IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DEC 24 2014

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. KAMAL KENNY NASSER, Defendant/Appellant.	**CASE NO. S217979** Appellate Case No: F066645, consolidated with F066646 Kern County Sup Ct No. CV-276603
PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, v. GHASSAN ELMALIH Defendant/Appellant.	Appellate Case No: F066646, consolidated with F066645 Kern County Sup Ct No. CV-276962

RESPONDENT'S ANSWER TO APPELLANTS' OPENING BRIEF

LISA S. GREEN, District Attorney
County of Kern, State of California
GREGORY A. PULSKAMP, SBN 166784
Supervising Deputy District Attorney
1215 Truxtun Avenue, 4th Floor
Bakersfield, California 93301
Telephone: (661) 868-1659
Attorney for Plaintiff and Respondent

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INTRODUCTION

"Experience teaches that those who have a penchant or passion for gambling are very ingenious in inventing new devices and contrivances with which to gratify their appetite for gambling, and at the same time evade the letter, if not the spirit, of the law. . . ." (*McCall v. State* (Ariz. 1961) 161 P. 893, 895.)

In these consolidated appeals, the latest technological contrivance in a long line of illegal gambling schemes is being brought before this Court. Appellants[1] purportedly offered legitimate retail business products, most prominently the sale of prepaid telephone cards, which they "heavily" promoted with a sweepstakes[2] that patrons played most often using electronic gambling-themed games at computer terminals to win cash prizes. (Nasser CT,[3] p. 67:17-18; Elmalih CT, p. 45:2-3; RT, p. 77:8-23.) Appellants provided the sweepstakes at their businesses using sophisticated computer software on private computer networks (Sweepstakes Gaming Systems).

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[1] The term "Appellants" as used herein refers to both of the Appellants in these consolidated appeals unless used with an express reference to a specifically named Appellant.

[2] The term "sweepstakes" is used solely to describe the ruse used by Appellants in their gambling schemes and is not intended to in any way connote that the schemes are legitimate or lawful.

[3] References to the Clerk's Transcripts for the respective Appellants are denominated as the Nasser CT and the Elmalih CT. These consolidated matters were heard together in the Trial Court, therefore the common Reporter's Transcript will be referred to as RT. These cases are nearly identical, with the same sweepstakes gaming system at issue, and with the same testimony and oral argument having been presented by Appellants to the Trial Court regarding the two cases. (RT, pp. 2:5-97:15; 140:5-164:13.)

Appellants' businesses are little more than mini-casinos seeking to exploit a perceived loophole in California's gambling laws. Appellants' patrons, the police, the public, and even Appellants themselves, know that the product being purveyed is illegal gambling in the guise of a promotional sweepstakes. Appellants' sweepstakes are actual games of chance played for money by patrons to win cash prizes. Accordingly, the Penal Code's express provisions and the overwhelming weight of legal authority from California and other jurisdictions establish the illegality of these sweepstakes gambling schemes.

Against this overwhelming authority, Appellants, as they must, rely desperately upon *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401 (*Trinkle II*). That case, however, does not involve sweepstakes gambling machines. Instead, *Trinkle II* merely examines the legality of selling lawful state lottery tickets through ordinary vending machines. Reading *Trinkle II* in a dramatically expansive manner, Appellants ask this Court to re-write California's slot machine and gambling device prohibitions to sanction their sweepstakes gaming schemes as a new, and unregulated, form of legal gambling.

The Trial Court and the Fifth District Court of Appeal ("the Court of Appeal") recognized these sophisticated sweepstakes schemes for what they plainly are: illegal gambling. These Courts, therefore, supported the People's request to preliminarily enjoin Appellants from operating the sweepstakes schemes as part of their businesses.

The People request that this Court also recognize this latest deliberate and contrived effort to unlawfully purvey gambling in California, and strongly affirm the Court of Appeal's decision.

STATEMENT OF CASE

I. Statement Of Facts

Appellants operated stores that sold "Tel-Connect" and "Inter-Connect" prepaid telephone cards. (Nasser CT, pp. 24-25, 53-54, 67; Elmalih CT, pp. 24-25, 40-41, 44; RT, pp. 8-15, 16:1-6.) Appellant Nasser's stores did business as the "Fun Zone Internet Café[s]." (Nasser CT, p. 66.) Appellant Elmalih's store did business as "Happy Land." (Elmalih CT, p. 43.) Appellants' businesses had numerous computer terminals where patrons played what appeared to be casino-style, electronic slot machines. (Nasser CT, pp. 24:12-14, 24:25-28, 119:9-15, 120:8-13, 126:13-15; Elmalih CT, pp. 24:11-13; 105:1-4.) Each computer allowed the patron to choose from one of several casino-style games. (Nasser CT, pp. 26:10-11, 119:26-27, 127:23-25; Elmalih CT, pp. 25:21-22, 37:18-20.) The audible noises coming from the machines were like that of casino-style, electronic slot machines (Nasser CT, p. 24.) The facilities typically offered free drinks and chips to its patrons as long as they continued to play. (Nasser CT, p. 119:20-21; RT, p. 50:18-25.) The gaming activity and mini-casino environment at Appellants' places of business were documented with video recordings (Nasser CT, pp. 51, 145; Elmalih CT, p. 35.) They were also documented in photographs (Nasser CT, pp. 130-137; Elmalih CT, pp. 28-31.)

The Tel-Connect and Inter-Connect telephone cards, along with the corresponding Sweepstakes Gaming Systems, were provided through licensing agreements between Appellants and Phone-Sweeps, LLC (Phone-Sweeps). (RT, pp. 6:12-22; 34:8-15; 40:24-41:2, 41:24-44:16.) Phone-Sweeps is a company based near Toronto, Canada. (Id.) A portion of the revenues generated by Appellants' operations were paid to Phone-Sweeps. (RT, pp. 44:16-50:1.) The Sweepstakes Gaming Systems were an

integrated system that formed a network of computers and servers. The main Phone-Sweeps server was in Canada and was electronically connected to the servers in Appellants' places of business. (RT, p. 48:8-50:1.) The server in each place of business was, in turn, electronically connected to each of the numerous computer terminals that the patrons used at the businesses. (RT, pp. 28:11-23, 82:4-83:13, 84:14-27.) When the server at a particular licensee was running low on their existing pool of electronic tickets, the main server in Canada would electronically resupply the licensee's server. (RT, pp. 49:8-50:1.)

When a patron provided money to one of Appellants' operations, that patron would receive points to enter the "sweepstakes" in direct proportion to the amount of money spent: 100 points for every dollar spent. (Nasser CT, pp. 25:18-21, 119-121, 126-128; Elmalih CT, pp. 25-26, 37.) In other words, for each cent a patron spent, that patron was credited with exactly one point, such that $1.00 paid resulted in a credit of 100 points, $20.00 paid resulted in a credit of 2000 points, and so forth. (Id.) Patrons would use the points to play the casino-style games which resulted in the patron either winning additional points, or losing the points that were played. (Id.) The winning points were redeemable in cash at the exact same rate in which points were provided, meaning that 100 redeemed points provided a payout of $1.00, 2000 redeemed points provided a payout of $20.00, and so forth. (Nasser CT, pp. 25-27, 119-121, 126-128; Elmalih CT, pp. 25-26; RT, pp. 36:18-37:2.) Patrons could win cash prizes ranging from $ .01 to $ 4,200.00 in each sweepstakes pool, based upon preset odds. (Nasser CT, p. 140; Elmalih CT, p. 33-34.)

Patrons were to receive 500 points upon signing-up as a new customer and making an initial purchase. (Nasser CT, p. 120:2-3.) Patrons were also supposedly eligible to receive 100 points without purchase on each day that they appeared at one of Appellants' businesses. (Nasser CT,

pp. 27, 119, 126-127; Elmalih CT, p. 26; RT, p. 22:5-19.) However, an undercover officer investigating the case was told that he had to make an initial purchase of the phone card before he would qualify for these points. (Nasser CT, p. 119:16-19.) Appellant Nasser admitted that after a customer used these limited "free" points . . . "you want more points you buy more phone time." (Nasser CT, p. 127:1-3.)

Patrons were also eligible to receive "one" free entry if they mailed-in an entry form along with a "self addressed stamped envelope." (Elmalih CT, pp. 145; 26:16-20.) Remarkably, the free entry form did not include a mailing address identifying where the form was supposed to be sent. (*Ibid.*) Appellants submitted no evidence as to the actual use of this mail-in free play option.

The rules for the Sweepstakes Gaming Systems stated in part: "Selection of Winners: The centralized computer system will *randomly* select winning and non winning [sic] tickets from the [sweepstakes] pool on a continuous basis from all eligible entries as they are received." (Nasser CT, p. 142; Elmalih CT, p. 34, italics added.) One of Appellants' witnesses, a Phone-Sweeps Executive, described the process as follows:

> [T]he pools have, for example, ten million tickets in them and those ten million tickets are jumbled by our server back in Toronto. So they are not in sequence. *They are not in order and nobody knows where the winning tickets are in that ten million ticket line*. And then those ten million tickets are then loaded to each individual's store, local computer. And when a customer decides to validate a ticket. [sic] What they are given is one of the tickets out of that pool. And it is done sequential. [sic]
>
> So the very first day that the very first customer accesses the sweepstakes, they get ticket number one, the next ticket is ticket number 2. Again, we don't know what those ticket are. *Nobody knows which ones are winners or non winners* [sic]. But they are all given sequentially to customers as they are validated. (RT, p. 27:2-19, italics added.)

