**IN THE COURT OF COMMON PLEAS**
**WASHINGTON COUNTY, PENNSYLVANIA**
**CIVIL DIVISION**

JANINE LITMAN and TIMOTHY MASTROIANNI, individually and jointly,

Plaintiffs,

v.

CANNERY CASINO RESORTS, LLC, a Nevada limited liability company, WASHINGTON TROTTING ASSOCIATION, INC., a Delaware corporation, WTA ACQUISITION CORP., a Delaware corporation, CANNERY CASINO RESORTS, LLC, CANNERY CASINO RESORTS and WASHINGTON TROTTING ASSOCIATION, INC. t/d/b/a THE MEADOWS RACETRACK & CASINO, an unincorporated association, CANNERY CASINO RESORTS, an unincorporated association consisting of one or more yet unidentified natural and/or legal persons, individually and jointly,

CASE NO: 2012-8149

**PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDNANTS' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION**

On behalf of Plaintiffs

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This case was filed on December 12, 2012. Since that time, Defendants have challenged every possible substantive theory of recovery; to wit, claiming no recovery is available in contract, tort and statute. Now, as of last Thursday,[1] almost 10 months later on October 2, 2013, Defendants, for the first time, also place into dispute the very power of this Court, by claiming this Court's lack of subject-matter jurisdiction even to hear the controversy, notwithstanding that Plaintiffs' due process individual rights have not been and cannot be otherwise adjudicated: no hearing, no presentation of their evidence and no right of legal counsel.

[1] On the afternoon of October 1, 2013, the undersigned was contacted by Defendants' counsel, who, for the first time, indicated an intention to file a motion to dismiss for lack of subject-matter jurisdiction. Because the oral arguments on the pending preliminary objections were already scheduled for the following Monday, October 7, 2013, Defendants sought a conference call with the trial judge to provide notice of intention: with a motion for subject-matter jurisdiction to be filed, arguments for preliminary objections might need to be postponed. The clerk for the trial judge was contacted and the undersigned received a call from the clerk that the trial judge would hear Defendants' motion regarding subject-matter jurisdiction and the preliminary objections on Monday morning.

Quite simply, to resolve the question of subject-matter jurisdiction, we must find the source of the claim for each theory of recovery. And, in a complex mix of facts, we must keep our eye on the shell, lest the casino will cause us to lose the ball with our money.

There are 14 counts, and only Court XI finds its source from 4 Pa.C.S.A. (the "Act"); the other substantive counts rest in common law jurisprudence or other available statutes. Defendants seek to dismiss an entire case when only one single count is grounded from the subject act.

Indeed, staying focused, Defendants are impliedly shuffling together two separate analytical legal conclusions: 1) that the Act itself does not grant a cause of action to Plaintiffs; and 2) even though the law provides substantive theories of recovery independent of the Act, the Act itself subsumes every other independent substantive theory of recovery, whether in contract, tort or statute, thereby preventing relief for the injury to Plaintiffs. Defendants turn the law on its head and try to make the Plaintiffs the victims of the injury and wrongs actually done by Defendants, by application of the law itself.

As to the first item — that is, only the Act itself — let us take two corollary scenarios regarding the right of action within the Act: a) the gambling house is violating the law and its license, and a private citizen seeks to file an action for that cause without having cognizable injury thereby; and b) the gambling house is violating the law and the license, and a private citizen has cognizable injury thereby.

To illustrate, take the statement made in the Pennsylvania Gaming Control Board Press Release, dated June 26th, 2013:

> **[D]owns Racing was fined $35,000 for permitting the shredding of various documents that are required to be retained for 5 years and were therefore unavailable upon request to state auditors. In addition, Downs Racing officials failed to notify the Board of the shredding incident even though they were aware of it soon after its occurrence.**

In the above scenario, if a plaintiff citizen attempted to institute a lawsuit for the violation of the statute, they have no cognizable injury. But, in this case, Plaintiffs had their money taken from them as a fee, on the bet, in violation of the rules of game play. Plaintiffs had their

money taken from them for the same actions for which the Pennsylvania Gaming Commission issued a fine against Defendants. This is not a dispute over winnings at the back-end; this is a dispute about following rules at the front-end.[2] The argument made in Defendants' motion to dismiss for lack of subject-matter jurisdiction actually supports the dismissal of Defendant's preliminary objections, by demonstrating the duel individual and social significance of the illegal actions.

