.* at 1411-1412.

In contrast to the machines at issue in *Trinkle II*, the machines in question in *Trinkle v. Stroh* and *People ex rel. Lockyer v. Pacific Gaming Technologies* were found to be slot machines under Penal Code section 330b because the outcome of the games at issue was dependent upon the element of chance that was generated by the machines themselves. As stated by the court in *Trinkle II*, "in both [*Trinkle v. Stroh*, 60 Cal.App.4th 771 (1997)] and [*People ex rel. Lockyer v. Pacific Gaming Technologies*, 82 Cal.App.4th 699 (2000)], the machines in question were found to be slot machines under Penal Code section 330b *because the outcome was dependent on the element of chance that was generated by the machines themselves.*" (*Trinkle II*, 105 Cal.App.4th at 1410-11 (emphasis added).) As noted by the court in *Trinkle II*, "[w]hile the technology of old slot machines may differ from the modern slot machines, the element of gambling remains the same. The operation of the device (the spinning wheels or a computer program) renders the chance result." (*Trinkle II*, 105

Cal.App.4th at 1411.)

Based on these established authorities and the undisputed facts before the trial court and Court of Appeal, Petitioner's computers were not illegal slot machines within the meaning of Penal Code Section 330b. The most relevant analogy to Petitioner's sweepstakes promotion is a lottery Scratcher ticket vending machine at issue in *Trinkle II*. As explained in *Trinkle II*, the vending machines used to dispense lottery tickets in the Scratchers games consisted of stand-alone cabinets containing a number of bins into which a stock of Scratchers tickets may be loaded. Each bin contained a separate Scratchers game, and the cost of a ticket varied depending upon the game. A customer elected to purchase a ticket from one or another of the bins by pushing a button in front of the window for that bin, and the tickets were dispensed sequentially, according to the order in which they were loaded into the bin. (*Trinkle II*, 105 Cal.App.4th at 1403-1404.)

Just like the vending machines in *Trinkle II*, it was undisputed below that neither the computer terminal nor the customer's interaction with the program affected the outcome of the sweepstakes results or the odds of winning a prize. None of the servers accessed by the computers utilized by Petitioner contained a random number generator that dictated the outcome of the sweepstakes entries. Instead, the outcome of each entry was predetermined and stored within a database of available entries, and the

computer was merely a means of displaying the outcome by revealing the next entry in the pre-shuffled database. Moreover, because the order in which the entries are to be revealed was predetermined, the system did not differentiate entries granted in conjunction with a retail purchase from those granted without purchase; all entries had an equal chance at a prize.

In sum, Petitioner's sweepstakes entries were dispensed just like lottery tickets are dispensed in hard form using the California State Lottery's Scratcher vending devices. The only difference is the way the results are viewed. In the case of the Lottery Scratchers, the results were predetermined, and the customer simply scratches off the top layer of the play card to see whether he or she won a prize. In Petitioner's case, the sweepstakes entries were generated off-site, and shuffled like digital lottery tickets. Once the customer selected the level of play, the computer revealed the results of the next sweepstakes entry from the top of the predetermined roll of entries based on the off-site shuffle.

Accordingly, under the undisputed facts before the trial court and Court of Appeal, if the decision in *Trinkle II* were recognized as controlling, Petitioner should have prevailed. (*Trinkle II*, 105 Cal.App.4th at 1411-1412 ("[w]ithout the element of chance incorporated into the operation of the machine, the machine is nothing more than a vending machine which disposes merchandise for consideration").)

The Court of Appeal, however, expressly rejected the interpretation of Penal Code Section 330b set forth in *Trinkle II*, and found that Petitioner's computers violated that Section based on its novel interpretation. It stated:

> [W]e disagree with *Trinkle II's* description of the manner in which the chance element must be realized in order to constitute a slot machine or device under section 330b. Specifically, *Trinkle II* held that the chance element must be created by a randomizing process occurring at the moment the machine or device is being played. (*Trinkle II, supra*, at p. 1411.) As will be explained below, we think that holding was in error. Since we disagree with *Trinkle II* on these significant matters relating to the statutory elements, we adopt a different approach here than what was articulated in that case.

(Opinion, at pp. 16-17.)

As a result of the Court of Appeal's holding, there is now a conflict among the District Courts of Appeal as to the proper definition of an illegal slot machine under Penal Code Section 330b. Because this Section is a criminal statute, resolving the conflict in the law is important to provide fair notice to all persons in California as to how their conduct will be judged under this Section. Review is warranted for this reason alone.

B. Review is Appropriate Because the Court of Appeal Exceeded its Authority by Improperly Injecting a Subjective Component Into the Determination of Whether a Device is a Slot Machine Under Penal Code Section 330b

As noted above, the element of "chance" must be satisfied in order for a device to constitute an illegal slot machine under Penal Code Section

330b. Under established law set forth in *Trinkle II*, *Trinkle v. Stroh*, *People ex rel. Lockyer v. Pacific Gaming Technologies*, and elsewhere, whether a customer using a particular device understands how the device works or can predict whether he or she will win is not determinative of the element of chance. Rather, as noted in these cases, the determinative issue is how the machine actually works. These cases make clear that if the machine does not create the element of chance, but just distributes pre-determined prizes or entries in a pre-determined fixed order, then the machine does not meet the statutory definition of a slot machine or gambling device under Section 330b.

For the first time in California, the Court of Appeal here steps away from looking at the actual workings on the machine or device, and focuses instead solely on the end user's experience to determine whether a device is an illegal slot machine. The Court of Appeal stated:

> Defendants insist that their sweepstakes systems are on par with the vending machine in *Trinkle II*, since customers playing defendants' computer sweepstakes games merely receive the next available entry result from a stack that is in a previously arranged, sequential order. We disagree. For at least two reasons, we hold that *Trinkle II* does not salvage the devices at issue in the present appeal. First, we disagree that the chance element must *always* be generated by some randomizing action of the device itself when it is being played. Section 330b only requires that prizes may be won "by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her ...." (§ 330b, subd. (d).) Under this broad wording, if the entries are arranged in a particular order beforehand, rather than rearranged each time the game is played, it will still suffice.

> Either way, the next sequential entry/result that is dealt out by the software system will be, from the perspective of the player, by "chance or of other outcome of operation unpredictable by him or her ...." (*Ibid.*)
>
> Second, *Trinkle II* is distinguishable factually because, in the words of a recent federal district court decision, it involved a passive vending machine that "simply delivered a finished product—the lottery ticket." (*Lucky Bob's Internet Café, LLC v. California Dept. of Justice, et al.* (S.D.Cal. 2013) 2013 U.S. Dist. Lexis 62470, p. *8 (*Lucky Bob's*).) Here, in contrast, **all the trappings and experiences involved in playing traditional slot machines are actualized in one form or another by defendants' sweepstakes software systems and networked computer terminals**, since in each case points are received upon making a purchase, a game program is activated by the customer at a terminal, points are used or bet in selected increments, audio-visual scenes are played out on the screen to create the feel and anticipation of a slot machine or other gambling game, and prizes are won. For these reasons, the integrated systems in our case are in a different category than the vending machine in *Trinkle II*. The mere fact that winnings are based on a predetermined sequence of results programmed into the software system, rather than on a randomly spinning wheel (or the like), does not change the nature and character of devices herein, which as integrated systems function as slot machines.

(Opinion, at pp. 21-22 [emphasis added, internal footnotes omitted].)

The Court of Appeal's focus on whether the "integrated system" has all the "trappings and experiences involved in playing traditional slot machines" finds no support in California law, and improperly injects a subjective component into the determination of whether a device or apparatus violates Penal Code section 330b. This is error, because the Court of Appeal "has no power to rewrite the statute so as to make it

conform to a presumed intention which is not expressed." (*Equilon Enterprises , supra,* 29 Cal.4th at 59.)

Nothing in the California Penal Code purports to legislate the look and feel of a sweepstakes. The mere fact that a digital sweepstakes game's screen image may bear a passing resemblance in sight or sound to the types of games traditionally played on slot machines does not make the sweepstakes game illegal. The Penal Code focuses not on how the sweepstakes results are revealed, but on the inner workings of the game and the role of chance. Thus, in order to determine if a particular sweepstake system meets these requirements, a court must go beyond the look and feel of a sweepstakes game, and analyze the internal working of the sweepstakes software and the way it is utilized by the business.

