Case No. S217979

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

KAMAL KENNY NASSER and GHASSAN ELMALIH,

Defendants and Appellants.

Court of Appeal Nos. F066645/F066646

Kern County Superior Court Nos. CV-276603/CV-276962

SUPREME COURT
FILED

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PETITION FOR REVIEW

After Decision by the Court of Appeal
Fifth Appellate District
Filed March 10, 2014

STEVEN GRAFF LEVINE
1112 Montana Avenue #309
Santa Monica, CA 90403
(310) 497-1974
Bar No. 140585

Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITION FOR REVIEW 1

INTRODUCTION 1

A. *Grewal* Created a Published Conflict 3

B. *Grewal* Made Bad Law 4

QUESTIONS PRESENTED 6

NECESSITY FOR REVIEW 7

STATEMENT OF FACTS 8

DISCUSSION OF *GREWAL* 11

A. Sweepstakes or Business Promotions 11

B. *Trinkle v. California State Lottery* (*Trinkle II*) 13

C. Phone-Sweeps' Business Promotion and Operation 16

D. *People v. Nasser* 19

ANALYSIS 23

A. Something of Value Must Be Staked or Hazarded 23

B. The Chance Element Must Be From the Machine Itself 25

C. *Grewal* is Bad for Business in California 26

CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Apple, Inc. v. Superior Court (2013) 56 Cal.4th 128 27

Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450 7

City of Bell Gardens v. County of Los Angeles (1991) 231 Cal.App.3d 1563 18

Cole v. Rush (1945) 45 Cal.2d 345 6

Hotel Employees & Restaurant Employees Internat. Union v. Davis (1999) 21 Cal.4th 585 24

Lucky Bob's Internet Café, LLC v. California Dept. of Justice, et al. (S.D. Cal. 2013) 2013 U.S. Dist. Lexis 62470 .... 23, n. 4

McVeigh v. Burger King Corp. (2010) 2010 Cal.App.Unpub.Lexis 8247 .... 25, n. 5

Morillion v. Royal Packing Co. (2000) 22 Cal.4th 575 6

Newman v. Emerson Radio Corp. (1989) 973 7

People v. Cardas (1933) 137 Cal.App.Supp. 788 12

People v. Carpenter (1956) 141 Cal.App.2d 884 12

People ex rel. Lockyer v. Pacific Gaming Technologies (2000) 82 Cal.App.4th 699 .... 15, 20

People v. Shira (1976) 62 Cal.App.3d 442 .... 12, 16

People v. Sobiek (1973) 30 Cal.App.3d 458 6

Regal Petroleum California Gasoline Retailers v. Regal Petroleum Corp. (1958) 50 Cal.2d 844 .... 4-5, 12, 16, 19, 22, 24

Score Family Fun Center, Inc. v. County of San Diego (1990) 225 Cal.App.3d 1217 20

Tibbets v. Van de Kamp (1990) 222 Cal.App.3d 389 17

Trinkle v. California State Lottery (2003) 105 Cal.App.4th 1401 .... *en passim*

Trinkle v. Stroh (1997) 60 Cal.App.4th 771 .... 15, 20

Western Telcon, Inc. v. the California State Lottery (1996) 13 Cal.4th 475 .... 18, 24

Wilkoff v. Superior Court (1985) 38 Cal.3d 345 .... 4, 6, 25

Statutes

Business and Professions Code section 17200 .... 1, 5, 27

Code of Civil Procedure section 904.1 1

Penal Code section 319 11

Penal Code section 330 .... 17-18, 24

Penal Code section 330a 1, 19, 24

Penal Code section 330b .... *en passim*

Penal Code section 330.1 .... 1, 14, 19

Penal Code section 337z 24

Penal Code Chapter 10 of title 9, part 1 24

Other Authority

California Rules of Court, Rule 8.500 .... 1, 7

California Rules of Court, Rule 8.504 1

California Constitution, article IV, § 19 11

(http://articles.latimes.com/1996-09-06/news/mn-41050_1_state-lottery) 18-19

(http://www.sfgate.com/entertainment/gaming/article/California-style-card-game -Blackjack-1873-2618922.php) 18

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<table>
<tr><td>THE PEOPLE OF THE STATE OF CALIFORNIA,

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</table>

PETITION FOR REVIEW

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

INTRODUCTION

Appellants Kamal Nasser and Ghassan Elmalih petition for review of the decision of the Fifth Appellate District (attached as Exhibit A), pursuant to rules 8.500 and 8.504 of the California Rules of Court. The People brought a civil action under Business and Professions Code section 17200 seeking injunctive relief against appellants' Internet cafes, claiming that appellants' phone cards, which allowed a purchaser (and nonpurchaser) to enter a sweepstakes on computer terminals in the business, rendered the computers illegal slot machines under Penal Code sections 330a, 330b and 330.1. The trial court granted the People's preliminary injunction and an appeal was taken pursuant to Code of Civil Procedure section 904.1, subdivision (a)(6). The Court of Appeal affirmed the trial court's order on the basis that appellants' computers constituted illegal slot machines under

Penal Code section 330b.[1]

A. *Grewal* Created a Published Conflict

In allowing appellants' businesses to be shut down, the Court of Appeal explicitly rejected the Third District's February 4, 2003 holding in *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401 (*Trinkle II*), claiming its test for determining what constitutes an illegal slot machine, i.e., that the machine *itself* must determine the element of chance, was "in error." (224 Cal.App.4th at p. 541.)

In *Trinkle II*, the Third District held that "the elements of a slot machine [in section 330b] 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 be entitled to receive a thing of value." (*Trinkle II*, 105 Cal.App.4th at p. 1410) The court explained, "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 p. 1411.)

In rejecting the *Trinkle II* holding, *Grewal* significantly broadened the criminal reach of section 330b by holding that the element of chance is to be determined from the user's perspective, and it is immaterial that the

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[1] This case is the unpublished companion to the published case of *People v. Grewal* (2014) 224 Cal.App.4th 527; the Court of Appeal stated that the fact the appellants in *Grewal* sold internet time instead of phone cards (as here) had no effect on the court's analysis: "With no material differences, the same rationale and disposition follows in those cases as is stated here." (224 Cal.App.4th at p. 531, n. 1.) The court's legal analysis is identical in both opinions. For the Court's convenience, this petition will cite to the published *Grewal* legal analysis when appropriate. If the case is accepted for review, however, petitioner requests that the Court consider making *Nasser* the lead case because its phone cards are unquestionably valuable, and its business promotion clearly constitutes a legal sweepstakes under California law. (See discussion *infra*, at pages 16-17, 23.)

that the machine itself did not determine the element of chance. Now, an illegal slot machine is found whenever "upon the payment of money (i.e., the purchase of phone cards or 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." (Slip opn. 11; 224 Cal.App.4th at pp. 540-541, emphasis added.)

In creating a published conflict, the Court of Appeal ignored the fact the Legislature had amended Penal Code section 330b *three times* since *Trinkle II* was decided – in September 2003, 2004 and 2010 – and left its decision and analysis intact, signifying the Legislature's approval of the *Trinkle II* analysis. "'Where a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it.' [Citations.] 'There is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts.' [Citation.]" (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353.) In other words, in changing and dramatically expanding the criminal definition of "slot machine" from that set forth in *Trinkle II*, the *Grewal* court not only created a published conflict, it went against the Legislature's intent as well.

