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.	)	

SUPREME COURT
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After a Decision by the Court of Appeal
Fifth Appellate District

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

In Respondent's Answer to Appellants' Opening Brief ("RA"), respondent concludes with a two-page, single-spaced quote from a Mississippi Law Journal article, which discusses the so-called "addictive quality" of video poker machines, and respondent urges, by analogizing video poker machines to video slot machines, that video slot machines "induce a trance-like state," create "disassociation," and "hypnotize" players. (RA, pp. 39-41.)

From reading this article, one would think that video slot machines are so dangerous they have been outlawed in California. Not even close. According to the Native American casinos "500 Nations" website, California Indian tribes operate 68 casinos statewide, which host a staggering total of 68,835 video slot machines, not including thousands more video poker machines. (http://500nations.com/California_Casinos.asp.) Despite respondent's dire warning of zombie-like Californians if *People v. Grewal* (2014) 224 Cal.App.4th 527 ("*Grewal*") is not upheld, hundreds of thousands of California residents annually are exposed to the "perils" of video slot and poker machines, with the State's blessing.

The theme of Respondent's Answer is straightforward: video slot machines are very bad, and appellants, like many "unscrupulous individuals" before them, have used a "technological efforts" to promote "illegal gambling devices." (RA, pp. 21-22, 1-2.) Despite the dime novel tone of Respondent's Answer, appellants have not done anything illegal, and have scrupulously followed existing California law.

A. Respondent's New "Subjective" Sweepstakes Test is Untenable

Respondent treats the Court to yet another two-page, single-spaced quote from another out-of-state law journal, the Las Vegas Gaming Law Journal, for the proposition that appellants' Internet Cafes run afoul of California sweepstakes law. (RA, pp. 7-9.) Untrue. In California, a sweepstakes promotion is legal where there is a legitimate product and a free method of entry to win a prize. (*Regal Petroleum California Gasoline Retailers v. Regal Petroleum Corp.* (1958) 50 Cal.2d 844, 853-857 (*Regal Petroleum*).) This has been the law for over 50 years.

Respondent asks the Court to adopt a new subjective sweepstakes test that no longer focuses on whether the product purchased is legitimate, but instead requires a court to divine a patron's actual intent in purchasing that legitimate product – respondent argues that despite appellants' patrons purchasing a legitimate, valuable phone card, "appellants' patrons were [actually] paying to play high-stakes, casino-style gambling—not to obtain telephone time." (RA, p. 23.)

Regal Petroleum does not require a court to ask consumers if they are purchasing a Coke or movie ticket just so they can obtain a sweepstakes entry, or to ask McDonald's patrons if they bought that super-sized soft drink (McDonald's MONOPOLY game pieces are only placed on the larger size soft drink cups) because they wanted the extra calories or because they wanted a chance at a million dollars.

(http://news.mcdonalds.com/US/news-stories/MONOPOLY-Game-at-Mc Donald-s-Returns-with-a-Chance.) It is simply not the law. No wonder, the test is unworkable, as it requires a court to divine the subjective intent of countless purchasers, instead of making the one determination required by *Royal Petroleum* – whether the product itself is a legitimate product.

B. Respondent's New "Percentage of Use" Test is Untenable

Respondent even argues that appellants' sweepstakes runs afoul of *People v. Shira* (1976) 62 Cal.App.3d 442, 458, because "the game itself is the product being merchandized." (RA, p. 23.) Respondent misleads the Court. In *Shira*, the "product" was the ticket for the sweepstakes. The ticket in *Shira* had no independent extrinsic value. Respondent admits appellants' phone cards *have* independent extrinsic value, as the average time used on appellants' phone cards is over 30%, but over 30% is somehow just "not enough," as respondent argues that the "unused" portion makes the phone card sales illegitimate. (RA, p. 25.)

This is nonsense. Appellants' are not selling "Internet time," as in the *Grewal* case. Appellants' phone card is a legitimate product, on par with (if not better than) the very same cards offered by AT&T and Verizon, as it provides phone time with no hidden fees for three cents a minute domestically. That satisfies California's *Regal Petroleum* test, period.

Nonetheless, respondent calls the sale of this legitimate product a "ruse" (RA, p. 22), and asks the Court to rewrite California's long-existing sweepstakes law to endorse a new a "percentage of use" test to determine a product's sweepstakes legitimacy. (RA, p. 25.) Under respondent's proposed test, if a McDonald's patron eats six of 20 (30%) of the Chicken McNuggets he or she purchased (the game piece is not available on the 6-piece Chicken McNuggets), the MONOPOLY game is illegal, but if he or she eats 13 or more the game is legal?