The tickets described above were "electronic tickets" that were "jumbled," or "randomly organized," by the main server in Toronto. (RT, pp. 26:23-27:19; 36:15-17; 46:15-23, 63:24-64:7.) Customers had no control over the results of the sweepstakes and could not do anything to impact whether they won or not. (RT, p. 28:11-23.) Patrons activated the Sweepstakes Gaming Systems by swiping their card through a card reader or, more recently, by entering a personal-identification-number (PIN). (Nasser CT, p. 24:14-16; Elmalih CT, p. 25:19-21; RT, p. 21:12-28.) The Phone-Sweeps Executive acknowledged that their licensees typically operated using retail space between 1200 and 2300 square feet, whereas the standard in the phone card industry was to sell the cards in check-out aisles of various drug stores. (RT, pp. 50:2-13; 54:2-23; 55:25-28). He also admitted that their customers were primarily the poor and elderly, and that they have consulted with an expert in the gaming industry. (RT, pp. 8:26-9:4; 58:10-14; 59:19-22; 32:6-11; 60:18-22.)

Another witness presented by Appellants, Nick Farley, confirmed that the Sweepstakes Gaming Systems distributed winners by "chance" and provided "an opportunity to receive a prize or reward" in the form of money. (RT, p. 88:2-21.) There was nothing that the operator of the store or the customer could do to change the results of the sweepstakes entries. (RT, p. 81:24-82:3.) Mr. Farley also stated that patrons "almost invariably" opened the sweepstakes entries using "entertaining displays, things that we can feel like [sic] slot machines or poker games or bingo or Keno." (RT, p. 77:8-12.) Mr. Farley's observation as to the play of the gambling-themed games was consistent with the observations of the law enforcement officials who investigated Appellants' operations. (Nasser CT, pp. 24, 51, 119-20, 126, 130-137, 145; Elmalih CT, pp. 24-25, 28-31, 35, 105.)

Appellants provided the Trial Court with a declaration to the effect that only approximately 31% of the total telephone time sold by Phone-

Sweeps through its licensees in California was actually used. (Nasser CT, pp. 194-195; Elmalih CT, pp. 150-151.) The Phone-Sweeps executive testified that they continuously offered the sweepstakes feature with the sale of all their telephone cards, and that without it, they "couldn't compete." (RT, pp. 34:22-25, 37:3-38:25.)

II. PROCEDURAL HISTORY

The People agree with the procedural history of these cases as set forth in the opinion of the Court of Appeal. (Slip opn., p. 5-6.)

ISSUE PRESENTED

Are the "sweepstakes" games at issue in these cases subject to Penal Code section 330b, subdivision (d), on the ground they constitute "slot machine[s] or device[s]"?

ARGUMENT

I. BACKGROUND OF THE SWEEPSTAKES CAFÉ GAMBLING PHENOMENON

Appellants' gambling schemes are not isolated ventures. Indeed, as described herein, courts throughout the United States have been dealing with illegal sweepstakes schemes essentially identical to those of Appellants. In the fall 2012 edition of the University of Nevada Las Vegas Gaming Law Journal, the authors did an in-depth review of the sweepstakes café phenomenon, generally describing it as follows:

> In recent years, a new phenomenon of "convenience gambling" has spread across the country. Utilizing the speed and sophistication of networked computer technology, proprietors are offering the appeal of slot machine gambling in strip mall store fronts under the legal cover of laws drafted for sweepstakes designed in the 1970s and 1980s for Publisher's Clearing House and the McDonald's Monopoly game. However, unlike the games intended to drive sales of commercial products, these new gambling enterprises appear

more focused on the typical casino goal of attracting gambling revenue rather than increased profits from the underlying non-gambling business. These new forms of gambling operate under the innocuous moniker of "Internet cafe," and are pushing the boundaries of gambling laws and regulations. Quite often, the communities in which they operate are ill-equipped to deal with their oversight.

The term "Internet café" requires further explanation, as it is a bit of a misnomer. On most occasions, patrons of an Internet cafe are not interested in accessing the Internet, nor are they enjoying the relaxing coffee-infused environment generally imagined when one fashions a mental picture of a "cafe." Rather, the type of Internet cafe at issue in this Article, also known as an "adult amusement arcade" or "convenience casino," is a place where people go to play electronic sweepstakes games that look and sound almost identical to slot machines found in regulated casinos around the world. The name "Internet café" is derived from the commercial product purportedly sold by these operations, i.e. internet time, and the intent of the proprietor to demonstrate facial compliance with state gambling laws. Many states in which these facilities operate have laws allowing a commercial business to conduct promotional sweepstakes in conjunction with the sale of a "good or service" to its customers. The sweepstakes serve as a marketing aid to drive sales of the underlying commercial product. These sweepstakes promotions range from the well-known "look under the cap" games of soft drink manufacturers to code numbers on restaurant and store receipts, which when entered following an online consumer satisfaction survey enroll the customer into a prize drawing.

* * * *

The argument of Internet cafe operators is that their operations are no different from McDonald's, Coca-Cola, or Home Depot. Counsel for a coalition of Internet cafes was quoted in Florida as saying:

> The sweepstakes is simply a marketing tool used to promote the Internet and telephone time purchased at these cafes. . . .

Despite this purported legal justification in support of their legitimacy, many customers, and even media outlets, are

entirely unaware that this "marketing tool" is not the actual underlying business, and that Internet cafes are not essentially casinos. The fact that the games played so closely resemble slot machines and are located inside facilities that have names such as "Luxxor Casino" or "Lucky 777 Café" further blurs the line as to what the underlying business actually entails. (Dunbar and Russell, *The History of Internet Cafes and the Current Approach to Their Regulation* (Fall 2012) 3 UNLV Gaming L.J. 243 pp. *243-*245.)

While some states may be having difficulty dealing with these sophisticated gambling schemes, California law unqualifiedly prohibits such schemes, no matter how well disguised.

II. THE SWEEPSTAKES GAMING SYSTEMS VIOLATE PENAL CODE SECTION 330b

A. Well-Accepted Rules Of Construction Should Be Applied To The Language Of Penal Code Section 330b

"The interpretation and construction of a statute, such as a [gambling statute], and its applicability to a given situation, are questions of law for the reviewing court. [Citations.]" (*Bell Gardens Bicycle Club v. Dep't of Justice* (1995) 36 Cal.App.4th 717, 746.)

California's broad Penal Code provisions on gambling devices forbid a wide range of electronic and mechanical machines beyond traditional casino-style slots. (Pen. Code §§ 330a, 330b, 330.1.)[4] Appellants invite this court to wholly undercut these long-standing

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[4] Penal Code sections 330b and 330.1 have similar definitions of a "slot machine or device." (*Trinkle v. Stroh* (1997) 60 Cal.App.4th 771, 778-780 & fn. 4.) Penal Code section 330a also has a similar definition of "slot or card machine, contrivance, appliance or mechanical device." (*Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 593-594.) For purposes of this brief, Penal Code section 330b is discussed in the most detail, but the analysis is applicable to all three statutes.

prohibitory statutes by adopting a tortured and narrow construction of them. But contrary to Appellants' proposed statutory reconstruction, it is well-accepted that the starting place for statutory construction is a plain reading of the statutes based upon the "ordinary import of the language employed." (*Fontana Unified School District v. Burman* (1988) 45 Cal.3d 208.)

With respect to Penal Code section 330b, subdivision (d),[5] Appellants would have this Court delete, ignore, or change the statute's language. They advocate ignoring the phrase "or by any other means" with respect to the so-called "insertion" element necessary to establish a violation of subdivision (d). Appellants also suggest deleting or ignoring language that a violation of section 330b, subdivision (d), will be found "irrespective of whether [the gambling device] may, apart from any element of hazard or chance or unpredictable outcome of operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value." Perhaps most importantly, Appellants implore the

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[5] In its entirety, Penal Code section 330b, subdivision (d), defines a "slot machine or device" as unlawful if it:

> 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, and by reason of any element of hazard or chance or other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or additional chance or right to use the slot machine or device, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value, or which may be given in trade, irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of operation, also sell, deliver or present some merchandise, indication of weight, entertainment or thing of value.

Court to re-write the statute by changing the word "or" to "and" in the phrase "by reason of any element of hazard or chance *or* of other outcome of operation unpredictable by him or her . . . ."