B. *Grewal* Made Bad Law

Appellants sell valuable "Tel-Connect" and "Inter-Connect" phone cards, which allow purchasers to pay three cents a minute for domestic calls and five cents a minute for international calls with no hidden charges. Like a wide variety of other lawful businesses, appellant promoted sales by means of a sweepstakes feature that allows customers and noncustomers alike to win cash prizes. Under *Regal Petroleum California Gasoline Retailers v. Regal Petroleum Corp.* (1958) 50 Cal.2d 844, 853-857 (*Regal Petroleum*), so long as there is a legitimate free method of entry into the

sweepstakes or promotion, the promotion is perfectly legal. Appellants' business promotion is no different than McDonald's Monopoly, Burger King's "Be the King" Sweepstakes, the Pepsi Bottle Cap sweepstakes or the My Coke Rewards sweepstakes, or countless others like them.

And unlike the typical slot machine case, where a person hazards a coin or something of value into a machine to win a prize, in a sweepstakes, the person has purchased a legitimate product and voluntarily enters the sweepstakes, or has simply entered the sweepstakes for free; in trying to win the prize, the person hazards nothing of value; the person cannot lose, he or she can only win. *Grewal* failed to consider this critical fact in determining whether appellants' sweepstakes can ever meet the definition of a "slot machine" as nothing of value is risked or hazarded to win the prize. In addition, *Grewal* unceremoniously cast aside the 11-year-old *Trinkle II* test, which required the machine *itself* to contain the element of chance, and now "chance" is viewed from the user's perspective, which unjustly broadens the criminal reach of the statute.

Overnight, appellants' business promotion went from a legal sweepstakes where a standard desktop computer revealed a predetermined prize, to a legal sweepstakes that would be lawful if not delivered on a computer, but is now illegal because it is delivered on a computer, as that computer now constitutes an illegal slot machine under section 330b. In criminalizing sweepstakes in this manner, the Court of Appeal has essentially outlawed all business sweepstakes in California.

After *Grewal*, individuals will be able to bring Business and Professions Code section 17200 unfair business practice suits against any company running a legal sweepstakes promotion where the winning prize is revealed over a smart phone or computer, or by purchase through a vending machine.

QUESTIONS PRESENTED

1. Whether *Grewal's* expansion of the Penal Code section 330b definition of slot machine is sound or warranted as its holding (1) violates the Legislature's intent (*Wilkoff, supra*, 38 Cal.3d at p. 353); (2) constitutes improper judicial legislation ("whatever may be thought of the wisdom, expediency or policy of [a statute, a court has] no power to rewrite the statute to make it conform to a presumed intention not expressed." (*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585); (3) violates *stare decisis* as this Court has said this about a Court of Appeal decision: "Its judgment stands, therefore, as a decision of a court of last resort in this state, until and unless disapproved by this court or until change of the law by legislative action." (*Cole v. Rush* (1945) 45 Cal.2d 345, 351, overruled on other grounds in *Vesely v. Sager* (1971) 5 Cal.3d 153, 167); (4) violates appellant's due process rights, as a potential judicial violation of due process comes into play when a "judicial interpretation of criminal law . . . alters the situation of an accused to his disadvantage by . . . making criminal an action innocent when done." (*People v. Sobiek* (1973) 30 Cal.App.3d 458, 472); and (5) is overbroad, as it criminalizes a host of activities that before were not criminal, including dispensing lottery tickets from a lottery vending machine; offering any promotional sweepstakes from a vending machine where a prize can be won where the user buys the product, such as bottle cap sweepstakes; and offering any sweepstakes that has a feature where, after buying the product, the winning prize is revealed on the patron's home computer or smart phone.

2. Whether the Court of Appeal erred in holding, in the first instance, that a legal sweepstakes promotion offering a prize revealed on a computer can ever constitute a "slot machine," as the patron has not hazarded or risked anything of value for the chance to win the prize?

NECESSITY FOR REVIEW

The effect of the *Grewal* holding is far reaching. By failing to consider the "insertion of money" element in the context of a legal sweepstakes promotion, and by holding that "chance" is now to be viewed from the perspective of the user and not the machine itself, the court expanded section 330b so that it essentially outlaws legal business sweepstakes promotions in California where the result is revealed on a computer or smart phone. Without the Court's review, overburdened civil courts can now expect a rash of unfair business practice suits to be filed against companies conducting sweepstakes promotions in California.

In addition, review is necessary to resolve the published conflict with *Trinkle II.* (Cal. Rules of Court, rule 8.500, subd. (b) [review may be ordered "when necessary to secure uniformity of decision"].) Indeed, resolving a published conflict is the most compelling reason for the Court to grant review, as trial courts are now free to pick either opinion, as the rule of *stare decisis* requiring a court of inferior jurisdiction to follow a Court of Appeal opinion, "has no application where there is more than one appellate court decision, and such appellate opinions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456.) Accordingly, Justice Broussard said this about the Court's function where there is a published conflict: "when Court of Appeal decisions conflict, it is our function to resolve that conflict." (*Newman v. Emerson Radio Corp.* (1989) 973, 1000 (dis. opn. of Broussard, J.).)

STATEMENT OF FACTS[2]

Appellants operate stores that sell "Tel-Connect" and "Inter-Connect" prepaid telephone cards. (Record Transcript ("RT") 13.) Appellants' telephone cards are furnished by Phone-Sweeps, LLC, a company based near Toronto, Canada. (RT 6.) Phone-Sweeps' wholesale telephone service provider is located in Texas. (RT 17.) Appellants and Phone-Sweeps entered into a licensing agreement so that Appellants could sell the prepaid telephone cards in their stores. (RT 42.)

The prepaid telephone cards look like credit cards, and purchasers are registered by name, address and some form of identification. The back of the card contains a PIN number. To place a phone call, customers call a toll-free access number, provide the PIN number, and then dial their desired number. Phone-Sweeps' wholesale telephone service provider keeps track of the minutes used across the entire network. Phone Sweeps' customers use between 900,000 and 1.5 million minutes per week. (RT 16-18.)

Phone-Sweeps' main competitors are Verizon, AT&T, and other large national brands. In order to compete with them, Phone-Sweeps cards offer a lower per minute phone rate (three cents per minute for domestic calls and five cents per minute for international calls) and the card has no hidden charges, such as maintenance and PIN fees or minimum calling times. In addition, the card is re-chargeable, so minutes left are not wasted, and are rolled into the new minutes purchased. All of these features make the card more valuable per minute than its competitors. (RT 11-14.) Phone-Sweeps' revenue is derived solely from its phone card sales. (RT 16.)

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[2] The facts regarding appellants' business practice are not in dispute, and are generally taken from Appellants' Opening Brief ("AOB") to the Court of Appeal. The trial court heard the *Nasser* and *Elmalih* cases together, and the Reporter's Transcript is identical in both cases. The facts appear in the AOB on pages 2 - 9.

Despite these benefits, Phone-Sweeps found that the only way it could compete in this industry was for its licensees to offer a promotional sweepstakes to encourage the sale of its card over that of its competitors. (RT 9-10.) Phone-Sweeps also provides the computer software system that operates its sweepstakes programs, including the computer sweepstakes games. (RT 18-20.) When a customer purchases a telephone card or purchases more time on his existing card, he receives 100 sweepstakes points for each dollar spent on prepaid telephone time. Thus, if a customer purchases $20 in telephone time, he receives 667 minutes of domestic phone time. (*Nasser* Clerk's Transcript ("NCT") 25.)