In the proceedings below, the People produced absolutely no evidence regarding the inner workings of Petitioner's sweepstakes systems, but instead relied on legally irrelevant declarations about how Petitioner's sweepstakes games superficially look like certain other sweepstakes games. The People appear to have made no effort to test the actual software systems used by Petitioner. The following facts, therefore, were undisputed in the trial court:

- the computers utilized by Petitioner do not impact the outcome of the sweepstakes, and do not contain random number generators (i.e., they do not create the element of chance).

- the results of the sweepstakes are predetermined, and nothing the player can do will affect the outcome of the sweepstakes.

- anyone can play for free without making a purchase, and nobody may purchase sweepstakes entries; that is, no consideration is required to participate in the sweepstakes.

Had the Court of Appeal properly focused on the actual workings of the device or apparatus and the actual language of the statute, several key differences between Petitioner's sweepstakes and the typical slot machines used in casinos would have been revealed, all of which illustrate why Petitioner's computer terminals are not illegal slot machines. Based on the undisputed evidence before the trial court, some of those key differences include:

- Customers at a casino must pay to play a slot machine. In contrast, Petitioner did not sell sweepstakes entries; he gave them away as a promotion in conjunction with retail purchases. Moreover, no purchase was necessary to enter Petitioner's sweepstakes, as any eligible person could enter Petitioner's sweepstakes for free.

- A typical slot machine contains a random number generator, which is a piece of software that randomly determines the outcome every time someone plays that slot machine. Because the random number generator inside the machine randomly determines the outcome every time the slot machine is played, on any given play, every outcome is just as likely to occur. In contrast, there is no random number generator inside Petitioner's computers or servers. Petitioner's computers simply reveal the next sweepstakes game piece in line based on a shuffle pattern that occurred years ago, and has not been changed since that time.

- If someone is operating a legitimate casino with a slot machine with a million-dollar jackpot, there is a chance that different customers could hit that jackpot five times over the

> first month the casino is open, and the casino would have to pay the jackpot five times. Unlike a slot machine, the prizes in Petitioner's sweepstakes games are fixed at the outset and distributed among the winners as the applicable game pieces are revealed. Petitioner therefore knows over the life of any individual sweepstakes game exactly how much it will pay out to winners of that game.

Based on these undisputed differences, had the Court of Appeal followed prior case law, Petitioner would have prevailed. But the Court of Appeal rejected prior law, and adopted a new, subjective "look and feel" test to determine whether the "chance" element of Penal Code Section 330b is met.

The Court of Appeal attempt to explain its "look and feel" test misses the mark. The Court of Appeal stated:

> If this were not the case, then even a casino-style slot machine would be legal as long as it was operated by a computer system that had previously arranged the sequence of entry results in a fixed order. Such a computer system might conceivably frontload hundreds of millions of discrete entry results into a predetermined sequence. A customer using that device would be surprised to learn that merely because there is a preset sequence, he is not playing a game of chance. Of course, in reality, that is exactly what he is doing. As aptly remarked in *People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th at page 701, "if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck." (Fn. omitted.)

(Opinion, at p.20 fn. 24.) This analysis over-simplifies the issues, and ignores an important point – a casino-style slot machine loaded with millions of pre-determined entries likely would *not* be legal if a customer had to pay to play; i.e., if consideration were required for the chance to win

a prize. If the customer had to pay, then, at the very least, the slot machine loaded with millions of pre-determined entries would be an illegal lottery in violation of Penal Code Section 319. The key distinction is the requirement of consideration, which is absent from Petitioner's sweepstakes. (*See California Gasoline Retailers v. Regal Petroleum Corp.* (1958) 50 Cal.2d 844, 858-859 (so long as anyone can receive sweepstakes entries without making a purchase, the element of consideration necessary for a lottery does not exist).) Here, it was undisputed that patrons did not pay to play the sweepstakes; they paid for retail products and services. The sweepstakes entries were used as a promotional tool to sell those products and services. And, it was undisputed that people could play the sweepstakes for free. The Court of Appeal's logic, therefore, has zero application to the facts of this case, and ignores the provisions of Penal Code Section 319.

Ultimately, because Penal Code Section 330b does not purport to regulate the look and feel of a device or apparatus, the Court of Appeal exceeded its judicial authority in interpreting that Section to include a subjective component. Again, review is warranted not only to clarify the appropriate test under Section 330b, but also to clarify the proper role of the appellate courts in interpreting statutes.

C. Review is Proper Because the Court of Appeal's Decision Runs Counter to Established Law By Reading the Long-Standing "Consideration" Requirement out of Penal Code Section 330b

The Court of Appeal's decision also runs afoul of well-established law because it finds a violation of Penal Code section 330b even though no consideration is required to participate in Petitioner's sweepstakes. The Court of Appeal stated:

> Defendants suggest that the devices in question cannot qualify as slot machines or devices under section 330b due to a lack of an adequate showing of consideration. We find the argument unpersuasive. Unlike section 319 (regarding lotteries), section 330b does not directly specify that consideration is an element. Therefore, it would seem that as long as the express statutory elements of section 330b are satisfied, no separate showing of consideration is needed. In other words, to the extent that consideration is a factor under section 330b, it is simply subsumed by the existing statutory elements. Since those elements were shown here, nothing more was required.

(Opinion, at p. 24.) In reaching this conclusion, the Court of Appeal once again deviated from established precedent, and review is warranted to clarify the law.

Section 330b (d) of the California Penal Code defines "slot machine or device" as a "machine, apparatus, or device that is adapted, or may readily be converted, for use in a way that, *as a result of the insertion of any piece of money or coin or other object*, or by any other means, the machine or device is caused to operate or may be operated . . . ." (Cal. Penal Code § 330b(d) (emphasis added).) By referring to the insertion of

"money or coin or other object," subdivision (d) of section 330b makes clear that some valuable consideration must be given in exchange for the chance to operate the slot machine or device.

To read the phrase "money or coin or other object" more expansively, as the Court of Appeal did here, would mean that home computers and personal phones, which other valid sweepstakes require the use of in order to enter their sweepstakes promotion, would be illegal slot machines. (*See also* Section D, *infra.*) That cannot be the case, meaning that consideration is the touchstone of an illegal slot machine. Thus, if no consideration is necessary to play a sweepstakes on a device, a device is not an illegal slot machine.

That conclusion is supported by the language of section 330a, which makes a misdemeanor the possession of "any slot or card machine, contrivance, appliance or mechanical device, *upon the result of action of which money or other valuable thing is staked and hazarded*, and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner...." (Penal Code § 330a(a) (emphasis added).)

Requiring some valuable consideration to be given in exchange for the chance to play is also consistent with existing case law. California law historically has recognized, and continues to recognize, three distinct forms of gambling: "gaming, lotteries and betting." (*Western Telcon, Inc. v.*

California State Lottery (1996) 13 Cal.4th 475, 484.) Chapter 10 of title 9, Part 1 of the Penal Code, which includes sections 330 through 337z, addresses gaming. A slot machine or device, defined by sections 330a and 330b, therefore falls under the category of "gaming." (*Trinkle II*, *supra*, 105 Cal.App.4th at 1412.) This Court has defined gaming as "the playing of any game *for stakes hazarded by the players*." (*Western Telcon, Inc.*, *supra*, 13 Cal.4th at 484 (emphasis added); see also *Trinkle II*, *supra*, 105 Cal.App.4th at 1407.) Accordingly, for a slot machine or any other type of gaming to exist, a player must hazard stakes (i.e., offer valuable consideration).

Petitioner's computers are not slot machines or other gambling devices because no stakes are hazarded by the players. The evidence offered by Petitioner, and not contradicted by the People, shows that no purchase was necessary to play Petitioner's sweepstakes. Sweepstakes entries are not sold; they were offered as a promotion in conjunction with retail purchases of products and services. Thus, because customers and non-customers alike had the ability to participate in the sweepstakes without furnishing anything of value in consideration for the chance to play, the first element of a slot machine or other gambling device – consideration – is not met. By reading the consideration requirement out of the analysis, the Court of Appeal created a conflict in the law that must be resolved.

D. Review is Warranted Because, if the Court of Appeal's Decision Stands, it Calls Into Serious Question the Continuing Legality of Well-Established Sweepstakes and Other Games Whose Validity Were Previously Beyond Question

By focusing on the customer's perspective, and broadly interpreting the term "apparatus" within the meaning of Penal Code Section 330b, the Court of Appeal's decision calls into question the legality of sweepstakes promotions routinely used throughout the State.