In contrast to Appellants' proposed revisions to Penal Code section 330b, subdivision (d), the People ask this Court to apply the statute's language as written, "'according to the usual, ordinary import of the language employed in framing [it]'. . . '[giving significance] to every word, phrase, sentence and part of [subdivision (d)] in pursuance of the legislative purpose.'" (*Fontana Unified School District v. Burman*, *supra*, 45 Cal.3d at p. 218)

B. The Sweepstakes Gaming Systems Contain All The Elements Of Gambling Devices Under Penal Code Section 330b

At its essence, Penal Code section 330b finds a device to be a gambling device (or slot machine) if "by the insertion of money and purely by chance (without any skill whatsoever), the user may receive or become entitled to receive money." (*People ex rel. Bill Lockyer v. Pacific Gaming Technologies* (2000) 82 Cal.App.4th 699, 703 (*Pacific Gaming Technologies*).) California courts have found this statute's broad scope to prohibit a wide variety of devices under California law as gambling devices. (*Id.* at 703 [holding that a device that dispensed a five-minute phone card for $1.00 was a gambling device because operators also received the random chance to win a sweepstakes prize]; *Trinkle v. Stroh* (1997) 60 Cal.App.4th 771, 775-77 (*Trinkle I*) [holding a jukebox that dispensed four songs for $1.00 was a gambling device because operators also received the random chance to win a cash jackpot]; *Score Family Fun Center, Inc. v. County of San Diego* (1990) 225 Cal.App.3d 1217, 1221-1223 (*Score Family Fun Center*) [holding that a video game that simulated

card games was a gambling device because operators could as a matter of chance win free games]; *Merandette v. City and County of San Francisco* (1979) 88 Cal.App.3d 105, 113-14 (*Merandette*) [finding that video devices that offered free games by chance can also be prohibited by this statute].)

Based on the above authority, Appellants' Sweepstakes Gaming Systems, as operated and observed on their private computer networks, constituted illegal gambling devices under Penal Code section 330b.[6] For the payment of money, patrons could have, based upon "chance" or "other outcome of operation unpredictable by" the patron, won cash prizes of up to $4,200.00. (Pen. Code § 330b, subd. (d); Nasser CT, p. 140; Elmalih CT, p. 33-34.)

C. The Sweepstakes Gaming Systems Satisfy The "Insertion" Requirement Stated In Penal Code Section 330b

Appellants' attempt to exclude their Sweepstakes Gaming Systems on the basis that a physical item was not manually inserted into the Sweepstakes Gaming Systems is not credible and should be quickly rejected. Indeed, the record shows that Appellants' Sweepstakes Gaming Systems required the insertion of a magnetic striped card in order to make them operational. (Nasser CT, p. 24:14-16; Elmalih CT, p. 25:19-21; RT, p. 21:12-28.) Although the Sweepstakes Gaming Systems later switched to a PIN activated system, this method still falls squarely within the statute which expressly includes devices that may be operated by the physical insertion of an object "*. . . or by any other means.*" (Pen. Code § 330b, subd. (d), italics added.) Penal Code section 330a reinforces the point by

[6] Appellants would like to force law enforcement to ignore the actual operation of their devices as can be observed by anyone, and require a painstaking review of their sophisticated software to see if they have somehow managed to build outcome predictability into their systems. But such a showing is simply not required by the statute.

including devices that may be operated by depositing physical items ". . . or in any other manner." (Pen. Code § 330a, subd. (a).) Penal Code section 330.1 adds even greater clarity and consistency in the law by including devices that may be operated by the insertion of a physical item ". . . or may be operated or played, mechanically, electrically, automatically, or manually." (Pen. Code § 330.1, subd. (f).) Therefore, the Court of Appeal[7] correctly held that "[h]ere, the insertion of a PIN or the swiping of a magnetic card at the computer terminal in order to activate or access the sweepstakes games and thereby use points received upon paying money at the register (ostensibly to purchase a product) plainly came within the broad scope of the statute[s]." (Slip opn., p. 13; *People v. Grewal, et. al.* (2014) 224 Cal.App.4th 527, 760-761.) If Appellants could evade the scope of California's slot machine and gambling device prohibitions by merely using a PIN or magnetic striped card to identify their customers and effectuate betting, then there would be no reason for them to resort to their sweepstakes ruse.

D. The Chance Element In Penal Code Section 330b Is In The Alternative To An Outcome (Winning Or Not Winning Cash Prizes) Unpredictable To The User

Penal Code section 330b explicitly states that a device may qualify as a gambling device if the prize is awarded ". . . by reason of any element of hazard or chance *or* of other outcome of operation unpredictable by him or her." (Pen. Code § 330b, subd. (d), italics added.) The Court of Appeal

[7] This case is very closely related to the published decision in *People v. Grewal*, et. al. (2014) 224 Cal.App.4th 527. The Court of Appeal properly utilized the same analysis and issued nearly identical opinions in both cases. For this Court's convenience and to provide consistency with Appellants' Opening Brief (AOB), Respondent will also cite to the *Grewal* opinion when appropriate.

in this case properly noted that the defined terms are "clearly in the disjunctive" and that the statute "refers to *chance* 'or' *unpredictable* outcome." (Slip opn., p. 11-12; *Grewal, supra*, 224 Cal.App.4th at p. 541, italics in original.)

Contrary to Appellants' contention, the Court of Appeal was not acting in a cavalier manner when they settled on this interpretation. In fact, the Court of Appeal appropriately acted in accordance with the statute's plain reading and traditional rules of statutory construction. (See, e.g., *People v. Beaver* (2010) 186 Cal.App.4th 107, 117.) Further, the Court of Appeal was not the first appellate court to place significance on Penal Code section 330b's use of the disjunctive "or." The Appellate Court in *Score Family Fun Center* made the same observation:

> The . . . premise that to be an illegal slot machine, the results of playing the game must occur both "by reason of any element of hazard or chance" *and* be unpredictable to the user is not supported by the language of the statute. The statute provides a machine is a slot machine if "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 piece of money, credit, allowance or thing of value or additional chance or right to use such slot machine . . . ." (Pen. Code § 330b, subd. [(d)].) (*Score Family Fun Center, supra,* 225 Cal.App.3d at p. 1221, fn. omitted, italics in original.)

This Court, too, has reached this same self-evident conclusion in statutory construction stating: "use of the word 'or' in a statute indicates an intention to use it disjunctively so as to designate alternative or separate categories. [Citations.]" (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 690.) With respect to the precise construction that Appellants argue for here, that the use of "or" in a statute should be construed as "and," this Court stated: "the language of [the statute] does *not* reasonably permit us to interpret the first 'or' . . . as meaning 'and.' Such a construction can only

be reached by rewriting the statute's language." (*People v. Garcia* (1999) 21 Cal.4th 1, 11, italics in original.) This same disjunctive use of the term "or" is mandated under Penal Code section 330b, subdivision (d).

E. The Sweepstakes Gaming Systems Operated In A Manner That Was Unpredictable To The Users

It is beyond dispute that Appellants' Sweepstakes Gaming Systems operated in a manner that was unpredictable to the user. Appellants have openly conceded that the patrons had no control over the outcome (RT, pp. 28:11-23, 88:2-21.); that no actions of skill or technique could impact the results (Nasser CT, p. 142; Elmalih CT, p. 34; RT, p. 81:24-82:3); and that nobody knew of the results until a particular entry had been drawn and then revealed (RT, p. 27:2-19). Therefore, Appellants have conceded that their Sweepstakes Gaming Systems operated in a manner that was "unpredictable" to the user. No further showing is required to establish the requisite element under Penal Code section 330b, subdivision (d), when the statute is properly read in the disjunctive.

F. The Sweepstakes Gaming Systems Operated By Reason Of Hazard Or Chance

The "chance" outcome of the Sweepstakes Gaming Systems is shown by Appellants' use of the term "sweepstakes" and the odds tables for winning cash prizes. (See e.g., *State v. One Hundred & Fifty-Eight Gaming Devices* (Md. 1985) 49 A2d 940, 957 ["We hold that all of the seized coin-activated, free-play devices . . . which involved an element of chance and which were equipped with odds mechanisms . . . are illegal slot machines . . .] and Bus. & Prof. Code, § 17539.5 subd. (12) ["Sweepstakes" means any procedure for the distribution of anything of value by lot or by chance . . ."].)

Additionally, the Sweepstakes Gaming Systems themselves consisted of a private, interconnected network of computers and servers that all worked together to produce the end result. (RT, pp. 48:8-50:1, 28:11-23, 82:4-83:13, 84:14-27.) Nothing in Penal Code section 330b requires a gambling device to consist of a single, stand-alone piece of equipment as it explicitly includes a ". . . machine, apparatus, or device." (Pen. Code § 330b, subd. (d).) Penal Code section 330a confirms the expansive nature of the statutes and includes any ". . . contrivance, appliance or mechanical device." (Pen. Code § 330a, subd. (a).) Penal Code section 330.1 is perhaps the broadest of all the statutes as it includes devices that ". . . may be operated or played, mechanically, electrically, automatically, or manually." (Pen. Code § 330.1, subd. (f).)

