Case No. S217979

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Court of Appeal Nos. F066645/F066646
v.	)	
KAMAL KENNY NASSER and GHASSAN ELMALIH,	)	Kern County Superior Court Nos. CV-276603/CV-276962 William D. Palmer, Judge
Defendants and Appellants.	)	

After a Decision by the Court of Appeal
Fifth Appellate District

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	S217979
Plaintiff and Respondent,	)	Fifth District
	)	Court of Appeal Nos.
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INTRODUCTION

A. Nature of the Action

The Kern County District Attorney's Office brought a civil action under Business and Professions Code section 17200 seeking injunctive relief against appellants' Internet cafes' phone card sweepstakes feature. The trial court granted a preliminary injunction and the Court of Appeal affirmed the trial court's order. The Court accepted the case for review to consider the question of whether a phone card sweepstakes feature, which allowed purchasers and nonpurchasers to reveal cash prizes on appellants' in-store computer terminals, rendered the computer terminals illegal slot machines under Penal Code section 330b, as the Court of Appeal essentially overruled an earlier Court of Appeal opinion on the same subject matter.

B. Summary of Significant Facts

Appellants Kamal Nasser and Ghassan Elmalih each ran an Internet café in Kern County. As part of the services they provided, each sold a prepaid telephone card that charged users three cents a minute for domestic calls, with no hidden fees, making it a valuable item, and on par with competitors AT & T and Verizon.

The phone card also had a sweepstakes feature that gave users 100 sweepstakes points for each dollar spent on prepaid telephone time. Nonusers were also entitled to 100 sweepstakes points per day, just for entering the store, and nonusers could also mail in a request and would receive 200 points for each mail-in request. The sweepstakes points allowed the user to accumulate "winning points," which were redeemable for cash at the register for $1 per 100 winning points. In other words, the sweepstakes points that came with each phone card had no monetary value; any potential monetary value was realized only if the person entered the sweepstakes and obtained winning points.

Each sweepstakes consists of a finite pool or batch of entries, with a certain number of predetermined winning entries in sequence, just like McDonald's Monopoly. Customers who chose to redeem sweepstakes points could either ask the clerk if their phone card was a winner (called a "Quick Redeem"), or they could use computer terminals in the store to reveal whether they won any prize. The computer terminals revealed whether a prize was won by using popular cell phone gaming themes and traditional slot style gaming themes.

The sweepstakes feature is completely independent from the phone card's benefits. 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 phone calls. In other words, the sweepstakes feature allows a customer to win; he or she cannot lose, and the customer has not staked or hazarded anything of value to participate in the sweepstakes.

Appellants had entered into a licensing agreement with Phone-Sweeps, LLC to sell Phone-Sweeps phone cards. These are the phone cards at issue in this case. Phone-Sweeps developed its sweepstakes feature in

accordance with California law. Corporations routinely use sweepstakes promotions to increase business. Corporations routinely offer prizes in gambling themed games where the outcome of winning is unknown to the patron, and the result is revealed on a computer or smart phone.

For a corporation to conduct a sweepstakes that is legal under California law, the sweepstakes must not constitute a lottery or utilize a slot machine. To avoid being a lottery, the corporation must be promoting a legitimate product and it must offer a legitimate free method of entry into the sweepstakes. (*Regal Petroleum California Gasoline Retailers v. Regal Petroleum Corp.* (1958) 50 Cal.2d 844, 853-857 (*Regal Petroleum*).) The Phone-Sweeps phone cards offered a sweepstakes feature in conformance with California law, as it was a legitimate product that offered a legitimate free entry into its sweepstakes.

To avoid being labeled a slot machine, the computer revealing the prize must not be able to randomize, because under California law prior to this case, the *machine itself* must determine the element of chance. (*Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1411 (*Trinkle II*).) The Phone-Sweeps computers revealing the sweepstakes prizes are not slot machines under *Trinkle II*, as the Phone-Sweeps computer terminals simply display the results of a preset entry and do not randomize.

The Legislature amended section 330b three times after the *Trinkle II* decision but left its analysis intact. (See, *infra*, p. 19, n. 3.) "'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.'" (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353, citations omitted.)

The Court of Appeal unexpectedly changed the playing field when it overturned the long-standing *Trinkle II* decision, stating: "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." (*People v. Grewal* (2014) 224 Cal.App.4th 527, 541.)[1] Under *Grewal*, an illegal slot machine is found whenever upon the payment of money for the purchase of a telephone card, a patron can activate computer sweepstakes games on the terminals, and "based on 'chance' or 'other outcome of operation unpredictable by' the *patron*, win cash prizes." (224 Cal.App.4th at pp. 540-541, emphasis added.)