As noted above, under previously-established law whether a customer using a particular device understands how the device works or can predict whether he or she will win is not determinative of the element of chance. For example, a customer buying a lottery ticket from a vending machine does not know whether he or she will win when buying the ticket, but the lottery vending machine still is not an illegal slot machine. Similarly, customers entering a code on their phone or personal computer in order to play a sweepstakes game do not know if they will win when they enter that code, but that does not make their phone or computer an illegal slot machine. Unfortunately, however, these are the direct (and probably unintended) results of the Court of Appeal's analysis.

It is common knowledge that many retail establishments, like McDonald's, Carl's Jr., Pepsi, Coca-Cola, Subway, and others, routinely use sweepstakes programs to promote their products and services. These programs all share common features for a valid sweepstakes as required by

California law, including: no purchase necessary, all entries have the same chance of winning, all prizes are final, and limited sweepstakes period.

More importantly, many of the well-known sweepstakes promotions in California openly use computers, cell phones, or other electronic devices not only to allow participants to submit their sweepstakes entries, but also to reveal the results of such entries. The sweepstakes programs run by McDonald's and Coca-Cola, for example, require the participant to enter a code on a computer or other electronic device to enter the sweepstakes and reveal the results thereof. (*See* http://www.mycokerewards.com/home.do.) A sweepstakes program recently run by Carl's Jr., called the "Wheel of Awesome," also required the use of a computer or an electronic device, and used a simulated casino-like spinning wheel to reveal the results of the sweepstakes entry. (*See* http://vimeo.com/24063584.)

Under the Court of Appeal's analysis, such use of a computer or phone to reveal the results of a sweepstakes entry makes that sweepstakes promotion illegal. That is not, and cannot be, the case. But again, that is the result of the Court of Appeal's decision. The Court of Appeal found:

> As should be apparent from the above analysis, we are treating each defendant's complex of networked terminals, software gaming programs and computer servers as a single, integrated system. Under section 330b, subdivision (d), an unlawful "'slot machine or device'" is not limited to an isolated or stand-alone piece of physical hardware, but broadly includes "a machine, *apparatus*, or device that is *adapted*" for use as a slot machine or device. (*Ibid.*, italics added.) As defined in dictionaries, the ordinary meaning for

> the term "apparatus" includes "a group or combination of instruments, machinery, tools, or materials having a particular function" (Random House Webster's College Dict. (1992) p. 66), as well as "[t]he totality of means by which a designated function is performed or a specific task executed" (Webster's II New College Dict. (2001) p. 54). Here, each defendant's system of gaming software, servers and computer terminals plainly operated together as a single apparatus. (§ 330b, subd. (d).) While it is true that the end terminals or computer monitors used by patrons—if considered in isolation—may not intrinsically or standing alone contain all the elements of a slot machine, in each case they are part of an integrated system or apparatus wherein the various parts or components work together so as to operate in a manner that *does* constitute an unlawful slot machine or device.

(Opinion, at pp. 23-24.)

By so broadly defining the term "apparatus" under Penal Code Section 330b, and by further holding that the "chance" element of Penal Code Section 330b is measured by the end user's perspective and not the inner-workings of the machine or device, the Court of Appeal effectively has called into question the legality of *any* sweepstakes promotion that permits a customer to determine whether they won a prize by using *any* electronic device or apparatus, including a personal computer or cell phone. Under the Court of Appeal's analysis, the "system" of integrated instruments or tools – i.e., the computer server operated by the retail establishment, the computer or cell phone utilized by the end user, and the software or mobile application used by the customer to reveal sweepstakes results – constitutes an "apparatus" within the meaning of Penal Code Section 330b. And, because the Court of Appeal held that the "chance"

element depends on the end-user's experience, that "apparatus" now constitutes an illegal slot machine. Accordingly, under this scenario, both the retailers and customers are guilty of possessing an illegal slot machine in violation of Penal Code Section 330b.

Clearly, this result is well beyond the Legislature's intention, and the consequences are likely well beyond the intention of the Court of Appeal. But that is the real impact of the Court of Appeal's analysis, which further demonstrates why the Court of Appeal's decision cannot stand.

E. The Court of Appeal's Decision Runs Counter to the Rule of Lenity

"The rule of statutory interpretation that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable." (*People v. Jones* (1988) 46 Cal.3d 585, 599) The rule does not apply every time there are two or more interpretations available, but rather only when that the court can do no more than guess what the legislative body intended in passing the law. (*People v. Avery* (2002) 27 Cal.4th 49, 58.) Essentially, it is a tie-breaking principal. (*People v. Manzo* (2012) 53 Cal.4th 880, 889; *People v. Nuckles* (2013) 56 Cal.4th 601, 611.) If the Court can discern the Legislature's intent from legislative history or

other extrinsic aids to statutory construction, the rule of lenity will not come into play. (*Id.*)

Moreover, "[i]t is fundamental that crimes are not to be "built up by courts with the aid of inference, implication, and strained interpretation and *penal statutes must be construed to reach no further than their words; no person can be made subject to them by implication.*" (*People v. Vis* (1966) 243 Cal.App.2d 549, 554 (emphasis added) (internal citations and quotations omitted).) "In other words, criminal statutes will not be built up 'by judicial grafting upon legislation ... [I]t is also true that the defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute." (*Id.* [citing *People v. Ralph* (1944) 24 Cal.2d 575, 581].) "Indeed, *it is 'the policy of California ... to construe and apply penal statutes as favorably to the defendant as the language of the statute and the circumstances of its application may reasonably permit.*'" (*Id.*) (Emphasis added.)

These rules strict construction of criminal statutes apply equally to civil proceedings, such as the proceeding here. (*Walsh v. Department of Alcoholic Beverage Control* (1963) 59 Cal.2d 757, 765; *Vis, supra,* 243 Cal.App.2d at 554 ("the foregoing principles apply even when the underlying action is civil in nature").)

The Court of Appeal's analysis violates these fundamental principles. In essence, the Court of Appeal ignored existing law, redefined Penal Code Section 330b by grafting its "look and feel" and "trappings and experiences" tests into the statutory analysis, and then applied its new interpretation of Penal Code Section 330b to Petitioner. Petitioner, in other words, has been found guilty of violating a statute based on an interpretation of that statute that not only did not exist at the time of his conduct. Even worse, Petitioner has been found guilty of violating a statute even though his conduct was *not* illegal under the interpretation of Penal Code Section 330b set forth in published appellate decisions. Such application of Penal Code Section 330b against Petitioner exceeds the Court of Appeal's authority, violates the rule of lenity, and violates the fundamental notion that courts must "construe and apply penal statutes as favorably to the defendant as the language of the statute *and the circumstances of its application may reasonably permit.*" (*Vis, supra*, 243 Cal.App.2d at 554.)

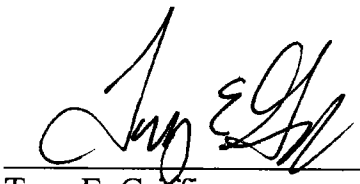
To the extent any doubt exists about whether the Court of Appeal's application of its new interpretation of Penal Code Section 330b to Petitioner was improper under the above authorities, currently pending in the California State Assembly is proposed legislation – Assembly Bill 1439 – which would expressly make the type of sweepstakes offered by so-called Internet café's illegal. The very fact that this proposed bill is pending in the

Legislature reveals that existing law does not clearly prohibit such activity or, at a minimum, that the legality of Petitioner's activity was not entirely clear under existing law. Either way, under the principles of statutory construction set forth above, Petitioner was entitled to the benefit of the doubt. Through its opinion, however, the Court of Appeal jumped the gun, and improperly attempted to legislate, instead of adjudicating based on existing law. This again was error warranting review.

CONCLUSION

The Court of Appeal's published decision expressly rejects existing precedent from the Third Appellate District in *Trinkle II*, and adopts a new interpretation of Penal Code Section 330b. The Court of Appeal's novel interpretation violates fundamental principles of statutory construction, creates numerous unintended consequences, and violates fundamental notions of due process by applying the novel interpretation to Petitioner. The Court of Appeal's decision, in short, has the potential to create far more problems than it solves. Review by this Court is warranted.

Dated: April 16, 2014



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CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(c)(1)

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DATED: April 16, 2014

By: _____

TORY E. GRIFFIN
Attorney for Petitioner John Stidman

EXHIBIT A .

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KIRNPAL GREWAL et al.,

Defendants and Appellants.

F065450/F065451/F065689

(Super. Ct. Nos. CV-276959, CV-276958, CV-276961)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. William D. Palmer, Judge.

Weston, Garrou & Mooney, John H. Weston, G. Randall Garrou and Jerome H. Mooney for Defendants and Appellants Kirnpal Grewal and Phillip Ernest Walker.

William H. Slocumb and Christopher T. Reid for Defendant and Appellant John C. Stidman.