Taken individually, or collectively, these gambling device statutes cover an extremely broad range of devices. As the Court of Appeal stated, the term "apparatus" by itself fits the Sweepstakes Gaming Systems extremely well because it is defined in the dictionary as including "*a group or combination* of instruments, machinery, tools, or materials having a particular function." (Slip opn., p. 18; *Grewal, supra*, 224 Cal.App.4th at p. 546, italics added.) Appellants' Sweepstakes Gaming Systems fall squarely within that definition because their private network of computers and servers included one which produced "sweepstake entries" or "electronic tickets," that were then "randomly organized" or "jumbled" into "pools" (RT, pp. 26:23-27:19; 36:15-17; 46:15-23, 63:24-64:7.) These pools were then sent electronically to a server in each individual store where, at the time of play, were further dispersed to numerous individual computer terminals within the store. (RT, pp. 48:8-50:1, 28:11-23, 82:4-83:13, 84:14-27.) When the Sweepstakes Gaming Systems are viewed as the private, interconnected network of computers and servers that they are—as opposed to a collection of independent, stand-alone machines

operating in isolation from one another—it becomes readily apparent that the "hazard or chance" is in fact produced within the Sweepstakes Gaming Systems themselves.

Appellants have taken the position that their Systems do not satisfy the "hazard or chance" prong because the random arrangement of the pools did not occur 1) at the time of play or 2) within the specific computer terminals used by the patrons. In other words, Appellants argue that because the sweepstake entries were 1) predetermined (i.e., produced and randomly stacked into pools before the patrons entered the sweepstakes) and 2) front-loaded (i.e., transferred to the computers in the businesses from other—albeit connected—computers and servers), their Systems cannot qualify as gambling devices. Appellants' argument should be rejected because it relies on an extremely narrow definition of gambling device. Specifically, there is absolutely no language in the Penal Code that specifies "when" a gambling device has to create the chance, or "where" within the device the chance has to be created, or "how" the chance must be established. In short, there is no statutory requirement to delve into the deep internal workings of any particular system. To the contrary, the Penal Code clearly and simply states that as long as the device operates by reason of "hazard or chance," then the chance element of the statute is satisfied.

Well-established case law confirms this straightforward analysis and further undermines Appellants' contentions. Specifically, the Court in *Pacific Gaming Technologies* addressed the issue of "when" chance is created. In that case, the Court analyzed a system that for one dollar dispensed both pre-paid phone cards and the chance to win cash "sweepstakes" prizes. (*Pacific Gaming Technologies, supra*, 82 Cal. App. 4th at p. 699-703.) The system at issue in that case was known as a "Venda Tel" system and had "predetermined winners" that were paid out over a period of time according to pre-set odds. (*Id.* at p. 702, fn. 4.) Even though

the winning entries were "predetermined," the Court nevertheless found the system qualified as a gambling device because the user had no control over the outcome, and it operated "purely by chance (without any skill whatsoever)." (*Id.* at p. 703, 707.) Therefore, as found in the *Pacific Gaming Technology* case, the fact that a system utilizes "predetermined winners" in no way prevents that system from qualifying as a gambling device under California law. The Court of Appeal very aptly explained this concept as follows:

> 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. (Slip opn., p. 17, fn. 20; *Grewal, supra*, 224 Cal.App.4th at p. 545, fn. 25.)

The Court in *Trinkle I* addressed the issue of "where" chance is created. In that case, the machine at issue was the "Match 5 Jukebox" that consisted of a standard jukebox with a *separate, but attached* "Match 5" device. (*Trinkle, supra*, 60 Cal.App.4th at pp. 775-776, 779-780.) A customer would insert one dollar into the jukebox and select four songs to play. In addition to receiving these songs, the player also received the chance to win the jackpot if five of the thirty flashing lights on the attached Match 5 device remained lit in the same color before each song was played. (*Ibid.*)

The *Trinkle I* plaintiff argued that the system did not qualify as a gambling device because "customers did not insert money into the Match 5 device" but, "[i]nstead, they inserted money into the attached jukebox." (*Id.* at p. 779-780.) In other words, the plaintiff argued that the Court should analyze the jukebox and the Match 5 device as two separate, isolated machines in which case neither machine, standing by itself, would satisfy all the requirements of a gambling device. The Court repeatedly noted that the two machines were "attached" and therefore analyzed the

machines as one system working together. As a result, the Court found that the system was in fact an unlawful gambling device under California Penal Code section 330b. (*Id.* at p. 780.) Therefore, as found in *Trinkle I*, the fact that a system is comprised of separate, but connected machines, in no way prevents that system from qualifying as a gambling device under California law. Based on the foregoing facts and law, the Sweepstakes Gaming Systems were not just "unpredictable" to the user, but also operated by reason of "hazard or chance."

Moreover, if Appellants' arguments were to be accepted, then the floodgates would be opened for casino-style video slot machines to proliferate all over the state. All the casino operators would have to do is remove the computing component within a slot machine, have pre-run results stored in its memory, and then attach it to the video display with a wire. The operators could then argue, as Appellants do here, that the video display is not a gambling device but only a "dumb terminal" that reads and displays the results. A very similar observation was noted by the Court of Appeal as follows:

> If this were not the case, then even a casino-style slot machine would be legal as long as it was operated by a computer system that had previously arranged the sequence of entry results in a fixed order. Such a computer system might conceivably frontload hundreds of millions of discrete entry results into a predetermined sequence. A customer using that device would be surprised to learn that merely because there is a preset sequence, he is not playing a game of chance. Of course, in reality, that is exactly what he is doing. . . ." (Slip opn., p. 15, fn. 19; *Grewal, supra*, 224 Cal.App.4th at p. 544, fn. 24.)

G. The Sweepstakes Gaming Systems Are Gambling Devices Even Though They Provided Players With Telephone Time In Addition To Chances To Win Cash Prizes

The Sweepstakes Gaming Systems qualify as unlawful gambling devices despite the fact they provided both a product (telephone time) and the chance to win cash prizes. This conclusion is supported by the plain language of Penal Code section 330b which states that an otherwise qualifying gambling device remains as such ". . . irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value." (Pen. Code § 330b, subd. (d).)

This issue was analyzed thoroughly in *Trinkle I* wherein the plaintiff argued that the Match 5 Jukebox was a lawful vending machine because it provided the customers with four songs in exchange for one dollar. (*Trinkle*, *supra*, 60 Cal.App.4th at pp. 778, 781-783.) There, the plaintiff argued that there was a "lack of consideration" in support of the gambling charges because the players paid for the songs (not the chance to win money) and received exactly what they purchased. (*Id.* at p. 781-782.) Rejecting this position, the Court held that, by receiving the jackpot, some customers inevitably received more than what they purchased. The Court further noted that "once the elements of chance and prize are added to a vending machine, the consideration paid from the player-purchaser's perspective is no longer solely for the product." (*Ibid.*)

The Court in *Pacific Gaming Technologies* reached a similar conclusion. In rejecting the vending machine/lack of consideration defense, the Court stated that "since the machine also dispenses a chance to win the sweepstakes, it gives more than the merchandise–which means the sum deposited is not the 'exact consideration' for the telephone card." (*Pacific*

Gaming Technologies, supra, 82 Cal. App. 4th at 704 [citing *Merandette*, 88 Cal.App.3d at 113-14].) Further, in refusing to accept this defense, *Pacific Gaming Technologies* rightfully acknowledged that "any reasonable person looking at the machine would recognize its true purpose and the probable intent of its users." (*Id.* at p. 706.) In colorful language, the appellate court recognized that "if it looks like a duck, walks like a duck, and sounds like a duck, it is a duck."[8] (*Id.* at p. 701.)

Trinkle I and *Pacific Gaming Technologies* are extremely important to the enforcement of California's public policy of banning illegal gambling devices. Both decisions represent modern day enforcement actions against a century's old nuisance. Unfortunately, unscrupulous individuals have a long history of trying to convert illegal gambling devices into vending machines by adding a feature whereby the device also vends something of nominal value. Their creativity at disguising gambling devices as vending machines has become legendary. (*See Nelson* v. *State* (1927) 256 P. 939, 940 [machine that dispensed a package of mints for a nickel was a gambling device under Oklahoma law because the machine would also at times, by chance, dispense to the player trade checks that were redeemable for additional merchandize]; *White v. Hesse* (D.D.C. 1931) 48 F.2d 1018, 1019 [device in District of Columbia that dispensed candy for a nickel, but also provided by chance the opportunity to replay the machine for amusement only, was a gambling device and not a legal vending machine]; *People* v. *Axelrod* (1954) 130 N.Y.S.2d 301, 303-305 [a "trinket vending

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[8] Appellants have referred to this quote disparagingly in the past. (Elmalih CT, p. 77.) However, the case from which that quote arose is directly on point as to Appellants' operations. Indeed, the metaphorical "duck" referenced is an observed illegal gambling device. As Appellants indisputably have gone to some lengths to completely mimic illegal gambling, they should not now complain that their efforts are judicially recognized.

machine" was an illegal gambling device under New York law because the machine would by chance provide the player with different amounts of trinkets for each nickel placed into the machine].)