Noncustomers also receive sweepstakes points because no purchase is necessary to enter the sweepstakes. Persons over the age of 18 who enters appellants' stores can receive 100 free sweepstakes points for that day. (RT 22.) Additionally, noncustomers can also receive free sweepstakes points by mailing in request form. They receive 200 free points with each mail-in request. (RT 22.)

Customers may enter the free sweepstakes by using their sweepstakes points either at the sales clerk's point of sale terminal or at the computer terminals provided at appellants' premises. The customers' available telephone time is not reduced by time spent on the computer terminals revealing the results of the prize tickets, nor is the telephone time reduced by any result or outcome from the entry into the sweepstakes. The only reduction in telephone time is due to its use in making calls. In other words, the sweepstakes feature allows a customer to win; he or she cannot lose. (RT 62, 80-87.) Currently, a customer gains access to the computer sweepstakes function by manually entering his or her PIN number on the terminal keyboard. (RT 21.)

Once the computer sweepstakes function is accessed, the customer is presented with a number of games ranging from popular cell phone gaming themes to traditional slot style gaming themes, which are activated by a touch screen or mouse. (NCT 25-26.) While using the free points to display the outcome of the sweepstakes tickets, all winning results are accumulated in a separate account (called "winning points"), which the system tracks and displays on the screen. (RT 36.) Winning points are redeemable for cash at the register for $1 per 100 points. (NCT 27.) For example, 2,400 winning points would result in a cash prize of $24.00.

If a customer does not wish to play the sweepstakes games, he or she simply purchases his phone card and leaves the store with a valuable phone card. He may also ask the cashier to do a "Quick Redeem" at the register to reveal whether his sweepstakes points have won him a prize. (RT 19, 79.)

Each sweepstakes consists of a finite pool or batch of entries. (RT 26, 48-49.) This is exactly the same as McDonald's Monopoly and any other "finite pool" sweepstakes. Approximately 65 million entries are in each pool, and within those entries, a certain number are predetermined to be winners. (RT 49.)

Phone-Sweeps main server in Canada creates the pools. (RT 46.) The main server randomizes the entries in each pool, puts them into a set, in sequential order, and then delivers the pool in that sequential order to the "Point of Sale" computer (or server) in appellants' stores. (RT 63, 81.) There is nothing appellants or their customers can do to change the sequence or contents of the entries once they leave Phone-Sweeps' main server in Canada. (RT 23, 63, 81.)

When customers enter the computer sweepstakes via Quick Redeem or by utilizing the computerized game display, they are simply receiving and obtaining the results of the next available entry or entries, in sequence. Thus, the outcomes are predetermined solely by the sequential entries, not

by how the customers play the games. The customer cannot impact the result. Additionally, neither appellants' servers (i.e., the point of sale computers) nor the computer terminals where the computer sweepstakes games are played contain a random number generator or any other way to randomize or alter the sequence of the entry results. (RT 20-23, 80-82.) The computer terminals are standard, off the shelf Hewlett-Packard computers that anyone could purchase at a retail store. (RT 19-20.)

As to the prepaid telephone time actually used by customers, appellants' expert testified it was his understanding that the phone cards' usage rates "came within the range of the industry which includes the big guys like AT&T and Verizon," (RT 70) and appellants also provided the trial court with an expert declaration stating that during 2011, California customers used approximately 31 percent of the Tel-Connect and Inter-Connect phone minutes that they purchased. (NCT 194.)

DISCUSSION OF *GREWAL*

Because it is important to put *Grewal* in its proper context, the petition will first discuss legal sweepstakes and business promotions conducted by corporations across California, and then it will discuss the *Trinkle II* case.

A. Sweepstakes or Business Promotions

Lotteries are illegal in California (Pen. Code § 319), with the constitutionally authorized exception for the California State Lottery (article IV, § 19, subd. (a)). Sweepstakes or business promotions, on the other hand, are legal and are regularly utilized by companies to increase sales. The difference between the two is simple: so long as a sweepstakes or business promotion, in addition to purchase of a genuine product, has a legitimate free method of entry, it is legal.

As stated by the Court in *Regal Petroleum*, *supra*, 50 Cal.2d 844, 853-854, "there are three elements necessary to constitute a lottery. These elements are: (1) The disposition of property, (2) upon a contingency determined by chance, (3) *to a person who has paid a valuable consideration for the chance of winning the prize, that is to say, one who has hazarded something of value upon the chance*." (Emphasis in original.) But "in order to constitute consideration within the definition of a lottery, there must be valuable consideration paid, or promised to be paid *by the ticket holder*." (*Id.* at p. 862, emphasis in original.) Thus, so long as there is a legitimate free method of entry into the sweepstakes or promotion, the consideration element is absent. (*Id.* at pp. 854-857.) The fact that the business owner receives a benefit in increased sales and patronage is not consideration and is irrelevant. (*Id.* at pp. 854-857, 861.)

Accordingly, the promotion in *Regal Petroleum* was deemed a legitimate business promotion, as gasoline purchasers and nonpurchasers alike were given a chance to win the prizes. (50 Cal.2d at p. 862.) The giveaways in *People v. Cardas* (1933) 137 Cal.App.Supp. 788 and in *People v. Carpenter* (1956) 141 Cal.App.2d 884, were deemed legitimate business promotions, as sweepstakes tickets were provided to theater attendees and nonattendees alike.

As stated in *People v. Shira* (1976) 62 Cal.App.3d 442, which held defendant's business promotion to be a lottery where everyone paid for a ticket and the ticket only promoted game itself: "An obvious important factual distinction between [*Cardas, Carpenter* and *Regal Petroleum*] which found a lottery did not exist and the case at bench is that they involved promotional schemes by using prize tickets to increase the purchases of legitimate goods and services in the free market place, i.e., theater tickets (*Cardas* and *Carpenter*) and gasoline and service from filling stations (*Regal*). While here, the RINGO game is conducted as a business

and the game itself is the product being merchandized." (*Id.* at p. 458.) And for those legitimate business promotions to be legal, the court further held that any and all persons who want a sweepstakes ticket must be given the ticket free of charge and without any of them paying for the opportunity to win the prize. (*Id.* at p. 459.)

Appellants' Phone-Sweeps' phone cards sweepstakes is a legal business promotion under California law. It promoted the sale of a legitimate phone card that gave true value to the purchaser, and any and all persons who came into the store were entitled to enter the sweepstakes for free and did not have to pay for the opportunity to win a prize.

B. *Trinkle v. California State Lottery* (*Trinkle II*)

Trinkle sought declaratory relief to determine whether the California State Lottery's (CSL's) use of electronic vending machines to dispense SCRATCHERS lottery tickets is an illegal use of slot machines. (*Id.* at p. 1403.) The parties stipulated that the CSL provides SCRATCHERS tickets for its electromagnetic device, which is a stand-alone device containing bins into which 100 - 250 tickets are loaded. A lottery employee loads the tickets into the bin in a sequential order. A purchaser can see which SCRATCHERS game he is playing, but cannot tell whether the visible ticket is a winning ticket. The tickets are dispensed sequentially, according to how they were loaded in the bin. Winning is determined by scratching off the substance covering the symbols underneath. There are a finite number of SCRATCHERS tickets available in one "game" and each ticket has its own unique number. Every SCRATCHERS game has a predetermined number of winning tickets distributed throughout the "deal." Once loaded, each electromagnetic device dispenses a SCRATCHER ticket for cash received. The stand-alone device does not have any ability to generate random numbers or symbols, or conduct any type of process of random selection. Instead, each predetermined winning ticket is dispense in

the order it was loaded into the device. (105 Cal.App.4th at pp. 1403-1405.)