Lisa S. Green, District Attorney, Gregory A. Pulskamp and John T. Mitchell, Deputy District Attorneys, for Plaintiff and Respondent.

Downey Brand, Stephen J. Meyer, Tory E. Griffin and Kelly L. Pope for Net Connection Hayward as Amici Curiae on behalf of Defendants and Appellants.

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In these three consolidated cases,[1] the People of the State of California by and through the Kern County District Attorney (the People) filed civil actions under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.), seeking to enjoin several Internet café[2] businesses from continuing to engage in practices that allegedly violated the gambling prohibitions set forth at Penal Code sections 319 (unlawful lottery) and 330a, 330b and 330.1 (unlawful slot machines or devices).[3] When the People requested preliminary injunctions, the owners and operators of the Internet café businesses in question (i.e., Kirnpal Grewal, Phillip Ernest Walker & John C. Stidman; collectively defendants) opposed such relief on the ground that their businesses did not conduct lotteries but merely offered lawful sweepstakes that promoted the sale of their products. Additionally, while acknowledging that customers could reveal sweepstakes results by playing (on terminals provided on premises) a computer game program that simulated the

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1 Two additional related cases (i.e., *People v. Nasser*, case No. F066645 & *People v. Elmalih*, case No. F066646) will be addressed by us in a separate opinion. We note the only difference in those cases from what is considered here is that a telephone card (rather than Internet time) was the product purchased to gain sweepstakes points used on game programs at the businesses' computer terminals. With no material differences, the same rationale and disposition follows in those cases as is stated here.

2 Broadly speaking, the term "Internet café" depicts a café or similar establishment that sells computer use and/or Internet access on its premises. As commentators have pointed out, many such businesses now promote the sale of their products (e.g., computer time, Internet access or telephone cards) by offering a sweepstakes giveaway that allows customers to ascertain their winnings, if any, by playing specialized game programs on the businesses' own computer terminals. Typically, these programs simulate casino slot machines or other gambling games. (See e.g., Dunbar & Russell, *The History of Internet Cafes and the Current Approach to Their Regulation* (2012) 3 UNLV Gaming L.J. 243, 243-245; Silver, *The Curious Case of Convenience Casinos: How Internet Sweepstakes Cafes Survive in a Gray Area Between Unlawful Gambling and Legitimate Business Promotions* (2012) 29 J. Marshall J. Computer & Info. L. 593, 594-599.)

3 Unless otherwise indicated, all further statutory references are to the Penal Code.

look and feel of a slot machine or other game of chance, defendants maintained that the required statutory elements of an unlawful slot machine or gambling device were not present. The trial court disagreed with that assessment and granted the preliminary injunctions as requested by the People. Defendants have appealed from the orders granting such preliminary injunctions, raising the same arguments they made in the trial court.[4] Because we conclude the People will likely prevail on the claims that defendants violated prohibitions against slot machines or gambling devices under section 330b, we shall affirm the relief granted below.

FACTS AND PROCEDURAL HISTORY

Since our opinion concerns three distinct Internet café businesses, we begin by summarizing the factual background of each of the underlying cases.[5]

Defendant Stidman's I Zone Internet Café

Defendant Stidman owns and operates a business known as the I Zone Internet Café (I Zone) in Bakersfield, California. I Zone sells Internet time to the public at a price of $20 per hour, which time may be used on a system of computer terminals located on the I Zone premises. In addition, I Zone sells copying services, packaging services and refreshments. To promote the sale of Internet time and other products, I Zone offers a sweepstakes to customers whenever they make a purchase. According to the sweepstakes rules, noncustomers may also enter the sweepstakes; that is, no purchase is necessary to

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[4] After separate appeals were filed, we ordered the three cases consolidated. The consolidated cases herein are *People v. Grewal*, case No. F065450, *People v. Walker*, case No. F065451 and *People v. Stidman*, case No. F065689.

[5] Although the facts and circumstances shown below were *as of* the time of the hearings below, for ease of expression we primarily use the present tense.

enter.[6] The sweepstakes is effectuated through a computer software system provided by a company known as Capital Bingo.

Under the sweepstakes as operated by the software system, a person who purchases Internet time or other products at I Zone receives sweepstakes points for each dollar spent. A customer is also given sweepstakes points for his first purchase of the day as well as for being a new customer. For example, a new customer who buys $20 of Internet time receives a total of 3,000 sweepstakes points, consisting of 2,000 sweepstakes points for the purchase of Internet time, 500 sweepstakes points for the first $20 of Internet time purchased for that day, and 500 sweepstakes points for being a new customer. Additional sweepstakes points may be received if the customer buys refreshments. A white plastic card with a magnetic strip is provided to the customer, which card is activated by an I Zone employee at the register. When the customer swipes the card at an open computer terminal, he is given the option of using the Internet function or playing sweepstakes computer games. If he chooses the latter, the time spent playing sweepstakes computer games does not reduce the amount of Internet time available.[7] Both options are touch-screen activated and do not require a keyboard or mouse.

In playing the sweepstakes computer games, I Zone customers use their sweepstakes points in selected increments (simulating bets) on games with names such as

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[6] To enter a sweepstakes without purchasing Internet time or other products, an individual may receive up to four free entries from the cashier each day upon request. Four additional entries are available by mailing a form with a self-addressed, stamped envelope.

[7] Detective Craig Checklenis of the Bakersfield Police Department initially reported that Internet time was reduced when he played the sweepstakes computer games. He later corrected himself, stating that "Internet time is not lost when playing the sweepstakes games."

"Buck Lucky," "Tropical Treasures" or "Baby Bucks." According to the I Zone sweepstakes rules, each increment level available for play "represents a separate sweepstakes."[8] As shown by photographic evidence, gambling-themed games resembling slot machines are prominently displayed on the I Zone terminals. According to the observations of Detective Checklenis, "[i]t appeared the subjects were playing casino style slot machine games on the computers.... The audible sounds were that of casino style slot machines." On a later inspection of I Zone, he surveyed the room and noted that no one was on the Internet, but rather "all the people using the computer terminals were playing the sweepstakes games."[9] Participants in the I Zone sweepstakes have a chance to win cash prizes in various amounts ranging from small sums to a top prize of $3,000.

In opposing the motion for preliminary injunction, Stidman presented evidence and argument regarding how the sweepstakes functioned. His position was essentially that the computer sweepstakes games played on the I Zone terminals were merely an entertaining way for customers to reveal a sweepstakes result. A customer could also reveal a sweepstakes result by other means, such as by using a special function on the computer terminal or by asking an I Zone employee at the register to print out a result on paper. As described in Stidman's opposition, "[e]ach time a customer reveals the results of a sweepstakes entry, [regardless of the means used], the next available sweepstakes entry in the 'stack' is revealed," in sequence, from a prearranged stack of entries. The

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8 Based on the description provided by Stidman of how the software system conducts the sweepstakes program, this statement indicates that each increment level available for play would access a distinct "batch of sweepstakes entries" stacked in a particular order or sequence.

9 Consistent with the detective's observation, Stidman's evidence revealed that at least some of the I Zone patrons had a considerable surplus balance of Internet time on their accounts.

"next available sweepstakes entry" contains a predetermined result that would be the same regardless of which method was used to reveal it. Thus, when the customer engages the sweepstakes computer games, the outcome is determined by the particular sweepstakes entry that is being revealed at that time, not by the workings of the game itself. That is, the game simply *reveals* the predetermined result of the next sequential sweepstakes entry.

Stidman provided a further operational description of how the software system used by I Zone conducted the sweepstakes. The descriptive information was primarily based on declarations from Stidman's expert, Nick Farley, and an attorney opinion letter provided to Stidman (purportedly from Capital Bingo's attorney) disclosing the Capital Bingo operational "model." Allegedly, there were three distinct servers, referred to as (1) the Management Terminal, (2) the Point of Sale Terminal, and (3) the Internet Terminal. As summarized in the trial court by Stidman's counsel: "It is at the Management Terminal where all sweepstakes entries are produced and arranged. Each batch of sweepstakes entries has a finite number of entries and a finite number of winners and losers. Once a batch of sweepstakes entries is produced at the Management Terminal, it is 'stacked' ... and then transferred to the Point of Sale Terminal in exactly the same order as when it left the Management Terminal. Each time a customer reveals the results of a sweepstakes entry, either at the Internet Terminal or at the Point of Sale, the next available sweepstakes entry in the 'stack' is revealed. In other words, the Internet Terminal simply acts as a reader and displays the results of the next sequential sweepstakes entry in the stack as it was originally arranged and transferred from the Management Terminal—it is never the object of play. In fact, exactly the same results [are displayed] for a specified sweepstakes entry whether the customer chooses to have the results displayed in paper format at the Point of Sale Terminal or in electronic format at an Internet Terminal." Additionally, Farley's declaration asserted that neither the Point of Sale Terminal nor the Internet Terminal had a random number generator and could not

be "the object of play," since those servers could not influence or alter the result of a particular sweepstakes entry, but merely displayed that result.