Appellants' technological efforts to dodge California's anti-gambling device statutes are not different. These efforts must also fail because, at their essence, these Systems are illegal gambling devices that have been added with a feature that vends telephone time as a ruse to make them legal. While these Systems may be more complex than the VendaTel machine in *Pacific Gaming Technologies*, and the Match 5 Jukebox in *Trinkle I*, they violate California Penal Code section 330b for the same reasons. Indeed, given the high-stakes casino-style gambling involved in these Sweepstakes Gaming Systems, they represent a greater threat of unregulated gambling. In *Pacific Gaming Technologies*, the Venda Tel machine offered a maximum cash prize of only $100.00, and a prize payout of only 10% ($500.00 in prizes for every $5000.00 paid into the machine). (*Pacific Gaming Technologies*, *supra*, 82 Cal.App.4th at p. 702, fn. 4.) In contrast, the Sweepstakes Gaming Systems offer top prizes of $4,200.00. Given these undisputed facts, the judicial determination that the Appellants' Sweepstakes Gaming Systems are unlawful under Penal Code section 330b must be sustained.

H. The Sweepstakes Gaming Systems Are Illegal Gambling Devices Because The So-Called "Sweepstakes" Is The Product Being Merchandized

As referenced above, the statutory authority and case law in California have traditionally not permitted a "lack of consideration" defense in cases involving gambling devices that also dispensed something of value. Although a "lack of consideration" defense may be relevant to the subject matter of lotteries, lotteries are separate and distinct things in law and fact from other forms of illegal gaming. (*Western Telcon, Inc. v.*

California State Lottery (1996) 13 Cal.4th 475, 484.) Nevertheless, Appellants have advocated for an analysis involving consideration in this case. However, such an analysis only serves to confirm that Appellants' patrons were paying to play high-stakes casino-style gambling—not to obtain telephone time.

Many years ago a California appellate court gave fair warning about illegal gambling schemes that masquerade as promotions and indicated that such schemes could be identified when "the game itself is the product being merchandized." (*People v. Shira* (1976) 62 Cal.App.3d 442, 458 (*Shira*).)[9] The *Shira* Court further noted that schemes designed to promote the play of the game itself contrast sharply with lawful promotions that use "prize tickets to increase the purchases of legitimate goods and services in the free market . . . ." (*Ibid.*) *Shira's* warning about scam promotions has certainly come to pass in regard to sweepstakes cafés.

In this case, the evidence establishes that the businesses and the patrons all recognized that the true product being merchandized was the opportunity to win money through the sweepstakes entries. First, the atmosphere in Appellants' businesses were designed to promote the playing of the games as they were essentially mini-casinos complete with the sights and sounds of traditional Las Vegas style gambling. The photographs and videos of the Fun Zone (Nasser CT, pp. 51, 145, 130-137) and Happy Land (Elmalih CT, p. 35, 28-31) documented this atmosphere. Even the audible noises coming from the machines were like that of casino-style, electronic slot machines (Nasser CT, p. 24.) If fact, Appellants went so far to try and mimic a traditional casino that they gave away free drinks (albeit non-

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[9]Although *Shira* dealt with a lottery scheme, the analysis regarding consideration applies equally to other forms of gambling.

alcoholic) and snacks to patrons as long as they continued to play. (Nasser CT, p. 119:20-21; RT, p. 50:18-25.)

Second, the sweepstake gaming points offered by the businesses directly correlated to the amount of money spent by a patron and functioned similarly to poker chips at a traditional casino. In other words, the points were exchanged for money at a direct ratio of one point per penny. This exchange allowed patrons to easily convert points into money and vice versa. It is also significant that all of the establishments in this industry use a variety of different exchange rates between money and phone time or internet time, but they all uniformly use the same exchange rate between points and money. This further shows that the true marketplace product is the points, and not the phone time.

Third, local law enforcement officers visited Appellants' businesses on many occasions in uniform and undercover capacities and always saw many patrons focused on the gambling-themed games – not the other claimed products or services. (Nasser CT, pp. 24, 51, 119-20, 126, 130-137, 145; Elmalih CT, pp. 24-25, 28-31, 35, 105.) Mr. Farley also stated that patrons "almost invariably" opened the sweepstakes entries using "entertaining displays, things that we can feel like [sic] slot machines or poker games or bingo or Keno." (RT, p. 77:8-12.) Due to the obvious game-focused activity at Appellants' places of business, Appellants actually posted a disclaimer stating "[The Sweepstakes Readers/Computers] are NOT gambling machines. You are NOT gambling." (Nasser CT, p. 48; Elmalih CT, p. 34; RT p. 29:15-27.) The fact that Appellants felt they needed to post a disclaimer of gambling says much more about what their Sweepstakes Gaming Systems were, than what they were not.

Fourth, the so-called "free" points were largely illusory because the first-time buyer bonus points and the daily bonus points were typically

conditioned on patrons buying time. (Nasser CT, p. 120:2-3; Elmalih CT, p. 26:11-15). In fact, an undercover officer investigating the case was explicitly told that he had to make an initial purchase of the phone card before he would qualify for these "free" points. (Nasser CT, p. 119:16-19.) Therefore, the bonuses appeared to do nothing more than promote the pay-to-play sweepstakes itself. In addition, the mail-in options were never shown to have been used. Remarkably, the free entry form did not even include a mailing address identifying where the form was supposed to be sent! (Elmalih CT, pp. 145; 26:16-20.) As noted in *Trinkle I*, a theoretical "free chance to play" that in fact provides customers with nothing is a sham. (*Trinkle I*, *supra*, 60 Cal.App.4th at p. 781.)

Fifth, the fact that the average usage of Appellants' phone card time was less than 31% indicates that the patrons did not value the phone time as a product, but valued the sweepstakes points. (Nasser CT, p. 195; Elmalih CT, p. 151; RT, p. 141:12-20.) In other words, more than two-thirds of the so-called "product" was on average left unused, while with each sale there were multiple cash prizes available, going all the way up to $4,200.00. (Nasser CT, p. 140.)

Sixth, and perhaps most probative, Appellants admitted that the standard in the prepaid phone card industry was to simply sell the cards in check-out aisles of various drug stores. (RT, pp. 54:2-23; 55:25-28). Yet, Appellants' places of business occupied large amounts of square footage within retail strip malls, complete with employees, furnishings, sophisticated computer equipment, utilities, and free non-alcoholic drinks and snacks. (Nasser CT, pp. 24, 51, 119-20, 126, 130-137, 145; Elmalih CT, pp. 24-25, 28-31, 35, 105; RT, p. 50:2-25.) This overhead expense would not be necessary if Appellants simply sold their cards in check-out aisles. The fact that Appellants were willing to incur all this additional overhead strongly indicates that their true competitors were not other phone

card companies, but other gambling establishments where patrons could sit down and enjoy themselves while gambling.

Seventh, the businesses did not survive without the sweepstakes because the sweepstakes were the business. Appellants' own witness admitted that they "couldn't compete" without the sweepstakes/gambling component of their systems. (RT, p. 38:23-25.) Since the sweepstakes were the actual product, it is not surprising to learn that Appellants offered the sweepstakes entries with all of their phone card sales and did so continuously, without interruption or a break in the "promotion." (RT, pp. 34:22-25, 37:3-38:25.) A review of the Trial Court's orders in these cases show that the orders only prohibited Appellants from "operating any business that includes any type of 'sweepstakes,' 'slot machine,' or 'lottery' feature." (Nasser CT, p. 200; Elmalih CT, p. 164.) The Trial Court also made it very clear on the record that the preliminary injunction was limited: "[t]here will not be any prohibition in regard to selling of phone cards, but simply the use of the existing sweepstakes." (RT, p. 164:2-4.) The fact that Appellants' businesses are not commercially viable without the "sweepstakes," reflects that the true nature of these businesses are not telephone card sales, but illegal gambling operations.

In sum, the record in these cases is more than sufficient for this Court to reject any defense put forth by Appellants based on a claim that the patrons were paying for telephone time and not the sweepstakes.

III. COURTS FROM OTHER JURISDICTIONS HAVE DETERMINED THAT SYSTEMS VERY SIMILAR TO THE SWEEPSTAKES GAMING SYSTEMS ARE UNLAWFUL GAMBLING DEVICES

A number of courts from around the country have analyzed systems that are virtually identical to Appellants' Sweepstakes Gaming Systems. In those cases, the so-called "sweepstakes" promoters have followed a similar script. They market devices that purport to sell either telephone time or

internet time along with the opportunity to win large cash prizes. They permit players to "reveal" the sweepstakes' outcome on computer terminals that mimic the operation of traditional casino-style slot machines or other casino games. They also offer some version of limited free play opportunities. Significantly, these courts have consistently rejected the arguments of sweepstakes café operators as nothing more than creative attempts to use modern technology to disguise unlawful gambling devices.