The court held that, "The mere use of electronic vending machines to dispense lottery tickets does not transform the lawful sale of lottery tickets into an unlawful use of slot machines, where as here, the machines inject no additional element of chance into the determination or distribution of the winning lottery ticket." (*Id.* at p. 1405.)

The *Trinkle II* court first looked to the statute itself: "The use or possession of a slot machine is prohibited by Penal Code section 330b which defines a slot machine in pertinent part as any device 'that is adapted . . . for use in such a way that, as a result of the insertion of any piece of money or coin or other object . . . such 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 such operation unpredictable by him*, the user may receive or become entitled to receive any . . . thing of value . . . ." (Pen. Code, § 330b, subd. (2).) Penal Code section 330.1 similarly defines a slot machine." (105 Cal.App.4th at p. 1409, emphasis in original.)

Section 330.1, noted the court, defines slot machine as a device 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 such 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 . . . ." (105 Cal.App.4th at p. 1409, n. 7.)

As the two sections were enacted in the same Legislative session in 1950, and the legislative history indicated they did not conflict, the court treated the definitions as one and the same. (105 Cal.App.4th at p. 1409.) "Thus, the elements of a slot machine 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." (105 Cal.App.4th at p. 1410.)

Relying on *People ex rel. Lockyer v. Pacific Gaming Technologies* (2000) 82 Cal.App.4th 699, 703 and *Trinkle v. Stroh* (1997) 60 Cal.App.4th 771, 779-780, Trinkle argued that the SCRATCHERS machines "are slot machines because they meet all the elements of a slot machine, namely that by the insertion of money and purely by chance, the user may receive or become entitled to receive money." (105 Cal.App.4th at p. 1410.)

The court disagreed. "With respect to the element of chance, Penal Code section 330b states, 'by reason of any element of hazard or chance or of other outcome of *such operation* unpredictable by him . . . .' By 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. [¶] 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." (105 Cal.App.4th at pp. 1410-1411.)

The court distinguished *Pacific Gaming Technologies* and *Trinkle v. Stroh* because in both cases, the Courts of Appeal found that the device in question constituted a slot machine under section 330b because "chance and prize" were added to the machine itself: "Thus, in both *Trinkle* [*v. Stroh*] and *Pacific Gaming Technologies,* the machines in question were found to be slot machines under Penal Code section 330b because the outcome was dependent upon the element of chance that was generated by the machines themselves." (105 Cal.App.4th at p. 1411.)

The SRATCHERS machines were not slot machines because they "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 any other kind of chance selection. [¶] In sum, the [machines] vend

SCRATCHERS tickets in the order the ticket is stacked in the bin. The purchaser inserts the purchase price and receives the next ticket(s) in line. The element of chance in a SCRATCHERS game is essentially twofold, involving the printing of the winning tickets and the placement of those tickets in a predetermined sequence among the other tickets. It is built into the game at the time of manufacture, not at the time of purchase or play. Therefore, the operation of [the machine] does not in any way affect the game's element of chance." (105 Cal.App.4th at pp. 1411-1412.)

C. Phone-Sweeps' Business Promotion and Operation

It is readily apparent that appellants operate their Phone-Sweeps sweepstakes according to the rules set forth in *Regal Petroleum* and *Shira.* First, appellants promote a legitimate business product, a phone card that allows its purchaser to pay three cents a minute for domestic calls and five cents a minute for international calls with no hidden charges; and appellants offer a free sweepstakes tickets to any and all persons who request one, without those persons having to purchase a phone card in order to win a prize. Phone-Sweeps also has a method where a person can mail away for free sweepstakes tickets. Under *Regal Petroleum* and *Shira,* the Phone-Sweeps phone card is a legitimate product and its free sweepstakes entry feature makes its sweepstakes a legal business promotion.

Although the sweepstakes issue had been briefed and was squarely before the *Nasser* court, the court bypassed the sweepstakes issue, signaling its acceptance that appellants' Phone-Sweeps sweepstakes was a legitimate sweepstakes. Instead, *Nasser* focused only on the issue of whether the Phone-Sweeps' sweepstakes, as it offered cash prizes revealed on a computer terminal in appellants' businesses, converted that computer terminal into an illegal slot machine.

But to avoid the problem that its sweepstakes converted a computer into a slot machine, Phone-Sweeps patterned its sweepstakes after the methodology approved in *Trinkle II.* Appellants' computer terminals, like the California State Lottery's electronic vending machines, are not slot machines because they "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 any other kind of chance selection. [¶] In sum, the [computers reveal a prize] in the order the ticket is [preloaded into the computer]. The [customer enters his PIN and plays] and receives the next ticket(s) in line. The element of chance in a [Phone-Sweeps] game is essentially twofold, involving the printing of the winning tickets and the placement of those tickets in a predetermined sequence among the other tickets. It is built into the game at the time of manufacture, not at the time of purchase or play." (*Trinkle II*, 105 Cal.App.4th at pp. 1411-1412.)

Far from trying to exploit a "loophole," Phone-Sweeps instead patterned its business to *legally conform* to statutes and case law that determined that such a method is permitted under California law. This is a time-honored method of doing business in California when allegations of illegal gambling are made.

For example, Stud Horse Poker is prohibited under Penal Code section 330. The card clubs thus offered Texas Hold 'em and the County tried to shut them down. In *Tibbets v. Van de Kamp* (1990) 222 Cal.App.3d 389, 395-396, the Court of Appeal held that as Texas Hold 'em utilized "community cards," that was distinct from stud poker, and thus it was deemed to be a legal game. The court then permanently enjoined the County from interfering with the game.

The card game Pai Gow was an illegal "house-banked" and "percentage" game under Penal Code section 330 until the card clubs made the players the banker and charged a flat fee to play the game. In *City of*

Bell Gardens v. County of Los Angeles (1991) 231 Cal.App.3d 1563, 1568-1569, the Court of Appeal upheld the trial court's ruling that Pai Gow played in this manner was legal and permanently enjoined the County from interfering with the game.

Blackjack is illegal under section 330, but in 1989, Roger Wisted invented "California Blackjack," in which the player is the designated banker, there are six jokers per sleeve, the players race to "22," there is no "busting," and the house charges a flat fee to play. "California Blackjack" is now legally played in all card clubs in California and Roger Wisted took the money he made from licensing agreements and opened a winery in Solvang. (http://www.sfgate.com/entertainment/gaming/article/California-style-card-game -Blackjack-1873-2618922.php).

In *Western Telcon, Inc. v. the California State Lottery* (1996) 13 Cal.4th 475, the issue before the Court was whether the California State Lottery's (CSL's) popular Keno game was a lottery or "house-banked" game, as the CSL is authorized only to run lottery games. Casino operators sought to enjoin the CSL from operating the game. The Attorney General argued on the CSL's behalf, but the Court was not persuaded, and held that as the CSL in the Keno game acted as the bank, it was an illegal house-banked game and not a lottery, and shut it down. (13 Cal.4th at p. 495.) The Court said its June 24, 1996 decision was limited – "We express no opinion as to whether a restructured Keno game could be run as a lottery." (*Id.* at p. 496.)

Just over two months later, on September 6, 1996, the CSL offered a Keno replacement, "Hot Spot." As stated in the Los Angeles Times, "Hoping to recoup some of the revenue lost when the Supreme Court outlawed one of its most lucrative games, the California Lottery is preparing to introduce a new form of keno specifically designed to comply with the state Constitution, state officials said Thursday." (http:

//articles.latimes.com/1996-09-06/news/mn-41050_1_state-lottery). "Hot Spot" is still legally played today on computer terminals located in stores throughout the state.