Defendant Walker's OZ Internet Café and Hub

Defendant Walker owns and operates a business called the OZ Internet Café and Hub (the OZ) in Bakersfield, California. Among other things, the OZ sells computer and Internet access (hereafter, Internet time) on computer terminals on its premises. The OZ promotes the sale of Internet time and other products with a sweepstakes giveaway that is implemented through a software system provided by a company known as Figure Eight Software. Participants in the sweepstakes have the chance to win cash prizes varying from small amounts to a top prize of $10,000 as set forth in the sweepstakes' odds tables.

Internet time may be purchased at the OZ for $10 per hour. When Internet time is purchased, a personal identification number (or PIN) is assigned to that customer by an employee of the OZ, who creates an account by which the customer may access the computers and Internet as well as play sweepstakes computer games. Customers are not charged for Internet time while they are playing the computer sweepstakes games. At the time of purchase, the customer receives 100 "sweepstakes points" for each dollar spent. As asserted by Walker, "[c]ustomers purchase product[s] consisting mostly of computer and Internet time at competitive prices and receive free sweepstake points in addition to the product purchased." Additionally, a customer may receive 100 free sweepstakes points every day that the customer comes into the OZ, and first-time customers receive 500 additional sweepstakes points. These sweepstakes points can be "used to draw the next available sequential entry from a sweepstake contest pool." This may be done and the result revealed in one of three ways: (i) asking an OZ employee to reveal a result, (ii) pushing an instant reveal button at the computer station, or (iii) playing computer sweepstakes games "that have appearances similar to common games of chance" at the computer terminals.

The sweepstakes rules provide that no purchase is necessary to enter the sweepstakes. According to Walker, noncustomers may obtain free sweepstakes entries by asking an employee at the OZ or by mailing in a request.

When Detective Checklenis investigated the OZ, he asked Walker if customers had to sign a form to access the computers. Walker responded in the affirmative and showed Checklenis a "Computer Time Purchase Agreement." On the form, each customer is required to acknowledge that he understands the following matters before using the OZ computers: (i) that he is purchasing computer time and (ii) that the sweepstakes computer games are "not gambling," but are a "promotional game" in which all winners are predetermined. On the form, the customer also affirms that he understands "[t]he games have no [e]ffect on the outcome of the prizes won," but are merely an "entertaining way to reveal [his] prizes and [he] could have them instantly revealed and would have the same result."

In opposing the motion for preliminary injunction, Walker's declaration explained what happens when a customer uses the sweepstakes computer game: "If a customer utilizes the pseudo-interactive entertaining reveal interface[,] the customer can encounter some games that have appearances similar to common games of chance." However, before any "spinning wheels or cards" appear on the screen, "the sweepstake entry has already been drawn sequentially from a pool of entries and is predetermined. There is no random component to the apparent action of the images in the interface even though it simulates interactivity. Instead, the images will display a result that matches the amount of any prize revealed in the entries. [Citation.] [¶] As told to the customers in the rules and in disclaimers, the pseudo interactive interface does not 'automatically' or 'randomly' utilize any play to obtain a result."

Walker's opposition also described in greater detail the operation of the software system utilized by the OZ to run the sweepstakes. Walker asserted by declaration that under that software system, the issue of whether a customer has won a cash prize is

determined at the point in time that his entry is drawn from a sweepstakes pool. Each such entry has a previously assigned cash prize of zero or greater. Entries are drawn sequentially from one of 32 sweepstakes pools created by the software company.[10] The entries in each pool are prearranged in a set order or sequence by the software company, and the OZ has no control over the order or sequence of the entries or the corresponding results. Access to a particular sweepstakes pool is determined by how many points the customer chooses to use (or bet) at any one time. Each pool has its own prizes and its own separate sequence of entry results. When a customer selects a sweepstakes pool, the software system assigns to him the next available entry result in that pool, in sequence. At that point, the result is established and cannot be affected by the computer game play, which merely reveals the established result. Additionally, Walker asserted that a specific sequential entry will yield the same result regardless of the method a customer used to draw and reveal it.

Defendant Grewal's A to Z Café

Defendant Grewal is the owner and operator of the A to Z Café in Bakersfield, California. Grewal's opening brief describes the sweepstakes conducted at his A to Z Café in identical terms to the sweepstakes operated by Walker. Our review of the evidentiary record confirms that the sweepstakes program used by the A to Z Café was in all material respects the same as the one described above regarding Walker's business, the OZ, and the parties likewise agree that the facts and circumstances of the two cases are in essence the same. Therefore, rather than engage in an unnecessary repetition of facts, we simply note that the material facts regarding the A to Z Café are the same as

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10 The printed sweepstakes rules also refer to such pools as "multiple finite deals of entries."

described above concerning the OZ. When we discuss Walker's system, the same is true of Grewal's.

Procedural Background

All three cases were commenced on June 21, 2012, by the Kern County District Attorney's Office on behalf of the People, filed as separate civil actions against Stidman, Walker and Grewal, respectively. Each complaint sought injunctive relief under Business and Professions Code section 17200 based on defendants' alleged violations of antigambling provisions of the Penal Code in the operation of their respective Internet café businesses.[11] The Penal Code provisions at issue under the pleadings were those relating to unlawful lotteries (§ 319) and unlawful slot machines or gambling devices (§§ 330a, 330b & 330.1). On July 23, 2012, hearings were held on the People's motions for preliminary injunctions by which the People sought to prohibit the sweepstakes operations until or unless otherwise ordered by the court after a trial on the merits. The trial court granted the requested relief as against each defendant. Formal written orders granting the preliminary injunctions were entered by the trial court on August 1, 2012, from which each defendant separately appealed. We ordered the three appeals consolidated.

DISCUSSION

I. The Issue in the Trial Court and Our Standard of Review

The decision to grant a preliminary injunction rests in the sound discretion of the trial court. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.) Ordinarily, "two interrelated factors" are evaluated by the trial court in deciding whether to exercise its discretion to issue a preliminary injunction: "The first is the likelihood that the plaintiff

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11 Other relief, such as civil penalties, was also sought in each of the underlying complaints filed by the People.

will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*Id.* at pp. 69-70.)[12] An order granting or denying such interlocutory relief reflects the trial court's evaluation of the controversy on the record before it at the time of its ruling; thus, "it is not an adjudication of the ultimate merits of the dispute." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1109.) In view of that latter principle, we base our opinion upon the state of the record that was before the trial court in granting interlocutory relief, and although on *those* initial facts we reach certain conclusions, we leave open the possibility—however remote it may be here—that a trial on the merits based on a more fully developed factual record may cast these matters in a different light.

We review an order granting a preliminary injunction under the abuse of discretion standard. (*People ex rel. Gallo v. Acuna, supra*, 14 Cal.4th at p. 1109.) If the evidence is in conflict, we interpret the facts in the light most favorable to the prevailing party. (*Cinquegrani v. Department of Motor Vehicles* (2008) 163 Cal.App.4th 741, 746.) To the extent that the grant of a preliminary injunction was based on statutory construction, we review the issue of statutory construction de novo. (*Ibid.*) The question of whether, under a given state of facts, a particular device is an unlawful slot machine is one of law. (*Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1405 (*Trinkle II*).) We review that question of law de novo.

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12 Where, as here, a governmental entity seeks specifically provided injunctive relief to prohibit an alleged violation of a statute, once that governmental entity makes a showing that it is likely to prevail at trial, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. (*IT Corp. v. County of Imperial, supra*, 35 Cal.3d. at pp. 71-72; see Bus. & Prof. Code, §§ 17203 [providing for injunctive relief against unlawful business practices], 17202 [includes specific or preventive relief to enforce penal law].)

In the instant appeal, defendants contend that the trial court erred or abused its discretion in issuing the preliminary injunctions because, allegedly, there was no likelihood that the People would be able to prevail on the merits. We proceed on this understanding of defendants' claims. (See *Tosi v. County of Fresno* (2008) 161 Cal.App.4th 799, 803-804.)