Under respondent's proposed "percentage of use" sweepstakes test, authorities would need to fish through the garbage and count uneaten French fries, Big Macs, and left over sodas to determine whether a sweepstakes is legitimate. This is not the law, and the Court should not rewrite it in the absurd manner suggested by respondent.

C. Respondent's New "Coupling" Sweepstakes Test is Untenable

Relying on *Trinkle v. Stroh* (1997) 60 Cal.App.4th 771, 779-780 (*Trinkle I*) and *People ex rel. Lockyer v. Pacific Gaming Technologies* (2000) 82 Cal.App.4th 699, 703 (*Pacific Gaming*), respondent also argues that "telephone time" coupled with a "chance to win cash prizes" makes appellants' phone cards an "unlawful gambling device." (RA, pp. 20-22.) This argument is similarly misplaced. Appellants' phone card itself is valuable, and has no strings attached with purchase. A patron may simply buy the card, and leave the store. In *Trinkle I* and *Pacific Gaming*, the patron had to put money into the vending machine itself to play the songs (*Trinkle I*), or obtain the 20-cent a minute five-minute phone card (*Pacific Gaming*). In essence, the patron was forced to play for a prize to get the product.

That is decidedly not the case here. No one is forced to put money into appellants' computer terminals to buy a phone card. The purchase of the phone card is independent, the phone card is a legitimate product, and the person can leave the store without participating in the sweepstakes after purchase.

Most importantly, under the new "coupling" sweepstakes test espoused by respondent, every product sweepstakes offered in California would be illegal. Under this test, purchasing a large "French fries," coupled with a "chance to win cash prizes," makes McDonald's MONOPOLY illegal. It does not. A person is not forced to play

MONOPOLY to eat the French fries. A person may buy the fries, eat them, and toss the fries' red holder into the wastebasket without peeling off the sweepstakes entry. The product is independently valuable. Again, respondent asks the Court to rewrite California's long-existing sweepstakes law and turn it into something absurd.

Indeed, even a Senate Rules Committee analysis has concluded that appellants' sweepstakes was legal under 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 of Assem. Bill 1439 (2013-2014 Reg. Sess.), amended Aug. 21, 2014, p. 4.)

D. Respondent's "Disjunctive" Chance Argument is a Red Herring

In *Trinkle v. California State Lottery* (2003) 105 Cal.App.4th 1401, 1411 (*Trinkle II*)), the Court of Appeal held that the chance element in Penal Code section 330b, subdivision (2) must be generated by some randomizing action of the device itself when it is being played.

In support of its argument that Penal Code section 330b's chance element simply requires "outcome of operation unpredictable to the user," respondent states that because section 330b is written in the "disjunctive," "in accordance with the statute's plain reading," a machine will 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.'" (RA, pp. 13-15.) Respondent then quotes from the *Grewal* opinion and concludes, like the Court of Appeal in *Grewal*, that Penal Code section 330b "'refers to *chance* "or" *unpredictable* outcome,'" not both. (RA, p. 14, citation omitted.)

This argument is a red herring, as the definition of "chance" *is* "unpredictable." The Merriam-Webster dictionary defines "chance" as "something that happens unpredictably without discernable human intention or observable cause." (http://www.merriam-webster.com/dictionary/chance.) The Collins dictionary defines "unpredictable" as "not capable of being predicted, changeable." (http://www.collinsdictionary.com/dictionary/english/unpredictable.) As is readily seen, the two words have the same meaning.

Indeed, in *Trinkle II*, the Court of Appeal agreed that the chance element of Penal Code section 330b was written in the disjunctive ("Penal Code section 330b states, 'by reason of any element of hazard or chance or of other outcome of *such operation* unpredictable by him . . . .'" (105 Cal.App.4th at p. 1410)), but focused on the statute's "such operation" language, and concluded that in using the phrase "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." (105 Cal.App.4th at pp. 1410-1411.)[1]

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[1] When *Trinkle II* was decided on February 3, 2003, Penal Code section 330b, subdivision (2) read, in relevant part, "Any machine, apparatus or device is a slot machine . . . as a result of the insertion of any piece of money or coin or other object, or by any other means, 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 piece of money, credit, allowance or thing of value . . . ." 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).)

As noted in *Grewal*, this language change did not impact the *Trinkle II* analysis: "Prior to 2004, this portion of the statute was worded as follows: "'by reason of any element of hazard or chance or of other outcome of *such* operation unpredictable by him ... .'" (*Trinkle, supra,* 105

Thus, whether viewed in the conjunctive or disjunctive, the issue before the Court is whether a machine is a Penal Code section 330b "slot machine" because the machine itself randomizes the result, making it the result unpredictable (*Trinkle II*, 105 Cal.App.4th at p. 1411); or whether a machine is a "slot machine" because the outcome of operation is unpredictable by the user. (*Grewal*, 224 Cal.App.4th at p. 545.)