The Alabama Supreme Court reviewed the legality of "Quincy's MegaSweeps" (MegaSweeps) in *Barber v. Jefferson County Racing Association* (2006) 960 So.2d 599 (*Barber*) [*overruled* on other ground by *Tyson v. Macon County* (2010) 43 So.3d 587, 591]. MegaSweeps involved a sophisticated computer system that sold customers internet access plus the chance to win cash prizes. (*Id.* at p. 604.) For every one dollar spent, customers received internet time plus 100 sweepstakes entries. Winning and losing sweepstakes outcomes were predetermined when the internet time was purchased by consumers. (*Id.* at p. 605.) Customers had the option of revealing the entries' outcome on electronic readers in an "entertaining format." (*Ibid.*) These readers looked like slot machines, and provided customers with a prize payout of 92%. (*Id.* at p. 606.) Based on these facts, the Alabama Supreme Court held that the MegaSweeps system was a slot machine under Alabama law.

In reaching this conclusion, the Alabama Supreme Court rejected the argument that the element of chance was missing because the operation of the electronic readers did not control the sweepstakes' outcome. The court found that MegaSweeps operated as a network system and that it was "immaterial that the readers" did not by themselves "assign values to the entries." (*Barber*, *supra*, 960 So.2d at pp. 609-610.) As the court concluded on this issue, "the element of chance is as much a feature of the MegaSweeps network system as of a stand-alone slot machine." (*Id.* at p.

610.) In expanding on this critical holding, the court further observed that in the "computer age" it is "simply inconsequential" that the chance takes place at the point of sale and not at the readers. (*Id.* at p. 614.)

The Alabama Supreme Court's decision in *Barber* is not alone in striking down devices that mirror Appellants' Sweepstakes Gaming Systems. The Mississippi Court of Appeals held that a similar computer system that sold telephone cards along with offering "sweepstakes" prizes constituted a slot machine under Mississippi law in *Moore v. Mississippi Gaming Commission* (2011) 64 So.3d 537 (*Moore*). Similar to *Barber*, *Moore* rejected the argument that the element of chance was missing because the internet café's computer terminals—which displayed the results of the sweepstakes entries through simulated slot machine games—did not control the outcome of the predetermined winners and losers. (*Id.* at pp. 539-541.) The court reiterated that "the element of chance is viewed from the player's" perspective. (*Id.* at p 541.) Therefore, chance was present even though the computer terminal did not impact the entries' outcome because the "consumer did not know whether the card contained a winning or losing sweepstakes points." (*Ibid.*)

As sweepstakes systems similar to the Sweepstakes Gaming Systems persist in spreading across the country, courts continue to issue opinions consistent with *Barber* and *Moore*. The United States Court of Appeals for the Fifth Circuit affirmed a criminal conviction for illegal gambling under Texas state law in *United States v. Davis* (5th Cir. 2012) 690 F.3d 330 (*Davis*). Once again, the court reviewed a sweepstakes promotion at internet cafés that offered for money sweepstakes entries plus internet time. (*Id.* at p. 333.) The sweepstakes entries could be revealed "by playing a variety of casino-like games available on each computer terminal." (*Ibid.*) In affirming the illegal gambling convictions, the Fifth Circuit in *Davis*

held that the sweepstakes system under review constituted illegal gambling under Texas state law. (*Id.* at pp. 332-342.)

Similarly, a United States District Court in Pennsylvania denied a motion for a temporary restraining order by a sweepstakes operator in *Telesweeps of Butler Valley v. Kelly* (M.D. Pa. Oct. 10, 2012) 2012 U.S. Dist. LEXIS 146157 (Butler). The plaintiff was in the business of selling phone cards and internet time, and allegedly promoted the sale of these products with sweepstakes entries. The results of the sweepstakes entries could be revealed on computer terminals that were "tailored to mimic slot machines and other amusing casino-style games." (Id. at p. *3.) In reviewing the element of chance under an ordinance that prohibited simulated gambling devices, *Butler* rejected the argument that chance was not present because the sweepstakes outcomes were predetermined prior to their reveal on the game display. Whether randomization occurred through the operation of the game display, or through the predetermined distribution of game entries, the court held that "both methods present to the player a game of chance." (Id. at p. *10.) Moreover, *Butler* observed that it was "too much for this Court to accept" plaintiff's argument that its sweepstakes system did not constitute gambling when plaintiff worked to create an "experience which mimics casino-style games as closely as possible" for players. (*Ibid.*)

Most recently, in *Lucky Bob's Internet Café, LLC v. California Department of Justice* (S.D. Cal., Order of May 1, 2013, No. 11-CV-148 BEN) 2013 U.S.Dist. Lexis 62470 (*Lucky Bob's*), the United States District Court for the Southern District of California ruled, applying California law, on the unlawfulness of sweepstakes operations very similar to Appellants'

Sweepstakes Gaming Systems in the instant cases.[10] In *Lucky Bob's,*[11] the sweepstakes was ostensibly to promote the sale of internet time. (*Lucky Bob's* at pp. *4-*5.) The court went on to find that sweepstakes cafes violated California's prohibitions on slot machines and gambling devices under the Penal Code, stating:

> Here, the World Touch Gaming system constitutes an illegal gambling device under [Penal Code] Section 330b. First, the insertion of money or other object caused the machines to operate. Customers operated the system by depositing cash into a sales terminal and receiving a coded card linked to the customer's game entries that could be revealed on a player terminal by swiping the card in the card reader. [Citation.]
>
> Plaintiffs argue that there could be no loss of money or other valuable thing attributable to the sweepstakes operation on the computer system because customers did not deposit any money or other consideration into the machines. As explained above, however, a customer swiped the pre-paid coded card loaded with the purchased internet time into a computer terminal to operate the machine. This constituted "the insertion of money or other object which causes the machine to operate."
>
> Moreover, the fact that sweepstakes entries were free with the purchase of internet time does not change this result. The consideration element is satisfied when some customers by chance receive more than what they paid for. *[People ex rel.] Lockyer [v. Pacific Gaming Technologies* (2000)] 82 Cal.

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[10] A detailed review of the facts of each case reflects that the two systems were remarkably similar. It is important to note that there was no "random number generator" in *Lucky Bob's.* Although that system, like the Systems at issue here, randomly generated and arranged sweepstakes entries, that is significantly different than having a "random number generator" which is responsible for contemporaneously injecting chance into traditional slot machines at the time of play.

[11] Although not binding, unpublished federal district court cases are citable as persuasive authority. (*Olinick v. BMG Entertainment* (2006) 138 Cal.App.4th 1286, 1301, fn. 11; see also Fed. Rules App.Proc., rule 32.1.)

App. 4th [699,] at 707. Once the elements of chance and prizes are added, the consideration paid is no longer solely for internet time. Paying for the chance to win money, rather than the use of internet time, may be the customer's main focus. (See *Trinkle v. Stroh*, 60 Cal. App. 4th 771, 785-86 (3d Dist. 1997).

Second, the operation of the machines is unpredictable and governed by chance. The World Touch Gaming system provided customers with opportunities to win cash prizes in a manner that was unpredictable to the player. [Citation.] The customers could not control or predict the distribution of cash prizes. [Citation.]

Plaintiffs argue that the operation of the machines was predictable because the sweepstakes entry results are sequenced in a pre-determined order, block loaded to the customer's account, and revealed to the customer sequentially. Plaintiffs compare the machines at issue here with the vending machine at issue in *Trinkle*. In *Trinkle*, a vending machine dispensed lottery tickets sequentially, which the court held made its operation predictable. [Citation.] There, however, the vending machine simply delivered the finished product--the lottery ticket. Plaintiffs' 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 Plaintiffs' 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.

The system here is more similar to the vending machines at issue in *Lockyer*. In *Lockyer*, the vending machines dispensed pre-paid telephone cards, but also had a sweepstakes feature that randomly paid out money after playing visual and audio displays that mimicked a slot machine. [Citation.] Winners were determined by a preset computer program, which decided "predetermined winners spread out over a period of time." [Citation.] The court in *Lockyer* held that the vending machine was an illegal slot machine under Section 330. [Citation.]

> In addition, Plaintiffs argue that the casino-style games did not create an element of chance because the games had no impact on whether a customer received a sweepstakes prize. Even if the machines did not display the casino-style games before revealing whether the customer had won, the operation of the machine was still "unpredictable and governed by chance," as explained above.
>
> Third, customers became entitled to receive a thing of value by reason of the chance operation of the machine. Because customers could receive cash prizes of up to $3,000, the World Touch Gaming system provided them with the opportunity to win a "thing of value."
>
> Plaintiffs argue that even if the element of chance were present, the World Touch Gaming system is lawful because it is missing the element of consideration. While lack of consideration is a possible defense in lottery cases under California Penal Code § 319, it is not a defense in gambling device actions brought under Section 330b. (*Trinkle*, 60 Cal. App. 4th at 780-81).
>
> Plaintiffs' network of machines qualify as slot machines under Section 330b. . . . (*Id.* at pp. *7-*10, fn. omitted.)