II. Statutory Construction of Penal Code Sections

Because our review of the trial court's rulings requires that we interpret or apply certain Penal Code provisions on the record before us, we briefly set forth the relevant principles of statutory construction.

"'[T]he objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we need go no further.'" (*People v. Beaver* (2010) 186 Cal.App.4th 107, 117.) When the language is susceptible of more than one reasonable interpretation, however, we look to extrinsic aids, including the objects to be achieved, the evils to be remedied, the legislative history, public policy, and the statutory scheme of which the statute is a part. (*Ibid.*; accord, *People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.)

Under the rule of lenity, which defendants argue should be applied here, any doubts as to the meaning of a criminal statute are ordinarily resolved in a defendant's favor. (See, e.g., *People v. Overstreet* (1986) 42 Cal.3d 891, 896; *Walsh v. Dept. Alcoholic Bev. Control* (1963) 59 Cal.2d 757, 764-765).[13] However, that rule of statutory

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[13] The rule is sometimes also described as a principle of strict construction. (See, e.g., *People v. Overstreet*, *supra*, 42 Cal.3d at p. 896; *People v. Avery* (2002) 27 Cal.4th 49, 58.)

interpretation is only applied where the statute is reasonably susceptible of two constructions that are in relative equipoise—that is, resolution of the statute's ambiguity in a convincing manner is impracticable. (*People v. Lee* (2003) 31 Cal.4th 613, 627; *People v. Avery*, *supra*, 27 Cal.4th at p. 58; *People v. Jones* (1988) 46 Cal.3d 585, 599.) "Thus, although true ambiguities are resolved in a defendant's favor, an appellate court should not strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent." (*People v. Avery*, *supra*, at p. 58 [citing § 4].)[14] As recently stated by our Supreme Court, "'[t]he rule of lenity does not apply every time there are two or more reasonable interpretations of a penal statute. [Citation.] Rather, the rule applies "'only if the court can do no more than guess what the legislative body intended; there must be an *egregious* ambiguity and uncertainty to justify invoking the rule.'" [Citation.]' [Citation.]" (*People v. Nuckles* (2013) 56 Cal.4th 601, 611.)

No such ambiguity exists in this case, as will become apparent in the discussion that follows and, therefore, the rule of lenity does not apply.[15]

III. An Unlawful Slot Machine or Device Was Shown by the Record

We begin with the issue of whether the devices in question (i.e., defendants' software systems operating the computer sweepstakes games on the networked terminals

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[14] Section 4 provides: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

[15] Even assuming a strict construction, however, that would not require the statutory wording to be strained or distorted to exclude conduct clearly intended to be within its scope, where the words are given their fair meaning in accord with the evident intent of the Legislature. (*Trinkle v. Stroh* (1997) 60 Cal.App.4th 771, 783 [so holding, construing provision relating to slot machines]; *People v. Shira* (1976) 62 Cal.App.3d 442, 460 [same, construing statute relating to lotteries]; cf. § 4 [penal provisions construed according to their fair import].)

provided to customers) were unlawful slot machines or gambling devices under the applicable penal statutes.

Sections 330a, 330b and 330.1 contain distinct but overlapping provisions that prohibit "slot machine[s] or device[s]" as defined in each section.[16] The definitional language in each section is similar, but not identical. (Cf. §§ 330a, subd. (a), 330b, subd. (d) & 330.1, subd. (f).)[17] Arguably the broadest of the three is section 330b, which defines a "'slot machine or device'" in the following terms: "[A] machine, apparatus, or device that is adapted ... for use in a way that, as a result of the insertion of any piece of money or coin or other object, or by any other means, the machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any piece of money ... or thing of value ...." (§ 330b, subd. (d).)[18] The People center their discussion on section 330b; we will do the same.

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16 Section 330a was enacted in 1911, while sections 330b and 330.1 were both enacted in 1950. (Stats. 1911, ch. 483, § 1, p. 951 [re: § 330a]; Stats. 1950, 1st Ex. Sess., ch. 17, § 1, p. 452 [re: § 330b]; Stats. 1950, 1st Ex. Sess., ch. 18, § 1, p. 454 [re: § 330.1].)

17 Our courts have recognized the three provisions are "similar" in their terms (e.g., *Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 593), but also have differences (e.g., *People ex rel. Lockyer v. Pacific Gaming Technologies* (2000) 82 Cal.App.4th 699, 703, fn. 6; but see *Trinkle II*, *supra*, 105 Cal.App.4th at pp. 1409-1410, fn. 7 [treating §§ 330b & 330.1 as identical]).

18 Section 330.1, subdivision (f), defines a "slot machine or device" in relevant part as "one that is, or may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object the machine or device is caused to operate or may be operated or played, mechanically, electrically, automatically, or manually, and by reason of any element of hazard or chance, the user may receive or become entitled to receive anything of value ...."

Section 330a, subdivision (a), prohibits "any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other

California courts have found section 330b to prohibit a variety of devices where prizes may be won based on chance. In *People ex rel. Lockyer v. Pacific Gaming Technologies, supra*, 82 Cal.App.4th 699, a vending machine that dispensed telephone cards for $1 included a "sweepstakes" feature with audio-video displays resembling a slot machine. When customers purchased a phone card for $1, they were given a chance to win a cash prize of up to $100. A "preset computer program" determined the results of the sweepstakes; the user could not control or alter the results. (*Id.* at pp. 701-702.) The Court of Appeal held the vending machine was a prohibited slot machine under the plain language of section 330b, because "[b]y the insertion of money and purely by chance (without any skill whatsoever), the user may receive or become entitled to receive money." (*Id.* at p. 703.) Similarly, in *Trinkle v. Stroh, supra*, 60 Cal.App.4th 771, a jukebox that dispensed four songs for $1 was found to be a prohibited slot machine or device under section 330b because the operators also received a chance to win a cash jackpot. (*Id.* at pp. 776-780; see also *Score Family Fun Center, Inc. v. County of San Diego* (1990) 225 Cal.App.3d 1217, 1221-1223 [holding that an arcade video game that simulated card games violated § 330b because operators could, as a matter of chance, win free games or extended play].)

Based on these authorities, the People argue that an unlawful slot machine or device under section 330b was involved in each of defendants' businesses at issue in this consolidated appeal. According to the People, this conclusion follows from the facts that, under defendants' sweepstakes software systems as operated on their computer networks

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valuable thing is staked or hazarded, and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner and by means whereof, or as a result of the operation of which any merchandise, money ... or any other thing of value, is won or lost, or taken from or obtained from the machine, when the result of action or operation of the machine, contrivance, appliance, or mechanical device is dependent upon hazard or chance ...."

and terminals, upon the payment of money (i.e., the purchase of Internet time), patrons can activate computer sweepstakes games on the terminals and, based on "chance" or "other outcome of operation unpredictable by" the patron, win cash prizes. We agree with that analysis. That is, on the question of whether it was appropriate for the trial court to grant the preliminary injunctions, we conclude that the record below was adequate to show the People would likely prevail on the merits under section 330b.

We explain our conclusion by examining each of the statutory elements of an unlawful "'slot machine or device'" under section 330b. Before we begin that task, a brief comment is needed concerning our approach. One Court of Appeal decision provided the following distillation of the three elements necessary to constitute a slot machine or device under section 330b: "(1) the insertion of money or other object which causes the machine to operate, (2) the operation of the machine is unpredictable and governed by chance, and (3) by reason of the chance operation of the machine, the user may become entitled to receive a thing of value." (*Trinkle II*, *supra*, 105 Cal.App.4th at p. 1410).) We take issue with this formulation because section 330b, subdivision (d), refers to *chance* "or" *unpredictable* outcome, while *Trinkle II* uses the conjunctive "and" in its articulation of the second element. As noted in *Score Family Fun Center v. County of San Diego*, *supra*, 225 Cal.App.3d, at page 1221, those terms are clearly in the disjunctive. As a result, this element of the statute (commonly referred to as the chance element) can be satisfied by showing that a prize may be won by reason of an "outcome of operation *unpredictable*" to the user (§ 330b, subd. (d), italics added; *Score Family Fun Center v. County of San Diego, supra*, at p. 1221). No further or additional proof relating to "chance" is needed.[19] Additionally, we disagree with *Trinkle II's* description

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[19] The disjunctive statutory wording does not mean that chance and unpredictability are entirely separable, but only that they may be distinguished in terms of what must be shown. Obviously, when the outcome of operation of a device is entirely unpredictable

of the manner in which the chance element must be realized in order to constitute a slot machine or device under section 330b. Specifically, *Trinkle II* held that the chance element must be created by a randomizing process occurring at the moment the machine or device is being played. (*Trinkle II*, *supra*, at p. 1411.) As will be explained below, we think that holding was in error. Since we disagree with *Trinkle II* on these significant matters relating to the statutory elements, we adopt a different approach here than what was articulated in that case.