In so holding, *Grewal* violated this basic tenet of appellate law and, in so doing, stretched the definition of slot machine past its snapping point, as *all* corporate sweepstakes have a feature where the outcome is unknown to the patron. Thus, *Grewal* has criminalized every corporate sweepstakes where the winning entry is revealed on a computer or smart phone, as that device now constitutes an illegal slot machine.

Grewal is bad for business in California. If the *Grewal* definition of "slot machine" is left to stand, it will outlaw legitimate business promotions in California where the result is revealed on a computer or smart phone, and it will not be long before a legion of private attorneys general sue each and every business establishment conducting such a sweepstakes for damages under Business and Professions Code section 17200, as such statutes have often been used as a springboard for "abusive litigation by serial plaintiffs or attorneys seeking only financial gain, often through extortion of settlements." (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 697-698.)

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[1] The *Nasser* case is the unpublished companion to the published *Grewal* case, 224 Cal.App.4th 527; the Court of Appeal in *Grewal* 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 brief will cite to the published *Grewal* legal analysis when appropriate.

The Legislature has attempted to address this problem with the passage of AB 1439, an Enrolled Bill placed on the Governor's desk on September 8, 2014, and scheduled to go into effect on January 1, 2015. AB 1439 amends Business and Professions Code section 17539.1, relating to sweepstakes. The legislation was passed knowing the *Grewal* case was up for review to the Court, but without waiting to find out if review would be granted.

A Senate Rules Committee analysis for AB 1439 has stated that appellants ran a legal sweepstakes under existing California law: "As long as there is a legitimate free method of entry into the sweepstakes or promotion, the consideration element is absent, and the 'sweepstakes is not a lottery. According to the State Governmental Organization Committee, it appears that most Internet cafés are not operating illegal lotteries under California law." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill 1439 (2013-2014 Reg. Sess.), as amended Aug. 21, 2014, p. 4.)

Accordingly, AB 1439 has narrowed the definition of "sweepstakes" by outlawing business establishments that offer a product that has a sweepstakes feature that offers simulated gambling for cash prizes. To protect "good corporate citizens," AB 1439 exempts "game promotions or sweepstakes conducted by for-profit commercial entities on a limited and occasional basis as an advertising and marketing tool that are incidental to substantial bona fide sales of consumer products or services and that are not intended to provide a vehicle for the establishment of places of ongoing gambling or gaming." It is unclear whether this language will protect businesses engaging in sweepstakes from Business and Professions Code section 17200 suits.

For purposes of this brief, appellants point out only that the Senate Rules Committee finding, that Internet cafés were conducting legal sweepstakes under then-existing California law, reinforces the conclusion that the *Grewal* opinion, if upheld, must be given prospective application because a retroactive application would constitute a judicial violation of due process, which occurs when a judicial interpretation of a criminal statute constitutes "an unforeseeable judicial enlargement of a criminal statute applied retroactively." (*People v. Sobiek* (1973) 30 Cal.App.3d 458, 474, citing *Boule v. City of Columbia* (1964) 378 U.S. 347.)

Appellants' conducted a legal sweepstakes under then-existing California law, and were certainly entitled to rely on the entrenched *Trinkle II* definition of "slot machine" in implementing their sweepstakes, especially where the Legislature had amended section 330b three times after the *Trinkle II* opinion but left its analysis intact.

STATEMENT OF FACTS[2]

Appellants operate stores that sell "Tel-Connect" and "Inter-Connect" prepaid telephone cards. (Reporter's 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

[2] The facts regarding appellants' business practice are not in dispute, and are generally taken from Appellants' Opening Brief 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 that brief on pages 2-9.

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. Also, 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.)

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 and 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.)

LEGAL BACKGROUND

Because it is important to put the *Grewal* decision in its proper context, the brief 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.) Similarly, 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." (62 Cal.App.3d 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, it had a free mail-in feature, 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. (*Trinkle* II, 105 Cal.App.4th 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 of Appeal 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." (105 Cal.App.4th 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 it, 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 an in-store computer terminal, 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.

D. Gambling and Games that Resemble Gambling are Legal in California

As noted in the legislative findings and declarations to Business and Professions Code section 19801, subdivision (b): "The State of California has permitted the operation of gambling establishments for more than 100 years. Gambling establishments were first regulated by the State of California pursuant to legislation which was enacted in 1984. Gambling establishments currently employ more than 20,000 people in the State of California, and contribute more than one hundred million dollars ($100,000,000) in taxes and fees to California's government. Gambling establishments are lawful enterprises in the State of California, and are entitled to full protection of the laws of this state."