Accordingly, appellants' simply asked the Court of Appeal to acknowledge that it ran a legitimate sweepstakes in accordance with *Regal Petroleum* and *Shira*, and that its sweepstakes computer program that awarded prizes followed the methodology approved the *Trinkle II* decision as the computer itself does not randomize. The *Nasser* court responded by ignoring the sweepstakes issue and overruling *Trinkle II.*

D. *People v. Nasser*

It is against this backdrop that the *Grewal/Nasser* decision is properly analyzed. As noted, the two opinions are substantively identical. The court, after reciting the facts listed above, framed the issue of whether the devices in question (appellants' "Sweepstakes Gaming System" operating the computer sweepstakes games on the networked computer terminals) are unlawful slot machines. (Slip opn. 9.) The court discussed the three distinct but overlapping provisions that prohibit slot machines or devices, Penal Code sections 330a, 330b and 330.1, and focused its analysis on "arguably the broadest," section 330b, subdivision (4) which defines a "slot machine or device" as follows: "[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 . . . ." (Slip opn. 9-10.)[3]

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[3] The Legislature amended Penal Code section 330b on September 3, 2003 to allow the sale of slot machines in California by tribal licensed manufacturers. The bill also made "various technical, nonsubstantive

The court then cited *Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th 699, *Trinkle v. Stroh*, *supra*, 60 Cal.App.2d 771 and *Score Family Fun Center, Inc. v. County of San Diego* (1990) 225 Cal.App.3d 1217, for the proposition that California courts have prohibited a variety of devices under section 330b. (Slip opn. 10-11.) But these three cases predated *Trinkle II*, and are distinguishable under *Trinkle II* because in each case, the device itself generated the element of chance. (See *Trinkle II*, 105 Cal.App.4th at p. 1411.)

Undeterred, the court stated: "Based on these authorities, the People argue that an unlawful slot machine or device under section 330b is involved [because] under defendants' Sweepstakes Gaming Systems as operated on their computer networks and terminals, upon the payment of money (i.e., the purchase of telephone cards or 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." (Slip opn. 11.)

The court then recited the *Trinkle II* three-part elements test (see discussion, *supra*, page 3) and said, "We take issue with this formulation because section 330b, subdivision (d) refers to chance or unpredictable outcome, while *Trinkle II* used the conjunctive 'and' in its articulation of the second element." (Slip opn. 11.) The court acknowledged the two concepts were not "entirely separable" but wanted to make clear that the statute can be read to find an illegal slot machine where the "'outcome of

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changes to that provision." (Stats 2003, ch. 264 § 1 (AB 360).) In 2004, section 330b, subdivisions (1) - (6) were redesignated subdivisions (a) - (f). (Stats 2004, ch. 183 § 267 (AB 3082).) In 2010, the Legislature added subdivisions (e)(1) - (4) (Stats 2010, ch. 577 § 2 (AB 1753).) The 2003 nonsubstantive language changes to section 330b, subdivision 4, enacted <u>after</u> *Trinkle II* was decided, are attached as Exhibit B. (See also Slip opn. 13, n. 15.)

operation is unpredictable by [the user].'" (Slip opn. 12, n. 14.)

Most importantly, the court explicitly stated: "Additionally we 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*, 105 Cal.App.4th 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." (Slip opn. 12, emphasis added.)

The court then "reinvented" the elements of a section 330b offense, significantly broadening it, and distilling it into two elements: (1) as a result of the insertion 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 (2) by reason of any element of hazard or chance or of other outcome of operation unpredictable to him or her, the user may receive or become entitled to receive any money or thing of value. (Slip opn. 13.)

As to element (1) the court rejected the notion that "insertion" required a coin or similar object to be inserted into the computer: "Here, the insertion of an account number 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 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." (Slip opn. 13.)

In so holding, the court never addressed the issue whether the user had to stake something of value to win a prize; it simply treated the product purchase as the thing of value; but *Regal Petroleum* teaches that this is the wrong analysis, because the purchase of a legitimate product to get a free sweepstakes ticket, so long as anyone can obtain that same ticket for free, is not considered a thing of value under California law. As will be discussed below, no matter the method of insertion, a "slot machine" requires that the player risk or hazard something of value to win a prize.

As to element (2), the court overruled *Trinkle II.* "Here, it is clear that defendants' customers may become entitled to win prizes under the Sweepstakes Gaming Systems implementing defendants' computer sweepstakes games based on 'hazard or chance or of other outcome of operation unpredictable' to the user." (Slip opn. 13.) And because it changed the *Trinkle II* test to the perspective of the user, the court was unimpressed that the sweepstakes were previously arranged in batches that had predetermined sequences. To the *patron*, the result was still unpredictable. (Slip opn. 15.)

While *"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 randomizes the entries), it is only a vending machine" (Slip opn. 16-17), "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 [chance] from the perspective of the player." (Slip opn. 17, emphasis in original.)

In dicta, the court also stated that *Trinkle II* is distinguishable because (1) the lottery machine in Trinkle dispensed a ticket, while here, all the trappings of playing a traditional slot machine were present; and (2) appellants' complex of networked terminals programs and computer

terminal was a single integrated system; thus, while the computer terminal standing alone may not be a slot machine, at it was working within a single system, it was a slot machine. (Slip opn. 18-19.)

ANALYSIS

Appellants ran a legal business promotion under California law. Their phone cards were unquestionably valuable as in 2011 they were used at a 31 percent rate,[4] which appellants' expert stated was consistent with industry usage standards. The court acknowledged as much when it stated that appellant's described their "promotional giveaways as sweepstakes" under California law, and did not challenge that assertion. (Slip opn. 14.)

A. Something of Value Must Be Staked or Hazarded

Absent from the court's analysis is whether, where a valid sweepstakes for prizes determined is offered by a company and the results can be determined by a computer, it now becomes an illegal sweepstakes as it converts that computer into a slot machine.

Section 330b, subdivision (d) 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 . . . ." (Italics added.) By referring to the insertion of "money or coin or other object," the section makes clear that something valuable must be staked or hazarded in exchange for the chance to operate the slot machine or device. The operative language in section 330b is not insertion but "money" or "like object." Indeed, in a traditional

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[4] In *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, the unpublished case cited by the Court of Appeal (Slip op. 17), the District Court noted that only three percent of the Internet time purchased at the café was used by the customer. (*Id.* p. *3.)

slot machine, a person risks a coin for the chance to win coins.

That concept is further 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 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, representative or articles of value, checks, or tokens, redeemable in or exchangeable for money or any other thing of value, is *won or lost* . . . ." (Emphasis added.)

Requiring stakes to be hazarded in exchange for the chance to play is also consistent with existing case law. Chapter 10 of title 9, part 1 of the Penal Code, which includes sections 330 through 337z, addresses *gaming*. The Court has defined gaming as "the playing of any game for stakes *hazarded* by the players." (*Western Telcon, supra,* 13 Cal.4th at p. 484, italics added; see also *Trinkle II*, 105 Cal.App.4th at p. 1407.) Moreover, in gaming, the operator has an interest in the outcome because the operator must pay off all winners, while retaining the stakes hazarded by the losers. (*Western Telcon*, *supra*, 13 Cal.4th at pp. 483, 487-488.) This prompted *Trinkle II* to proclaim: "An illegal slot machine is therefore a house-banked game in which the machine dispenses coins, currency, or another thing of value to the winning player, giving the operator an interest in the outcome. (See *Hotel Employees & Restaurant Employees Internat. Union v. Davis* [1999] 21 Cal.4th 585, 604, 608-612.)" (105 Cal.App.4th at p. 1412.)