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* legal sweepstakes game that involves chance has an outcome of operation that is unpredictable by the user. When people go on a computer to reveal whether they won a sweepstakes prize from Coke, the result is unpredictable to them. When people pull off the tab of their McDonald's MONOPOLY piece to see if they have won a prize, the result is unpredictable by them. Thus, as fully discussed in Appellant's Opening Brief ("AOB"), under the new and expansive *Grewal* test, formerly legitimate business promotions would now be illegal in California. (AOB, pp. 4-5, 26-27.)

E. Appellant's Sweepstakes Gaming System Does Not Operate in a Manner Unpredictable to the User

Central to respondent's argument is the mistaken notion that "it is beyond dispute the Appellants' Sweepstakes Gaming Systems operated in a manner that was unpredictable to the user." Respondent even argues that appellants have "conceded" this issue. (RA, p. 15.) Not so.

Cal.App.4th at p. 1409, fn. 6, italics added.) In 2004, as a result of housekeeping legislation that made technical, nonsubstantive changes to numerous statutes, the word "such" appearing before the word "operation" was removed from section 330b (Stats. 2003, ch. 264, § 1, p. 2416.)" (*Grewal*, 224 Cal.App.4th at p. 542, fn. 20.)

Even if the Court were to somehow agree with respondent and the *Grewal* court that the chance element in Penal Code section 330b is defined as "an outcome of operation unpredictable by the user," "Appellants' Sweepstakes Gaming Systems" *still* does not convert appellants' computer terminals into "slot machines" under Penal Code section 330b because the sweepstakes outcome is *absolutely predictable and knowable* by a patron prior to the patron revealing the sweepstakes result on appellants' computer terminal using a slot-machine themed game.

Specifically, as noted in Appellant's Opening Brief, "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." (AOB, p. 2, emphasis added.)

In other words, before appellants' patrons go to the computer terminal, they have the option of finding out from the clerk whether their sweepstakes entry is a predetermined winner. The result is *exactly the same* whether they use Quick Redeem or go to the computer terminal. Certainly, the sweepstakes result is unpredictable prior to the "Quick Redeem" reveal, but with the "Quick Redeem" feature, no computer terminal slot-machine theme is utilized, and patrons find out from the clerk if their predetermined sweepstakes entry is a winner or not.

Thus, before appellants' patrons sit down in front of appellants' computer terminals and utilize a slot-machine themed game to reveal their prize, the issue before the Court, the outcome is absolutely predictable and knowable by them *prior* to the computer terminal reveal.

To draw an analogy – if I record a Sunday football day game because I am busy, so that I may watch it at night, I may choose to stay off the computer, not watch television, and avoid my friends so I don't learn the score, which allows me to watch the game as if it is live, but the result is absolutely predictable and knowable. I simply have to go to ESPN.com and get the score and recap. This is no different than the system utilized by appellants, as the sweepstakes results have been recorded or "locked in" at the moment of the phone card purchase, and can be determined without resort to the computer terminal reveal.

Because of the "Quick Redeem" feature, appellants' gaming system sets it apart from the California Lottery and traditional video slot machines, because in purchasing a Lottery ticket, or in putting a quarter into a video slot machine, the outcome is *necessarily unpredictable* by all users, as users have no means to find out, beforehand, if their Lottery ticket or video slot "pull" will be a winner. Not so here. Phone card purchasers have the absolute right to find out whether they have a winning sweepstakes entry at the moment of purchase from the clerk, and many purchasers utilize that option. The fact that many other purchasers subjectively choose to have their sweepstakes prize revealed on appellants' computer terminals does not transform those computer terminals into slot machines – while the result for them may be *unknown*, the outcome is *not unpredictable*. My pregnant wife and I may choose not to learn the gender of our baby and the baby's sex will be unknown until the time of birth, but the baby's gender is absolutely knowable and predictable prior to birth.

A prohibited "slot machine" must objectively be determined based on how a system works, and must not be based on a customer's subjective choice to not learn of the sweepstakes result before he or she sits down at the computer terminal and plays a slot-machine themed game. In other words, to be a prohibited slot machine under Penal Code section 330b, the outcome must be unpredictable to *all* users, as in a Lottery ticket or a traditional video slot machine; the outcome cannot be unknown to some users by choice, but predictable, as in appellants' case.