Further, as remarked in *Metropolitan Creditors Service v. Sadri* (1993) 15 Cal.App.4th 1821, 1828, "It cannot be denied that California's historical public policy against gambling has been substantially eroded. Pari-mutuel horse racing, draw poker clubs, and charitable bingo games have proliferated throughout the state. These forms of gambling are indulged by a relatively small segment of the population, but the same cannot be said of the California State Lottery, which was passed by initiative measure and has become firmly rooted in California's popular culture. Lottery tickets are now as close as the nearest convenience store, turning many Californians into regular gamblers."

While legal gambling is entitled to the full protection of the laws of California, that has not stopped municipalities, cities and counties from calling a form of entertainment "illegal gambling" and shutting it down, only to have a court determine the activity was legal all along.

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 nonetheless 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 in the *Trinkle II* decision as the computer terminal used to reveal the prizes does not randomize. The *Grewal* court responded by bypassing the sweepstakes issue and overruling *Trinkle II.*

E. *People v. Nasser*

It is against this backdrop that the *Grewal/Nasser* decision is properly analyzed. As noted, the *Grewal* court, by bypassing the sweepstakes issue, treated the two opinions as substantively identical, and stated: "We note the only difference in [*Nasser*] from what is considered here is that a telephone card (rather than Internet time) was the product purchased to gain sweepstakes points used on game programs at the businesses' computer terminals. With no material differences, the same rationale and disposition follows in those cases as is stated here." (224 Cal.App.4th at p. 531, fn. 1.)

The *Nasser* opinion, after reciting the facts (slip opn. 3-5), 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; 224 Cal.App.4th at pp. 539-540.)[3]

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; 224 Cal.App.4th at p. 540.) 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

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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 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).) (See also slip opn. 13, n. 15.)

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; 224 Cal.App.4th at pp. 540-541.)

The court then recited the *Trinkle II* three-part elements test (see discussion, *supra*, page 13) 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; 224 Cal.App.4th at p. 541.) 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 "if a prize may be won by reason of an 'outcome of operation unpredictable by [the user].' (§ 330b, subd. (b).)" (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*, 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; 224 Cal.App.4th at p. 541, 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. 12-14; 224 Cal.App.4th at pp. 542-543.)

As to element (1) the court held that "insertion" was not limited to a coin or similar object: "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; 224 Cal.App.4th at p. 542.)

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. 14; 224 Cal.App.4th at p. 543.)

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; 224 Cal.App.4th at pp. 544-545), "we disagree that the chance element must *always* be generated by some randomizing action of the device itself when it is being played." (Slip opn. 14; 224 Cal.App.4th at p. 545.) Section 330b, said the court, only requires chance or unpredictability from the perspective of the player. (*Ibid.*)

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 (slip opn. 17-18; 224 Cal.App.4th at p. 545); 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; 224 Cal.App.4th at p. 546.)

ANALYSIS

Appellants ran a legal business promotion under California law. Their phone cards were unquestionably valuable as in 2011 they were used at 31 percent rate,[4] which appellants' expert stated was consistent with

[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 opn. *30), the District Court noted that only three percent of the Internet time purchased at the café was used by the customer. (*Id.* p. *3.)

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.) Indeed, the Senate Rules Committee agreed that appellants' phone card promotion constituted a valid sweepstakes under California law. (See discussion, *supra*, pp. 5-6.)

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 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 the *Trinkle II* court 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, supra,* 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]

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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

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 clearly adopted the *Trinkle II* interpretation of slot machine.

Specifically, the Legislature 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*, *supra*, 38 Cal.3d at p. 353.)

Yet, *Grewal* ignored the Legislature's intent and has instead adopted the very test urged by the losing appellant in *Trinkle II* and rejected by the Court of Appeal: "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

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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.

entitled to receive money." (*Trinkle II*, 105 Cal.App.4th at p. 1410.) "Trinkle's analysis [must be rejected because it] ignores the statutory language." (*Ibid.*)

In interpreting the element of chance from the perspective of the user, the *Grewal* court bent the definition of slot machine past its breaking 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 Court of Appeal 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

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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.

based on a chance or other outcome of operation unpredictable to the patron, wins cash prizes. General Mills – upon the payment of money (for 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 and the result is unpredictable to the *user*. Those computer terminals, which are operated by the California State Lottery, are now illegal slot machines under *Grewal.* [7]

D. *Grewal* Must Be Applied Prospectively

The Senate Rules Committee has indicated that appellants' phone card promotion was legal under California law. *Grewal* bypassed the issue, and then took the drastic step of changing the established definition of "slot machine," which effectively made appellants' businesses illegal, *overnight*. Accordingly, even if the Court agrees with the *Grewal* analysis, *Grewal* must be given prospective application, because a retroactive application