None of these characteristics are present in a sweepstakes. By buying a legitimate product, and by offering free sweepstakes tickets to anyone who wants to play, this Court in *Regal Petroleum* held that the sweepstakes players are not staking or offering any of their own money for

the chance to win a prize. Indeed, the sweepstakes players playing on the computer terminals in appellants' stores can only win money, they cannot lose money because they have not staked or hazarded any. As this element is absent where the prize is offered in the context of a legitimate business promotion, there can be no illegal slot machine. [5]

B. The Chance Element Must Be From the Machine Itself

Trinkle II carefully analyzed the slot machine statutes and the cases that preceded its decision, and correctly concluded that the statutory language of section 330b, "by reason of any element of hazard or chance or of other outcome of *such action* unpredictable by him," "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." (105 Cal.App.4th at p. 1411, emphasis in original.) The Legislature adopted this interpretation. (*Wilkoff v. Superior Court*, *supra*, 38 Cal.3d at p. 353.)

Yet, *Grewal* has now adopted the very test urged by appellant Trinkle and rejected in *Trinkle II*: "Trinkle contends [lottery machines] are slot machines because they meet all the elements of a slot machine, namely that by the insertion of money and purely by chance, the user may receive or become entitled to receive money." (105 Cal.App.4th at p. 1410.) "Trinkle's analysis [must be rejected because it] ignores the statutory language." (*Ibid.*)

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[5] The only other Court of Appeal case to consider the slot machine issue in the context of a legal business promotion is *McVeigh v. Burger King Corp.* (2010) 2010 Cal.App.Unpub.Lexis 8247. Justice Flier, writing for Division Eight of the Second District, found that Burger King's sweepstakes promotion was not an illegal "slot machine" as the participants did not stake or hazard anything of value for the chance to win a prize. The case is mentioned not as controlling authority but because it is the only known California case to discuss this precise issue.

In interpreting the element of chance from the perspective of the user, the *Grewal* court stretched the definition of slot machine past its snapping point because every game that involves chance is unpredictable to the user. For example, if I buy a lottery ticket, when I scratch off the substance to reveal the secret numbers underneath, the result is unpredictable to me. When I go on my computer to reveal whether I won a sweepstakes prize from Coke, the result is unpredictable to me. When I pull off the tab of my McDonald's Monopoly piece to see if I have won a prize, the result is unpredictable to me.[6]

C. *Grewal* is Bad for Business in California

The interpretation urged by the *Nasser/Grewal* court is bad for business in California. Here is the slot machine test espoused by the court: Now, an illegal slot machine is found whenever "upon the payment of money (i.e., the purchase of telephone cards or 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." (Slip opn. 11; 224 Cal.App.4th at pp. 540-541, emphasis added.)

By a simple substitution of terms, it is readily apparent that formerly legitimate business promotions are now illegal in California. McDonald's – upon the payment of money (for food), a patron goes on his computer, and based on a chance or other outcome of operation unpredictable to the patron, wins cash prizes. General Mills – upon the payment of money (for

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[6] Appellant Grewal's Reply Brief to the Court of Appeal listed ten national companies whose sweepstakes results were revealed via computer terminal: SanDisk, General Mills, McDonald's, Carl's Jr., Pepsi, Irish Spring, Green Mountain Coffee, Walmart, Coca-Cola and Fed Ex. (Grewal Reply Brief, p. 11, n. 10.) There are dozens more, as sweepstakes promotions are a common way for companies to stimulate business.

Chex Mix), a patron goes on her computer, and based on a chance or other outcome of operation unpredictable to the patron, wins cash prizes.

Indeed, lottery vending machines will now again be illegal in California – upon the payment of money (for the ticket), the machine dispenses the ticket, and based on chance or other outcome of operation unpredictable to the patron, the patron reveals the secret contents and wins cash prizes. The "Hot Spot" game is clearly illegal as the results are revealed on a computer terminal, the patron wins cash prizes, and the result is unpredictable to the *patron*. Those computer terminals, which are operated by the California State Lottery, are now illegal slot machines under *Grewal*.

CONCLUSION

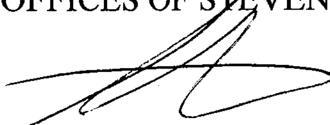
There is a reason the Legislature left the *Trinkle II* decision intact – it set reasonable limits on the reach of the section 330b slot machine statute. By overruling *Trinkle II*, the Court of Appeal in *Grewal* usurped this Court's and the Legislature's function; it created a published conflict and the uncertainty that accompanies it; and it rendered a decision that is bad for business in California.

As Justice Liu recently said in *Apple, Inc. v. Superior Court* (2013) 56 Cal.4th 128, 150, where technology is not consistent with the statutory scheme, a court "cannot make a square peg fit a round hole." But that is precisely what the *Grewal* court did in this case. If the *Grewal* definition of "slot machine" is left to stand, it will outlaw legitimate business promotions in California, and it will not be long before a legion of private attorneys general sue each and every business establishment conducting a sweepstakes for damages under Business and Professions Code section 17200.

Review is desperately needed to resolve this published conflict and to rein in a decision that is overbroad and criminalizes business promotions and Lottery games that had been legal under long-standing and established California law.

Respectfully Submitted,

LAW OFFICES OF STEVEN GRAFF LEVINE



By: ______________________________
Steven Graff Levine
Attorney for Appellants

WORD COUNT CERTIFICATE

Counsel of record hereby certifies, pursuant to rule 8.504, subdivision (d)(1) and rule 8.204 of the California Rules of Court, that the enclosed brief has been produced using 13-point Times Roman type including footnotes, the margins are 1 ½ inches on the left and right and 1 inch on the top and bottom, and the brief contains 28 pages and 7,800 words, a total below the 8,400 allotted amount of words for computer generated briefs under the rule. Counsel relies on the word count feature of the computer program used to prepare this brief.

Dated: April 18, 2014

STEVEN GRAFF LEVINE

PROOF OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE
(Pursuant to C.C.P. sections 1013, 1010.6 and Court Rules 8.212 and 8.500)

I, the undersigned, declare under the penalty of perjury under the laws of the State of California:

I am a resident of the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action; my business address is 1112 Montana Avenue, #309, Santa Monica, CA 90403. On April 18, 2014, I served copies of the foregoing document entitled **PETITION FOR REVIEW** on the interested parties in this action by delivering a true copy thereof, by U.S. Mail, addressed as follows:

Judge William D. Palmer
Kern County Superior Court
Metropolitan Division
1415 Truxtun Avenue
Bakersfield, CA 93301

Fifth District Court of Appeal
2424 Ventura Street
Fresno, CA 93721

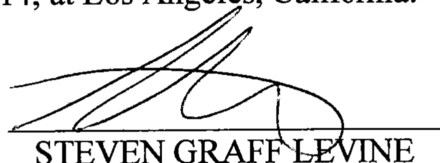
Deputy District Attorney Gregory Pulskamp
1215 Truxtun Avenue
Bakersfield, CA 93301
(With a courtesy copy sent to gpulskamp@co.kern.ca.us

John Weston
Attorney for Appellants Grewal and Walker
12121 Wilshire Blvd., Suite 525
Los Angeles, CA 90025
(With a courtesy copy sent to johnhweston@wgdlaw.com)

William H. Slocumb
Attorney for Appellant Stidman
1929 Truxtun Avenue Suite C
Bakersfield, CA 93301
(With a courtesy copy sent to bill@billslocumblaw.com)

AND BY Electronic Service and Fed Ex to the California Supreme Court.