In light of the foregoing, and in view of the complexities of the present case, we believe it is best to frame our discussion of the elements of section 330b in terms that are closely tethered to the language of the statute itself. We now turn to those statutory elements as revealed in the statutory language.

The first element specified in the statute is that "*as a result of the insertion of any piece of money or coin or other object, or by any other means, the machine or device is caused to operate or may be operated* ...." (§ 330b, subd. (d), italics added.) Defendants argue that this element is lacking because no coin or similar object was inserted into a slot by customers at the computer terminal to cause the sweepstakes computer games to operate. We reject that argument. Here, the insertion of a PIN or the swiping of a magnetic card at the computer terminal in order to activate or access the sweepstakes games and thereby use points received upon paying money at the register (ostensibly to purchase a product) plainly came within the broad scope of the statute. The statute

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to the user, it is *also* involving chance, since for purposes of our gambling laws "'[c]hance'" means that "winning and losing depend on luck and fortune rather than, or at least more than, judgment and skill." (*Hotel Employees & Restaurant Employees Internat. Union v. Davis*, *supra*, 21 Cal.4th at p. 592.) Here, we believe the statute is simply making clear that it is *sufficient* to establish this element of an unlawful slot machine or device if a prize may be won by reason of an "outcome of operation unpredictable by [the user]." (§ 330b, subd. (d).)

expressly includes the catchall phrase "*by any other means*." (§ 330b, subd. (d), italics added.) Even though a coin, money or object (e.g., a token) was not inserted into a slot, the games were commenced *by other means* analogous thereto which effectively accomplished the same result and, therefore, this element is satisfied.

The second element of a "slot machine or device" articulated in section 330b is that "*by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any ... money ... or thing of value ....*" (§ 330b, subd. (d), italics added.)[20] This language describes the so-called "chance" element—that is, the requirement that any potential to win a prize must be based on hazard, chance or other outcome of operation unpredictable to the user of the machine or device.

Here, it is clear that defendants' customers may become entitled to win prizes under the software systems implementing defendants' computer sweepstakes games based on "hazard or chance or of other outcome of operation unpredictable" to the user. (§ 330b, subd. (d).) That is, we agree with the People that the chance element is satisfied. Under California gambling law, "'[c]hance'" means that "winning and losing depend on luck and fortune rather than, or at least more than, judgment and skill." (*Hotel Employees & Restaurant Employees Internat. Union v. Davis*, *supra*, 21 Cal.4th at p. 592.) Since customers playing defendants' computer sweepstakes games can exert no influence over the outcome of their sweepstakes entries by means of skill, judgment or

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[20] Prior to 2004, this portion of the statute was worded as follows: "'by reason of any element of hazard or chance or of other outcome of *such* operation unpredictable by him ....'" (*Trinkle II*, *supra*, 105 Cal.App.4th at p. 1409, fn. 6, italics added.) In 2004, as a result of housekeeping legislation that made technical, nonsubstantive changes to numerous statutes, the word "such" appearing before the word "operation" was removed from section 330b. (Stats. 2003, ch. 264, § 1.)

how well they play the game, it follows that we are dealing with systems that are based on chance or luck. Moreover, by describing their promotional giveaways as *sweepstakes*, defendants have effectively admitted to the chance element because a "'[s]weepstakes'" is, by definition, "any procedure for the distribution of anything of value by lot or by chance that is not unlawful under other provisions of law...." (Bus. & Prof. Code, § 17539.5, subd. (a)(12).)[21] Our conclusion is further supported by the official rules of defendants' sweepstakes, which disclose odds or chances of winning and reiterate that the manner of playing the game does not alter the outcome of an entry.

(A) We Follow *People ex rel. Lockyer v. Pacific Gaming Technologies*

Moreover, even though all sweepstakes entries were previously arranged in batches (or pools) that had *predetermined* sequences, that fact does not change our opinion of this issue (i.e., the chance element) because the results would still be unpredictable and random from the perspective of the user. Section 330b, subdivision (d), refers to chance "*or* of other outcome of operation *unpredictable by him or her* ...." (Italics added.)[22] The situation here is clearly analogous to what was described in *People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th 699, where "[a] preset computer program determine[d] the results of the sweepstakes." (*Id.* at p. 702.) The machine or device in that case (a "VendaTel" that

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21 The difference between a lawful sweepstakes and an unlawful lottery has nothing to do with the chance element. Rather, the difference is that a sweepstakes does not require that consideration be paid to enter. (See § 319 [elements of lottery include consideration]; *California Gasoline Retailers v. Regal Petroleum Corp.* (1958) 50 Cal.2d 844, 861-862 [promotional sweepstakes was not an unlawful lottery since consideration element was absent where no purchase necessary to enter].)

22 In the words of an out-of-state case addressing this same issue, "'[w]hat the machine "knows" does not affect the player's gamble.'" (*Moore v. Miss. Gaming Com'n* (2011) 64 So.3d 537, 541.)

distributed a telephone card to each customer while entering them in a chance to win a prize) had a "'10 percent payout structure'" where it would "pay[] out $500 in prizes for every $5,000 paid into the machine" with "'predetermined winners' spread out over a period of time." (*Id.* at p. 702, fn. 4.) Under those facts, the Court of Appeal held that the users of the device became entitled to receive cash prizes "*purely by chance* (without any skill whatsoever)." (*Id.* at p. 703, italics added.)[23] The same is true here. Even if the sequence of entries has been electronically frontloaded into defendants' integrated system, patrons win cash prizes based upon "hazard or chance or of other outcome of operation unpredictable by [the patron]" in violation of section 330b, subdivision (d). Therefore, the chance element is satisfied.[24]

Finally, whether viewed as a third element or an aspect of the second, the statute requires that "*by reason of*" the chance element, a prize or thing of value may be won. (§ 330b, subd. (d), italics added.) Here, it is clear that defendants' customers may become entitled to receive a thing of value (i.e., cash prizes in varying amounts) by reason of the "chance" or "unpredictable" operation of defendants' software systems that run the computer sweepstakes games. (*Ibid.*)

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[23] As the Court of Appeal queried later in that same case, "if it isn't chance, what is it that determines whether the customer wins $100 for his $1?" (*People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th at p. 707.)

[24] If this were not the case, then even a casino-style slot machine would be legal as long as it was operated by a computer system that had previously arranged the sequence of entry results in a fixed order. Such a computer system might conceivably frontload hundreds of millions of discrete entry results into a predetermined sequence. A customer using that device would be surprised to learn that merely because there is a preset sequence, he is not playing a game of chance. Of course, in reality, that is exactly what he is doing. As aptly remarked in *People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th at page 701, "if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck." (Fn. omitted.)

(B) We Distinguish *Trinkle II*

In *Trinkle II*, the Court of Appeal reached the unsurprising conclusion that a vending machine that simply dispenses California State Lottery tickets in the sequential order that they were loaded into the machine is not an unlawful slot machine. However, certain statements made by the Court of Appeal in reaching that conclusion are specifically relied on by defendants herein. In explaining why the element of chance was not present, *Trinkle II* observed: "If a player purchases his ticket from a [Scratcher's vending machine, or SVM], the player obtains the ticket by inserting money into the machine and pushing a button, which releases the next ticket in sequence, according to the order in which it was printed and loaded into the SVM bin. Nothing about the machine or its operation by the customer alters the order in which the tickets were arranged at the time they were printed." (*Trinkle II*, *supra*, 105 Cal.App.4th at p. 1411.) The court further observed that "SVM's do not have computer programs that generate random numbers or symbols, nor do they have any capability of conducting a process of random selection or other kind of chance selection." (*Id.* at pp. 1411-1412.) Since the only element of chance was due to "the printing of the winning tickets and the placement of those tickets in a predetermined sequence" at the time the tickets were manufactured, the SVM itself had no role in outcomes because no further element of chance was involved in connection with the operation or play of the machine. (*Id.* at p. 1412.) In other words, *Trinkle II* explained that unless the element of chance is generated by the machines themselves at the time the customer plays or operates it (like the spinning wheels of the original mechanical slot machines or a computer program that shuffles the entries), it is only a vending machine.

Defendants insist that their sweepstakes systems are on par with the vending machine in *Trinkle II*, since customers playing defendants' computer sweepstakes games merely receive the next available entry result from a stack that is in a previously arranged, sequential order. We disagree.