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[7] To the extent *Grewal* attempted to distinguish the *Nasser* and *Grewal* computer terminals from the California State Lottery vending machines by stating, in dicta, that *Nasser* and *Grewal* used a complex of networked terminals and was thus a single "apparatus," as opposed the California State Lottery's "passive vending machine" (slip opn. 17-19; 224 Cal.App.4th at pp. 545-546), that distinction is disingenuous. The California State Lottery creates the lottery tickets, it creates the odds, it prints the tickets, it delivers the tickets to its own vending machines, it loads the tickets into the machines, it collects the proceeds, and it pays off the winning tickets – which, from the player's perspective, is completely random and unpredictable. A California State Lottery vending machine, as it is an essential part of a closed, fully integrated system, and it dispenses tickets where winning is unpredictable to the user, is necessarily a slot machine under *Grewal*.

would constitute a judicial violation of due process, which occurs when a judicial interpretation of a criminal statute constitutes "an unforeseeable judicial enlargement of a criminal statute applied retroactively." (*People v. Sobiek*, *supra*, 30 Cal.App.3d at p. 474, citing *Boule v. City of Columbia*, *supra*, 378 U.S. 347.)

This doctrine has its basis in the Ex Post Facto Clause: "The Ex Post Facto Clause is a limitation upon the powers of the Legislature, [citation], and does not of its own force apply to the Judicial Branch of government. [Citation.] But the principle on which the Clause is based - the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties - is fundamental to our concept of constitutional liberty. [Citation.] As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment." (*Marks v. United States* (1977) 430 U.S. 188, 192.)

Thus, in *Bouie v. City of Columbia*, *supra*, 378 U.S. 347, "the Court reversed trespass convictions, finding that they rested on an unexpected construction of the state trespass statute by the State Supreme Court: [¶] '[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, § 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.' [378 U.S. at pp. 353-354.] [¶] Similarly, in *Rabe v. Washington*, 405 U.S. 313 (1972), we reversed a conviction under a state obscenity law because it rested on an unforeseeable judicial construction of the statute. We stressed that reversal was mandated because affected citizens lacked fair notice that the statute would be thus applied." (*Marks*, *supra*, 430 U.S. at p. 192.)

This is precisely the situation here. Certainly, appellants were entitled to rely on the entrenched *Trinkle II* opinion in setting up their sweepstakes, especially where the Legislature had amended section 300b three times after *Trinkle II* was decided, signaling the Legislature's acceptance of the *Trinkle II* slot machine definition.

Indeed, *Grewal* had no true authority to overrule the *Trinkle II* slot machine test. The 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.)

Despite the Court of Appeal's eagerness to overrule *Trinkle II,* in light of the foregoing principles of law, *Grewal's* entirely new definition of "slot machine," which significantly broadens the definition of "slot machine" and criminalizes activity that had been legal, cannot be applied retroactively to appellants, as it constitutes an unexpected and unfair judicial enlargement of a criminal statute and is thus barred by the Due Process Clause.

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 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 put otherwise legitimate business promotions in California in serious jeopardy and it will not be long before a long line of private attorneys general sue business establishments conducting a sweepstakes under Business and Professions Code section 17200, where the winning prize result is revealed over a computer or a smart phone. While AB 1439 has attempted to address this issue, it still has left businesses at risk that routinely use sweepstakes to promote products.

Finally, even if the Court disagrees with this analysis, *Grewal* must be given prospective application, because a retroactive application would constitute violation of the Due Process Clause, which occurs when a judicial interpretation of a criminal statute constitutes an unforeseeable judicial enlargement of a criminal statute applied retroactively. Certainly, appellants were entitled to rely on the entrenched *Trinkle II* opinion in setting up their sweepstakes, especially where the Legislature had amended section 300b three times after *Trinkle II* was decided, signaling the Legislature's acceptance of the *Trinkle II* slot machine definition.

Respectfully Submitted,

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WORD COUNT CERTIFICATE

Counsel of record hereby certifies, pursuant to 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 30 pages and 8878 words. Counsel relies on the word count feature of the computer program used to prepare this brief.

Dated: September 19, 2014

STEVEN GRAFF-LEVINE

PROOF OF SERVICE

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 September 19, 2014 I served copies of the foregoing letter entitled **OPENING BRIEF ON THE MERITS** on the interested parties in this action by delivering a true copy thereof, by U.S. Mail, addressed as follows:

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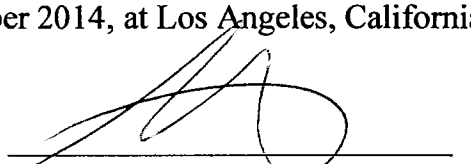
Executed this 19th day of September 2014, at Los Angeles, California.



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