It would be difficult to find a case more factually and legally on point as to each and all of Appellants' arguments than *Lucky Bob's*. If anything, the growing number of precedents striking down these computerized sweepstakes gaming systems throughout the United States, and now in California, illustrate the spread of these gambling schemes and the opportunistic criminals seeking to exploit perceived loopholes in state gambling laws. Taken together, *Barber*, *Moore*, *Davis, Butler*, and *Lucky Bob's* persuasively demonstrate how this Court should apply California law to affirm the Court of Appeal's decision.

In spite of Appellants' prodigious efforts to the contrary, "the justice system is not some lumbering oaf who must ignore the patently obvious gambling scheme apparent here. . . ." (*Cleveland v. Thorne* (Ohio 2013) 987 N.E.2d 731, 744.) Appellants' Sweepstakes Gaming Systems

intentionally mimic casino-style games and adds the elements of chance to win cash prizes on devices that purportedly promote products. While Appellants may sell telephone time or related products in their own right, as the Trial Court's orders allow, the sweepstakes component that promotes the play of casino-style gambling for high-stakes violates California Penal Code sections 330a, 330b and 330.1 and was appropriately enjoined.

IV. *TRINKLE II* DOES NOT AUTHORIZE APPELLANTS' SWEEPSTAKES GAMING SYSTEMS

Against the foregoing tide of applicable precedent, Appellants rely almost totally on a breathtakingly expansive reading of *Trinkle II*. However, Appellants' reliance is misplaced because the Systems at issue in this case have almost no resemblance to the machines that were at issue in that case. In *Trinkle II*, the machines were called Scratcher Vending Machines (SVM's) and were classic, old-style "electromechanical" vending machines that dispensed legal California lottery tickets. (*Trinkle II, supra*, 105 Cal.App.4th at p. 1403-1404.) The SVM's did no more than replace the live sale of the legal lottery tickets by ordinary vending machine sales as authorized by the State Legislature. (Gov. Code, § 8880.335, subds. (a)(1) & (b); see *Trinkle II, supra*, 105 Cal.App.4th at p. 1411, fn. 8.) Also unlike the Sweepstakes Gaming Systems, "[n]o [California State Lottery] game may use the theme of roulette, dice, baccarat, blackjack, Lucky 7s, draw poker, slot machines, or dog racing." (Gov. Code, § 8880.28, subd. (a)(1).)

Unlike the Sweepstakes Gaming Systems, the SVM's were not connected to any other machines but consisted of an isolated "stand-alone cabinet" that needed to have the lottery tickets manually loaded. (*Trinkle II, supra*, 105 Cal.App.4th at p. 1403-1404.) The lottery tickets would also have to be manually revealed by "'scratching' off the substance covering

the symbol on the ticket(s)." (*Ibid.*) Furthermore, the machines were *not* unpredictable. In fact, they were completely predictable. For example, a customer that purchased one item, received one item. A customer that purchased two items, received two items. Absent some sort of mechanical failure, there was no chance that a customer who purchased one item would receive two items, or that a customer who purchased two items would receive three, four, or five. A customer using the vending machines paid money in consideration, and in return got exactly what they expected, a legal lottery ticket, and nothing more from the machines. In the end, the vending machines in *Trinkle II* worked exactly like other vending machines that dispensed potato chips, candy bars, and other similar items. Therefore, the Court in *Trinkle II* reached the correct conclusion that the machines were not gambling devices because the only "chance" that was involved came from the lottery tickets, not the machines.

The Sweepstakes Gaming Systems here were dramatically different than the ordinary vending machines in *Trinkle II* because the Sweepstakes Gaming Systems consisted of a private, integrated network of computers and servers that electronically incorporated the entire gaming process from the beginning to the end. In the Sweepstakes Gaming Systems, the process of randomly arranging the entries, loading them on to the servers and computers in the businesses, and revealing the results were all part of the automated, electronic process inherent in the Systems. Therefore, if the Sweepstakes Gaming Systems are viewed as a whole, it becomes very clear that the components of "chance" and "unpredictability" are built into the automation of the Systems themselves.

Appellants attempt to employ a "parade of horribles," by implying that SVM's would be made illegal if *Grewal* is affirmed here. They are wrong. The California State Lottery's SVM's are not before this Court -

Appellants' sophisticated efforts to subvert California gambling device prohibitions with their Sweepstakes Gaming Systems are the only matter at issue here. Moreover, Appellants' claim that SVM's could be made illegal here is patently incorrect based upon the material factual distinctions between the two systems discussed above. Indeed, the Court of Appeal expressed this same sentiment, stating that it was "unsurprising" *Trinkle II* concluded that SVM's were legal. (*Grewal*, supra, 224 Cal.App.4th at p. 544.)

V. APPELLANTS' DUE PROCESS ARGUMENT IS NO MORE THAN ANOTHER STATEMENT OF THEIR MISPLACED RELIANCE UPON *TRINKLE II*

Appellants' argument that due process should absolve them from their wrongdoing in operating their Sweepstakes Gaming Systems is not persuasive because it is no more than another statement of their misplaced reliance upon *Trinkle II.* Appellants' claim that *Trinkle II* created an ambiguity in Penal Code section 330b, and by implication Penal Code sections 330a and 330.1, is undermined by the fact that those statutes utilized clearly understandable language and *Trinkle II* dealt with a machine that was dramatically different than Appellants' Sweepstakes Gaming Systems. Although concerns of due process may come into play when a statute is truly susceptible to two or more reasonable interpretations, as aptly noted by the Court of Appeal, "[n]o such ambiguity exists in this case." (Slip opn., p. 9; *Grewal*, supra, 224 Cal.App.4th at p. 539.) To the contrary, the language of Penal Code section 330b, subdivision d, "does *not* reasonably permit us to interpret the first 'or' . . . as meaning 'and.' Such a construction can only be reached by rewriting the statute's language." (*Garcia, supra,* 21 Cal.4th at p. 10-11, italics in original.) Therefore, Penal Code section 330b, as well as sections 330a and 330.1, were clear and did provide Appellants with fair warning of the illegality of their conduct. This

Court should not now rewrite these sections to accommodate Appellants' unlawful gambling schemes.

Furthermore, the Sweepstakes Gaming Systems were not created and operated by unwary individuals who inadvertently fell within the scope of an ambiguous statute. Rather, they are very sophisticated gambling promoters who deliberately attempted to circumvent the express terms of California's gambling statutes by reliance upon a single inapplicable case, in the face of on-point in-state and out-of-state precedent to the contrary. As a result, Appellants' claims that they were not provided with proper notice of the illegality of their conduct are not credible should be rejected.

VI. THE SO-CALLED DOCTRINE OF LEGISLATIVE ADOPTION HAS NO APPLICATION TO *TRINKLE II*'S INTERPRETATION OF PENAL CODE SECTION 330b.

Appellants, for the very first time in the history of these cases, argue before this Court that the Legislature implicitly adopted *Trinkle II's* holding as to Penal Code 330b, by not subsequently amending that statute after the opinion was issued.[12] (See Cal. Rules of Court, rule 8.500(c)(1) ["As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal"].) However, here, it is almost inconceivable that the Legislature would have believed it was necessary to amend Penal Code section 330b, when *Trinkle II* did no more than affirm the Legislature's authorization for the California State Lottery to use vending machines. (Gov. Code, § 8880.335.) Moreover, with *Pacific Gaming Technologies*, supra, 82 Cal.App.4th 699, being right on point as to Appellants' sweepstakes

[12] The State Legislature very recently foreclosed the ability of sweepstakes café operators, such as Appellants, to defend Unfair Competition Law claims by arguing that they are lawful sweepstakes. (Assem. Bill No. 1439, approved by governor, Sept. 25, 2014 (2013-2014 Reg. Sess.).)

schemes, the Legislature had no reason to predict that Appellants would think they could get away with an almost identical sweepstakes gambling scheme.

VII. NONE OF THE ADDITIONAL ISSUES RAISED BY APPELLANTS IN ANY WAY DETRACT FROM THE ILLEGALITY OF THEIR SWEEPSTAKES GAMING SYSTEMS

Appellants' argument that their Sweepstakes Gaming Systems are just like the promotional sweepstakes offered by legitimate retailers such as McDonald's and Coca-Cola is the pre-textual rationale for the Sweepstakes Gaming Systems, but it is no more than another red herring. (AOB, p. 2, 26.) Appellants do not expound on their argument beyond making allusions of factual similarities, and hyperbolic statements that nearly all electronic devices would be illegal under the line of cases finding that sweepstakes cafes are unlawful. This is not surprising, because the only relevant legal basis for raising such comparisons would be under a disparate treatment claim. (See *People v. Toomey* (1984) 157 Cal.App.3d 1, 12-13 [discussing the requisites for a showing of discriminatory prosecution in the context of an action under Business & Professions Code section 17200].)