The *fact* appellants' patrons have the absolute right to find out the result of their sweepstakes entry before they go to the computer terminal defeats the argument that, when they sit down at the computer terminal and play a slot-machine themed game, the outcome is unpredictable by them. That is simply not a true statement of fact. The sweepstakes outcome is absolutely predictable and knowable by appellants' patrons; they simply have to ask.[2]

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[2] The out-of-state cases cited by respondent (RA, pp. 26-33) are not on point, as they deal with statutes and laws different than California's, and they are also factually off point. For example, in *Moore v. Mississippi Gaming Commission* (2011) 64 So.3d 537, a customer who purchased $5.00 or more of "phone time" had to complete the sale through the computer terminal. Appellants' phone card is a stand-alone legitimate phone card on par with AT&T and Verizon.

Barber v. Jefferson County Racing Association (2006) 960 So.2d 599, *United States v. Davis* (5th Cir. 2012) 690 F.3d 330, and *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, are "Internet time" cases and necessarily did not consider the *Regal Petroleum* issue that appellants' phone cards are a legitimate product. Indeed, in *Lucky Bob's*, the District Court noted that only 3% of the Internet time purchased was used by the customers. (Slip. opn. *3.) This is a far cry from the over 30% usage rate of appellants' phone card. Moreover, as its features are on par with the phone cards offered by AT&T and Verizon, appellants' phone card is undoubtedly a legitimate product.

CONCLUSION

Respondent argues that as appellants "indisputably have gone to some lengths to completely mimic illegal gambling," they "should not now complain that their efforts" have been "judicially recognized" as an "illegal gambling device." (RA, p. 21, fn. 8.) Respondent's argument misses the mark. A parrot that mimics a human is still a parrot. Something that looks like a duck, which is a bird, may be a platypus, which is a mammal.

Appellants sell a valuable phone card with a sweepstakes feature where the sweepstakes prize *may* be revealed on computer terminal utilizing a slot-machine themed game, but that does not make that computer terminal a prohibited slot machine under Penal Code section 330b.

First, appellants' sweepstakes feature is in full compliance with long-standing California sweepstakes law, and respondent's attempt to rewrite that law to engraft an indefinable subjective component seeking to divine a user's "actual purpose," and to engraft an indefinable "percentage of use" component, simply because respondent does not approve of appellants' business model, is unwarranted, unworkable, and leads to absurd results.

Second, respondent's proposal to reinterpret existing law so that any legitimate product coupled with a chance to win cash prizes is now prohibited; and that a prohibited "slot machine" is found where the sweepstakes "outcome is unpredictable by the user," is unwarranted, unworkable, and overbroad, as it criminalizes a vast majority, if not all business sweepstakes in California.

Finally, even if the Court were to somehow adopt the overbroad "outcome unpredictable by the user" test, appellants' sweepstakes is still legal, as its "Quick Redeem" feature makes the sweepstakes outcome

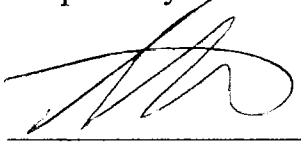
absolutely predictable and knowable by the user before he or she sits down at a computer terminal in appellants' store, and instead chooses to reveal whether he or she has won a prize using a slot-machine themed game. The result may be unknown to them, but it is completely predictable.

The "Quick Redeem" feature sets apart appellants' sweepstakes from the California Lottery and traditional video slot machines, as the outcome in those games is *necessarily and always* unpredictable by the user as there is no means to determine the result beforehand; appellants' sweepstakes outcome, contrarily, is always *predictable* and may be determined before the patron sits down at appellants' computer terminal; he or she just has to ask.

Penal Code section 330b's "unpredictability to the user" element must apply to all users. This element is not met where the result is *unknown* for those users who choose not to find out whether their ticket is a winner, but where the outcome is nonetheless predictable and knowable. As this critical element is not met, appellants' sweepstakes feature does not convert its computer terminals into illegal slot machines under Penal Code section 330b. The *Grewal* case was wrongly decided and its holding should not be allowed to stand.

February 4, 2015

Respectfully submitted,



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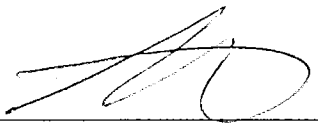
WORD COUNT CERTIFICATE

Counsel of record hereby certifies, pursuant to rules 8.204 and 8.360 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 12 pages and 3,528 words. Counsel relies on the word count feature of the computer program used to prepare this brief.

Dated: February 4, 2015



STEVEN GRAFF LEVINE

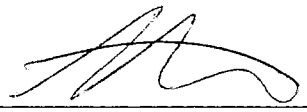
PROOF OF SERVICE

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 February 4, 2015 I served copies of the foregoing letter entitled **APPELLANTS' REPLY BRIEF** on the interested parties in this action by delivering a true copy thereof, by U.S. Mail, addressed as follows:

Deputy District Attorney Gregory Pulskamp
1215 Truxtun Avenue
Bakersfield, CA 93301

Executed this 4th day of February 2015, at Los Angeles, California.



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