For at least two reasons, we hold that *Trinkle II* does not salvage the devices at issue in the present appeal. First, we disagree that the chance element must *always* be generated by some randomizing action of the device itself when it is being played. Section 330b only requires that prizes may be won "by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her ...." (§ 330b, subd. (d).) Under this broad wording, if the entries are arranged in a particular order beforehand, rather than rearranged each time the game is played, it will still suffice. Either way, the next sequential entry/result that is dealt out by the software system will be, from the perspective of the player, by "chance or of other outcome of operation unpredictable by him or her ...."[25] (*Ibid.*)

Second, *Trinkle II* is distinguishable factually because, in the words of a recent federal district court decision, it involved a passive vending machine that "simply delivered a finished product—the lottery ticket." (*Lucky Bob's Internet Café, LLC v. California Dept. of Justice, et al.* (S.D.Cal. 2013) 2013 U.S. Dist. Lexis 62470, p. *8 (*Lucky Bob's*).) Here, in contrast, all the trappings and experiences involved in playing traditional slot machines are actualized in one form or another by defendants' sweepstakes software systems and networked computer terminals, since in each case points are received upon making a purchase, a game program is activated by the customer at a terminal, points are used or bet in selected increments, audio-visual scenes are played out on the screen to create the feel and anticipation of a slot machine or other gambling game, and prizes are won. For these reasons, the integrated systems in our case are in a different category than the vending machine in *Trinkle II*. The mere fact that winnings

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25 To use an analogy, whether a deck of cards was shuffled the day before, or at the moment the player sits down at the table and places a bet, it is still a matter of chance whether the ace of spades is the next card dealt.

are based on a predetermined sequence of results programmed into the software system, rather than on a randomly spinning wheel (or the like), does not change the nature and character of devices herein, which as integrated systems function as slot machines.[26]

As should be apparent from the above analysis, we are treating each defendant's complex of networked terminals, software gaming programs and computer servers as a single, integrated system. Under section 330b, subdivision (d), an unlawful "'slot machine or device'" is not limited to an isolated or stand-alone piece of physical hardware, but broadly includes "a machine, *apparatus*, or device that is *adapted*" for use as a slot machine or device. (*Ibid.*, italics added.) As defined in dictionaries, the ordinary meaning for the term "apparatus" includes "a group or combination of instruments, machinery, tools, or materials having a particular function" (Random House Webster's College Dict. (1992) p. 66), as well as "[t]he totality of means by which a designated function is performed or a specific task executed" (Webster's II New College Dict. (2001) p. 54). Here, each defendant's system of gaming software, servers and computer terminals plainly operated together as a single apparatus. (§ 330b, subd. (d).) While it is true that the end terminals or computer monitors used by patrons—if considered in isolation—may not intrinsically or standing alone contain all the elements of a slot machine, in each case they are part of an integrated system or apparatus wherein

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26 In *Lucky Bob's*, the district court correctly focused on all of the components of an integrated system functioning together in that case: "Plaintiff's operating system can be distinguished from the vending machine in *Trinkle* by the integrative nature of its components. Here, the sweepstakes winnings necessarily involved the 'value added' of each component of Plaintiff's integrative system—from the computers that read the magnetic strip card; the database server controlling the games; and the point of sale computer that allowed the employee to create the accounts, add internet time and sweepstakes entries and play out redeemed entries." (*Lucky Bob's*, *supra*, 2013 U.S. Dist. Lexis 62470 at pp. *8-9.)

the various parts or components work together so as to operate in a manner that *does* constitute an unlawful slot machine or device.

(C) Other Issues

We briefly address two remaining issues. Defendants suggest that the devices in question cannot qualify as slot machines or devices under section 330b due to a lack of an adequate showing of consideration. We find the argument unpersuasive. Unlike section 319 (regarding lotteries), section 330b does not directly specify that consideration is an element. Therefore, it would seem that as long as the express statutory elements of section 330b are satisfied, no separate showing of consideration is needed. In other words, to the extent that consideration is a factor under section 330b, it is simply subsumed by the existing statutory elements. Since those elements were shown here, nothing more was required. (*Trinkle v. Stroh*, *supra*, 60 Cal.App.4th at pp. 780-781.) Other cases have essentially followed this approach by concluding that even if consideration is necessary in slot machine cases, its existence will be found where a connection exists between purchasing a product from a vending machine or device and being given chances to win a prize. (*Id.* at pp. 781-782; *People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th at pp. 705-706.) "'Once the element[s] of chance [and prize]'" are added to a vending machine or device, it is reasonable to assume that "'people are no longer paying just for the product regardless of the value given that product by the vender.'" (*Trinkle v. Stroh*, *supra*, at p. 782; accord, *People ex rel. Lockyer v. Pacific Gaming Technologies*, *supra*, at pp. 704-707.) That is the case here as well, since points are given to play the computer sweepstakes games on defendants' terminals based on dollars spent in purchasing products—that is, the elements of chance and prize are added to the purchase. Additionally, to the extent that defendants are raising the issue of consideration by analogy to the cases addressing lotteries (e.g., *California Gasoline Retailers v. Regal Petroleum Corp.*, *supra*, 50 Cal.2d at pp. 851-862 [consideration element of § 319 lacking where no purchase necessary to enter]), that

argument likewise fails because "lottery cases (which are governed by § 319) are not controlling on the issue of illegal slot machines," since they are separate things under the law. (*Trinkle v. Stroh*, *supra*, at p. 781.)[27]

Finally, defendants argue their integrated systems cannot be slot machines on the ground that they are not house-banked games in which the owner has an interest or stake in the outcome. (See *Trinkle II*, *supra*, 105 Cal.App.4th at p. 1412 [so indicating].) We disagree with the premise that only a house-banked game may constitute an unlawful slot machine or device. Section 330 forbids persons from playing or conducting any "banking ... game played with cards, dice, or any device." Sections 330a, 330b and 330.1 *separately* prohibit slot machines or devices as defined therein. No mention is made in the latter statutes of any requirement that the slot machine or device be a house-banked game. We are constrained to follow the explicit definition of an unlawful slot machine or device provided in the applicable statutory language, which is broad enough to include defendants' devices whether or not they are house-banked.[28] (See *Hotel Employees & Restaurant Employees Internat. Union v. Davis*, *supra*, 21 Cal.4th at pp. 593-594 [noting broad scope of slot machine statutes].)

We conclude on the record before us that the People are likely to prevail on the merits of its claims that the particular devices at issue were unlawful "slot machine[s] or device[s]" under section 330b. Accordingly, we affirm the trial court's orders granting preliminary injunctions. Because the foregoing analysis provides sufficient grounds to

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27 Additionally, we note that section 330b, subdivision (d), explicitly states that a device meeting the statutory criteria set forth therein constitutes an unlawful slot machine or device "irrespective" of whether a product is also sold by that same machine or device. (See also § 330.1, subd. (f) [same wording].)

28 To put it another way, we decline to insert a new element into section 330b (that the device be house-banked) that the Legislature did not put there.

affirm the trial court's orders, it is unnecessary to address the additional issue raised by the parties of whether or not the sweepstakes programs may also have constituted unlawful lotteries under section 319.

DISPOSITION

The orders of the trial court are affirmed. Costs on appeal are awarded to the People.

Kane, J.

WE CONCUR:

Levy, Acting P.J.

Franson, J.

PROOF OF SERVICE

CASE TITLE: *People v. Grewal, et al.*
COURT: Supreme Court of California
CASE NO.:

I am a citizen of the United States, and I am employed in Placer County, State of California. My business address is 1478 Stone Point Drive, Suite 100, Roseville, CA 95661. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with HUNT JEPPSON & GRIFFIN, LLP'S office practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in the U.S. mailbox after the close of each day's business.

On April 16, 2014, I served the following:

PETITION FOR REVIEW

☐ on the party(ies) in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid and deposited in the designated area for outgoing U.S. Mail addressed as follows:

☐ on the party(ies) in this action by causing a true copy(ies) thereof to be delivered by hand as follows:

☒ on the party(ies) in this action by causing a true copy(ies) thereof to be delivered to Overnight Delivery in a sealed envelope(s) with receipts affixed thereto promising overnight delivery thereof addressed as follows:

☐ on the party(ies) in this action by causing a true copy(ies) thereof to be delivered by causing a true copy(ies) thereof to be sent by facsimile transmission as follows:

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(Served pursuant to Business &Professions Code §§ 17209 and 17536.5)

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on April 16, 2014, at Roseville, California.

Mariana W. Wibbenhorst

MARIANA WIBBENHORST