As a threshold showing for a disparate treatment claim, Appellants "'must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion.' [Citations.]" (*People v. Toomey, supra*, 157 Cal.App.3d at p. 13, quoting *Murgia v. Municipal Court* (1975) 15 Cal.3d 286.) In almost the identical context of this case, a sweepstakes café was precluded from making a disparate treatment argument *vis-à-vis* McDonalds and Coca Cola sweepstakes because it had made no threshold showing to support the argument. (*State of New Mexico v. Vento* (2012) 286 P.2d 627, 634-635.) Here, too, Appellants have not

shown any kind of invidious discrimination or intentional discriminatory prosecution by the People.

Similarly, in *Shira*, the Court refused to address a discriminatory prosecution argument on appeal because the record did not contain "an adequate showing of an intentional and purposeful singling out of defendants for prosecution on an 'invidious discrimination' basis." (*Shira, supra*, 62 Cal.App.3d at p. 464, fn. 15.) For the same reasons, this Court should decline Appellants' invitations to compare their Sweepstakes Gaming Systems with other sweepstakes promotions not before this Court.

VIII. THE HARM TO THE PUBLIC WILL BE GREAT IF THE COURT OF APPEAL'S DECISION UPHOLDING THE PRELIMINARY INJUNCTIONS IS NOT AFFIRMED

In this case, there is no mystery about Appellants' goal: duplicate the experience of casino gambling that illegal slot machines and gambling devices provide, and give patrons the thrill of wagering money to win cash by random luck, all without violating the laws prohibiting that activity. Appellants' businesses are little more than illegal gambling operations preying upon the public with the thrill of winning cash based upon chance at the blink of an eye.

Some of the most probative evidence of the illegality of the Sweepstakes Gaming Systems comes from the video recordings of the investigations in which Appellants' patrons can be seen quite clearly gambling on slot machine type games in an environment that looks and sounds like a mini-casino. (Nasser CT, pp. 51, 145; Elmalih CT, p. 35.) The still photographs also reflect that Appellants' market their places of business as mini-casinos. (Nasser CT, pp. 130-137; Elmalih CT, pp. 28-31.) Even though Appellants may call the games a mere "entertaining"

display and have consistently tried to avoid saying that patrons "lose" money under the Sweepstakes Gaming Systems, Appellants' own expert witness stated as follows:

> [W]e go on to how they can reveal their [sweepstakes] entries, what [sic] means are there often times almost *invariably* the systems involve entertaining displays, things that we can feel [sic] like slot machines or poker games or bingo or Keno. But we also look to see if there are any other means to reveal sweepstakes entry.
>
> In [sic] many times the systems have the ability to, through a cashier to detail quick reveal. When a patron says I am interested in the sweepstakes I don't have time to look at the displays, can you tell whether I *won or lost*. At which point the cashier with the Telconnect system you can do this. The cashier can put in their account and reveal their entries right in front of them at the point of sale and tell them what they've *won or lost*. (RT, p. 77:8-23, italics added.)

Therefore, Appellants' own expert witness inadvertently, but honestly, revealed that the true nature of the games was about winning and losing money. In sum, the facts, even as carefully massaged by Appellants, are more than sufficient for this Court to affirm the Trial Court's preliminary injunctions prohibiting the operation of these gambling devices under Penal Code section 330b, subdivision (d).

In a Mississippi Law Journal article, entitled "From Mad Joy to Misfortune," the author described the addictive quality of gambling in relation to video poker machines:

> The illusion of skill. A belief that they exert some control over the outcome of a risk-taking venture is perhaps the single most important factor in promoting persistent and prolonged gambling. Although the only skill involved in playing video poker against a machine with a random number generator is the ability to read, players are often adamant in their belief that their skill made them more likely to win. Logically, if an individual thinks they have no control over the outcome and that the house

has even a small advantage they are less likely to continue to play, be-cause it is easy to demonstrate that over time this small advantage is all that is needed to wipe them out. Therefore, continued play requires a belief that promotes the illusion of control through a system or skill. In turn this irrational belief system supports irrational gambling behavior. Video poker players often report that their "skill" at determining when a machine is "hot" is based on the logic that if a machine has not paid off recently it will soon and thus they would "be a fool to quit now." This is an example of the "gambler's fallacy" and periodically of luck, which suggests that one can predict random events or even control them, by studying brief patterns in random behavior.

The ability to produce dissociative-like experiences. Almost from their inception, video poker machines have been known for their ability to induce a trance-like state in players and to allow players a sense of escape. This trance-like experience has been compared to dissociation, a psychiatric term used to describe an experience in which "an individual experiences temporary alterations in normally integrative functions of consciousness, identity or motor behavior." Initially this experience was reported by players who "lost all track of time" and played as though hypnotized for hours. Later this phenomenon was replicated in experiments demonstrating that players often not only lost track of time but also developed difficulty responding to external stimuli other than the video screen. There is something about this phenomenon that seems to disproportionately attract or effect women.

The ability to quickly switch from one type of game to another. Each video poker machine might be best thought of as a miniaturized electronic casino. The machines in South Carolina offered twelve to sixteen different games on each terminal. Most of these games were variants of poker, blackjack or keno. If a player were to tire of one game or attempt to "change their luck," all they had to do was touch the screen and select another game, which could be done in three to five seconds. This ability to switch games rapidly contributes to players playing longer, which contributes to the development of pathology.

> Immediate reinforcement with multiple stimulus cues. From their sometimes provocative titles to their flashing lights and ringing bells, video poker machines are designed to arouse patrons through a variety of stimulus responses. To understand the impact of multiple stimulus cues compare the impact of watching MTV to listening to a CD or duck hunting with a shotgun as opposed to a rifle. The use of multiple stimulus cues however may not be as important as the immediacy of the reinforcement. The ability of video poker machines to immediately reinforce play through a variety of auditory and visual cues contributes significantly to continued play.
>
> Variable levels of betting and variable rate of play. The video poker machines used in South Carolina mostly allowed for minimum bets of a quarter, although the machines only took bills and gave no change, but bet size was determined only by how much a player was willing to stuff into the machine and put at risk. The ability to vary the bet size contributes to the illusion of skill, and some players believe that the outcome is affected by the level of bet, which leads them to believe that they could control the outcome by varying their bet size. Another factor contributing to this sense of control is the ability of players to vary their rate of play. This may seem insignificant given the average player could play seven to twelve hands a minute, but once more, it is the illusion of control that contributes to continued play. (72 Miss.L.J. 565, 712-715, footnotes omitted.)

This is precisely the gambling experience that Appellants are trying to achieve with the play of the gambling-themed games. Conversely, it is the concern for public protection that has caused gambling to be prohibited or highly regulated in California. (Pen. Code § 319, et seq.; Pen. Code §330, et seq.; Bus. & Prof. Code § 19800, et seq.) It is also the concern for public protection that caused the People to seek relief under the Unfair Competition Law to enjoin Appellants' Sweepstakes Gaming Systems.

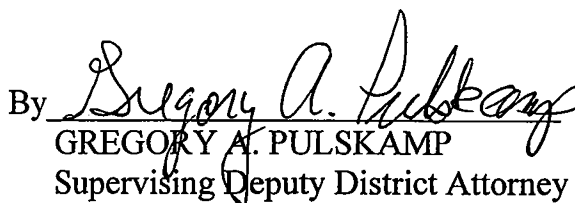
CONCLUSION

For all of the foregoing reasons, the People respectfully request that this Court affirm the Court of Appeal's well-founded decision upholding the preliminary injunctions against Appellants' gambling operations.

Respectfully submitted,

Dated: December 22, 2014

LISA S. GREEN
District Attorney, County of Kern

By 
GREGORY A. PULSKAMP
Supervising Deputy District Attorney

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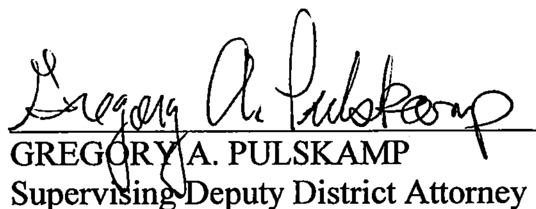

GREGORY A. PULSKAMP
Supervising Deputy District Attorney

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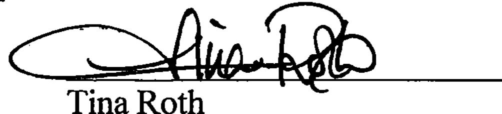

Tina Roth

SERVICE LIST

Steven Graff Levine Attorney at Law 1112 Montana Avenue, #309 Santa Monica, California 90403	[1] Copy; Regular Mail Attorneys for *Defendants/Appellants, Kamal Kenny Nasser and Ghassan Elmalih*
Office of the Clerk Fifth District Court of Appeal 2424 Ventura Street Fresno, California 93721	[1] Copy; Regular Mail
Superior Court of California County of Kern Civil Appeals Division 1415 Truxtun Avenue Bakersfield, California 93301	[1] Copy; Regular Mail
Office of the Clerk Supreme Court of California 350 McAllister Street San Francisco, California 94102-4797	[1] PDF Submitted electronically and [1] Original plus [8] copies sent via Federal Express Overnight Mail.