Executed this 18th day of April 2014, at Los Angeles, California.



STEVEN GRAFF LEVINE

Filed 3/10/14 P. v. Nasser CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

KAMAL KENNY NASSER et al.,

Defendants and Appellants.

F066645/F066646

(Super. Ct. Nos. CV-276603 & CV-276962)

OPINION

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

Dowling Aaron, Daniel K. Klingenberger, Lynne Thaxter Brown and Stephanie Hamilton Borchers for Defendants and Appellants.

Lisa S. Green, District Attorney, and Gregory A. Pulskamp, Deputy District Attorney, for Plaintiff and Respondent.

-ooOoo-

Kamal Kenny Nasser and Ghassan Elmalih (together defendants) each own and operate Internet café[1] businesses that feature a sweepstakes whereby customers may ascertain their winnings, if any, by playing computer game programs on terminals provided at defendants' business premises. Although the games played on defendants' terminals simulate the look and feel of slot machines or other games of chance, defendants maintain that the programs are merely an entertaining way for customers to reveal sweepstakes results. Further, according to defendants, the sweepstakes are a legitimate means to promote the sale of certain products—namely, telephone cards. 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 injunctive relief on the ground that defendants' sweepstakes practices violated the gambling prohibitions set forth at Penal Code sections 319 (unlawful lottery) and 330a, 330b and 330.1 (unlawful slot machines or gambling devices).[2] After the complaints were filed, the trial court heard and granted the People's motions for preliminary injunctions. Defendants appeal from the orders granting such provisional relief.[3] Because we conclude the People will likely prevail on the claims that defendants

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[1] 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 such as the ones offered here. (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.)

[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

[3] We ordered defendants' appeals consolidated. Three other related cases (i.e., *People v. Grewal*, case No. F065450, *People v. Walker*, case No. F065451, and *People v. Stidman*, case No. F065689) are addressed by us in a separate, published opinion.

violated the prohibitions against slot machines or gambling devices under section 330b, we affirm the trial court's orders.

FACTS AND PROCEDURAL BACKGROUND

Defendants operate stores that sell, among other things, "Tel-Connect" and "Inter-Connect" prepaid telephone cards. Nasser's stores do business as "Fun Zone Internet Café[s]," while Elmalih's store does business as "Happy Land." Defendants promote the sale of telephone cards at their stores by offering sweepstakes to their customers. The Tel-Connect and Inter-Connect telephone cards are furnished by Phone-Sweeps, LLC (Phone-Sweeps), a company based near Toronto, Canada. Phone-Sweeps is also the provider of the computer software system that operates defendants' sweepstakes programs, including the computer sweepstakes games (hereafter, the Sweepstakes Gaming System). The Sweepstakes Gaming System is provided to defendants through licensing agreements between defendants and Phone-Sweeps.[4]

When a customer purchases a telephone card or purchases more time on his existing card, he receives 100 sweepstakes points for each dollar spent on prepaid telephone time. Thus, if a customer purchases $20 in telephone time, he would receive 2,000 sweepstakes points with his purchase.[5] Customers may use their points by playing sweepstakes computer games on the terminals provided at defendants' premises. The customers' available telephone time is not reduced by time spent on the terminals playing the computer sweepstakes games. Initially, the way a customer gains access to the

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4 Phone-Sweeps found that the only way it could compete in the telephone card industry was through having its licensee's offer a continuous sweepstakes.

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.

5 Noncustomers can receive sweepstakes points as well; that is, no purchase is necessary to enter. Persons over the age of 18 who enter defendants' stores can receive 100 free sweepstakes entries or points for that day. Additionally, free points can be received by mailing in a request form.

computer sweepstakes games was to swipe his or her telephone card into an electronic card reader at the computer terminal. More recently, the process followed is that a customer manually enters his or her account number shown on the back of the telephone card at the terminal keyboard.

Once the computer sweepstakes games are displayed, the customer is presented with a number of slot machine style games activated by a touch screen. The customer selects, based on available increments (such as 25, 50 or 100), how many points to use at one time. The customer either loses the points played, or is awarded additional points (called "winning points"), which the system tracks and displays on the screen. If the customer ends up with a positive number of winning points, they are redeemable at $1 per 100 points at the register. For example, 2,400 winning points would result in a cash prize of $24. According to an odds table, within each pool of entries there are entry results that range from $0.01 to $4,200 (based on redeemable points won).[6]

The Sweepstakes Gaming System used to operate defendants' sweepstakes program and computer sweepstakes games is an integrated system that forms a network of computers and servers. The main Phone-Sweeps server is located in Canada and is electronically connected to the servers in defendants' places of business. The server used in each place of business is, in turn, electronically connected to each of the numerous computer terminals that the customers use at that place of business to play the computer sweepstakes games.

Each sweepstakes consists of a finite pool or batch of entries. Depending on the size of the retail store, the number of entries in a sweepstakes pool may be as high as 65 million. The pools are created by Phone-Sweeps main server in Canada. The main server randomizes the entries in each pool, puts them into a set sequential order, and then

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6 If a customer does not wish to play the sweepstakes games, he or she may ask the cashier to do a "Quick Redeem" at the register to reveal a result at the time.

delivers the pool in that sequential order to the "Point of Sale" computer (or server) in defendants' stores. There is nothing defendants or their customers can do to change the sequence or contents (i.e., results) of the entries. Phone-Sweeps main server can detect when the pool in any particular store is nearing the end, and it then creates a new pool, in the same manner, and delivers it to the Point of Sale computer (or server).

When customers play the computer sweepstakes games, they are simply receiving and obtaining the results of the next available entry or entries, in sequence. Thus, the outcomes are predetermined solely by the sequential entries, not by how the customers play the games. The customer cannot impact the result that is determined by the next available entry. Additionally, neither defendants' servers (i.e., the Point of Sale computers) nor the terminals where the computer sweepstakes games are played contain a random number generator or any other way to randomize or alter the sequence of the entry results.

As to the telephone cards (or prepaid telephone time) purchased by customers, defendants provided the trial court with a declaration to the effect that over a one-year period, 31 to 32 percent of the total telephone time sold by Phone-Sweeps through its licensees (such as defendants) was actually used.

The cases against defendants were commenced in May and June 2012 by the Kern County District Attorney's Office on behalf of the People, filed as separate civil actions. 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. 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). A hearing was held in the trial court on the question of whether the court should issue preliminary injunctions as requested by the People, with both cases heard together. The evidence consisted of the parties' moving and opposing declarations along with oral testimony

presented at the hearing. The oral testimony was that of defendants' experts, including Julius Kiss, owner of Phone-Sweeps, and Nicola Farley, an expert in the gaming industry who personally examined defendants' Sweepstakes Gaming System as it operated in conjunction with Phone-Sweeps's main server. Following the hearing, the trial court granted the People's motions for preliminary injunctions. Defendants' appeals followed, which we ordered 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 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.)[7] 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 on 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 that a

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[7] 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].)

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.

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).[8] However, that rule of statutory 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].)[9] 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.)

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8 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.)

9 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."

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.[10]

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' Sweepstakes Gaming System operating the computer sweepstakes games on the networked terminals provided to customers) are 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.[11] The definitional language in each section is similar, but not identical. (Cf. §§ 330a, subd. (a), 330b, subd. (d) & 330.1, subd. (f).)[12] 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

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10 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].)

11 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].)

12 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 [treating §§ 330b & 330.1 as identical]).

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).)[13] The People center its discussion on section 330b; we will do the same.

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

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13 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 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 …."

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 is 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 Gaming Systems as operated on their computer networks and terminals, upon the payment of money (i.e., the purchase of telephone cards or 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.[14] Additionally, we 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.

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

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14 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 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).)

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 an account number 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 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.)[15] 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 Sweepstakes Gaming 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

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15 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.)

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 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).)[16] Our conclusion is further supported by the official rules and printed materials regarding defendants' sweepstakes, which refer to 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*

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[16] The difference between a lawful sweepstakes and an unlawful lottery 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].)

or her . . . ." (Italics added.)[17] 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 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.)[18] The same is true here. On the record before the trial court, the Sweepstakes Gaming Systems and networked terminals were integrated systems or devices through which 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).[19]

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[17] 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.)

[18] As the Court of Appeal remarked 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.)

[19] If that were not the case, then even a casino-style slot machine would be legal as long as it was operated by a software system that had previously programmed the sequence of entry results in a fixed order. A customer inserting money and pulling the handle would receive the outcome assigned to the next available entry result in sequence. Such a computer program might conceivably include millions of discrete entry results in 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.)

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' Sweepstakes Gaming Systems. (*Ibid.*)

(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 randomizes the entries), it is only a vending machine.

Defendants insist that their systems are on par with the vending machines 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 ...."[20] (*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 Gaming Systems and networked computer terminals, since in each case

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20 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.

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 or devices in our case are in a different category than the vending machines in *Trinkle II.* The mere fact that winnings are based on a predetermined sequence of entry results that were delivered into defendants' Sweepstakes Gaming System by an outside server, 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.[21]

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. (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

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21 In *Lucky Bob's*, the district court correctly focused on all 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.)

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.

(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.)[22]

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.[23] (*Hotel Employees & Restaurant Employees Internat. Union v. Davis*, *supra*, 21 Cal.4th at pp. 593-594 [noting broad scope of slot machine statutes].)

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[22] 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].)

[23] 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.

We conclude on the record before us that the People are likely to prevail on the merits of their claims that the particular devices at issue are 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 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.

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Kane, J.

WE CONCUR:

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Levy, Acting P.J.

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Franson, J.

CALIFORNIA LEGISLATURE—2003–04 REGULAR SESSION

ASSEMBLY BILL No. 360

Introduced by Assembly Member Jerome Horton

February 14, 2003

An act to amend Section 330b of the Penal Code, relating to gaming.

LEGISLATIVE COUNSEL'S DIGEST

AB 360, as introduced, Jerome Horton. Slot machines or devices.

Existing law prohibits possession and sale of slot machines or devices, except in limited instances.

This bill would create an exception to this prohibition for manufacturers that are licensed pursuant to tribal-state gaming compacts and that satisfy specified conditions. The bill would also make various technical, nonsubstantive changes to that provision.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 330b of the Penal Code is amended to
2 read:
3 330b. Possession or keeping of slot machines or devices.
4 (1) It is unlawful for any person to manufacture, repair, own,
5 store, possess, sell, rent, lease, let on shares, lend or give away,
6 transport, or expose for sale or lease, or to offer to repair, sell, rent,
7 lease, let on shares, lend or give away, or ~~to~~ permit the operation,
8 *placement, maintenance, or keeping* of, ~~or for any person to permit~~
9 ~~to be placed, maintained or kept~~ in any place, room, space, or
10 building owned, leased, or occupied ~~by him or under his~~

1 ~~management or control~~, *managed, or controlled by that person,*
2 any slot machine or device, as~~ hereinafter~~ defined~~, or~~ *in this*
3 *section.*
4 *(2) It is unlawful for any person* to make or to permit~~ to be made~~
5 ~~with any person any~~ *the making of an* agreement with~~ reference to~~
6 *another person regarding* any slot machine or device~~, as~~
7 ~~hereinafter defined, pursuant to~~ *by* which the user~~ thereof~~ *of the*
8 *slot machine or device*, as a result of~~ any~~ *the* element of hazard or
9 chance or other *unpredictable* outcome ~~unpredictable by him~~, may
10 become entitled to receive~~ any~~ money, credit, allowance, or *other*
11 thing of value or additional chance or right to use ~~such~~ *the* slot
12 machine or device, or to receive any check, slug, token, or
13 memorandum entitling the holder to receive~~ any~~ money, credit,
14 allowance, or *other* thing of value~~; provided, however, that this~~
15 ~~section, insofar as it relates to owning, storing, possessing, or~~
16 ~~transporting any slot machine or device as hereinafter defined,~~
17 ~~shall not apply to~~.
18 *(3) The limitations of paragraphs (1) and (2) do not apply in the*
19 *following instances:*
20 *(A) To* any slot machine or device~~ as hereinafter defined,~~
21 located upon or being transported by any vessel regularly operated
22 and engaged in interstate or foreign commerce, so long as ~~such~~ *the*
23 slot machine or device is located in a locked compartment of the
24 vessel, is not accessible for use, and is not used or operated within
25 the territorial jurisdiction of this State.
26 ~~(2) Any machine, apparatus~~, or device is a slot machine or
27 device within the provisions
28 *(B) To a manufacturer licensed pursuant to the tribal-state*
29 *gaming compacts entered into in accordance with the Indian*
30 *Gaming Regulatory Act (18 U.S.C. Sec. 1166 to 1168, inclusive,*
31 *and 25 U.S.C. Sec. 2701 et seq.) by a tribal gaming agency if the*
32 *manufacturer's application for a determination of suitability has*
33 *been properly submitted to the State Division of Gambling*
34 *Control, and has not been found to be unsuitable by the Division*
35 *of Gambling Control.*
36 *(4) For purposes* of this section ~~if it is one~~, *"slot machine or*
37 *device" means a machine, apparatus, or device* that is adapted, or
38 may readily be converted ~~into one that is adapted~~, for use in ~~such~~
39 a way that, as a result of the insertion of any piece of money or coin
40 or other object, or by any other means, ~~such~~ *the* machine or device

1 is caused to operate or may be operated, and by reason of any
2 element of hazard or chance or of other outcome of ~~such~~ operation
3 unpredictable by him *or her*, the user may receive or become
4 entitled to receive any piece of money, credit, allowance or thing
5 of value or additional chance or right to use ~~such~~ *the* slot machine
6 or device, or any check, slug, token or memorandum, whether of
7 value or otherwise, which may be exchanged for any money,
8 credit, allowance or thing of value, or which may be given in trade,
9 irrespective of whether it may, apart from any element of hazard
10 or chance or unpredictable outcome of ~~such~~ operation, also sell,
11 deliver or present some merchandise, indication of weight,
12 entertainment or other thing of value.
13 ~~(3)~~
14 *(5)* Every person who violates this section is guilty of a
15 misdemeanor.
16 ~~(4) It is expressly provided that with respect to the provisions~~
17 ~~of Section 330b only of this code, pin~~
18 *(6) Pin* ball~~,~~ and other amusement machines or devices, which
19 are predominantly games of skill, whether affording the
20 opportunity of additional chances or free plays or not, are not
21 ~~intended to be and are not~~ included within the term slot machine
22 or device, as defined in ~~said Section 330b of~~ this ~~code~~ *section*.

O