As to references to the pleading, Defendants cite to certain averments that may factually state a violation of the Act, but such factual averments are cumulative and it does not mean that, *e.g.,* the claimed legal theory of recovery is actually grounded solely from the Act.[3] In Paragraph 5 of their motion, Defendants argue that this Court must ignore Plaintiffs' separate counts, and that this Court must ignore Plaintiffs' alternative theories of recovery, and that this Court must then unify all counts and factual averments into a single count (Count XI) and dismiss the entire case on that theoretical fiction.

If Defendants' position is to be adopted, citizens can have cognizable injury done to them by the would be casino defendants, but there is no supporting cause of action in contract, or tort, or by statute, and the Pennsylvania courts itself lacks power to hear the controversy; but, the Defendants conveniently argue, the injury is apparently vindicated by theoretical process because, by accident of internal investigation and all dynamics and risks appurtenant thereto, irrespective if the matter is settled or litigated by the Commonwealth, even if a fine should be issued,

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[2] Exhibit 12 to the Third Amended Complaint contains explanatory comments and multiple legal citations as to various applicable legal provisions; said Exhibit is incorporated herein by this reference.

[3] This pleading confusion by Defendants is also represented in the preliminary objections by which Defendants actually demurred to factual averments existing within a separate count. Demurrers are inapplicable to factual averments which are not the claimed theory of recovery. For example, for Plaintiffs' Deceptive Trade Practices count, Plaintiffs averred, among other things, the facts that one or more Defendants have not complied with the Commonwealth legal requirement to qualify to do business as a foreign corporation, and that the fictitious name registration contains false or misleading information, that the federal copyright notice and trademark registration contain false or misleading information. These facts support the theory of recovery. If Defendants demurrer *to the counts* that contain these factual averments, they admit the facts as true, and if the demurrer *to the factual averments themselves*, they still admit them as true. The demurrers do not seek to change the pleading, but to test it, admitting the averments. Feingold v. Hendrzak, 15 A.3d 937 (Pa.Super 2011)

the monies taken from the plaintiffs, sit in the general fund of the Commonwealth with monies generally taxed to citizens. The civil penalty has become part of the general funds of the Commonwealth, commingled with general collections arising from taxation, effectively making Plaintiffs' monies taken illegally by Defendants at the front-end, tantamount to a tax for the Commonwealth at the back-end.[4]

Plaintiffs had their money taken from them illegally, they have not been provided the right to a hearing, have not had the right to present their evidence, nor have they been permitted to do so with legal counsel representing their interests before an independent tribunal. This Court will take judicial notice that there was a private investigation by the Gaming Control Board that resulted in the civil fine, but this investigation is not an adjudication of Plaintiffs' individual rights. Defendants contention makes the Act unconstitutional for a violation of Plaintiffs' due process rights. Pa. Constit. Art. 1, §§ 1, et. seq.; United States Constitution Arts. 5 and 14.

In paragraphs 6 through 11 of their motion, Defendants set forth the Act citations upon which they rely for their novel proposition. Clearly, the glove does not fit. In no cited provision does the law support Defendants' proposition that: 1) that the Act itself does not grant a cause of action to Plaintiffs; and 2) even though the common law and other law independently provide alternative substantive theories of recovery, the Act itself subsumes every other independent substantive theory of recovery, whether in contract, tort or statute, thereby preventing relief for the injured Plaintiffs.

Defendants' entire argument is set forth without direct citation of law, but only with a general citation generally to the Act itself in paragraph 14 of their motion, and a reference to the Gaming Control Board having "sole regulatory authority" statement in paragraph 15 of its motions.

[4] On October 2, 2013, the undersigned declares, under penalty of perjury, that he spoke with Dale Miller, of the Pennsylvania Gaming Control Board Enforcement Division, who verbally confirmed that the civil penalty went into the General Fund of the Commonwealth, commingled with Commonwealth tax dollars.

As to the former part, apparently the parties expressly agree that the Act is applicable to the harm *onto the Plaintiffs themselves*, which is certainly an important point of concession. As to the latter part, it begs the question: neither party challenges that the Gaming Control Board is the only agency of this Commonwealth that is statutorily charged to regulate and to grant licenses for gambling. The word "sole" modifies the noun-phrase "regulatory authority"; that is, the authority to regulate. 1 Pa.C.S.A. § 1903.

Defendants generally cite to *see Retail Clerks Union Pa. State Store Organizing Committee v. Com.*, 357 A.2d 244 (Pa.Commw.Ct. 1976), which is inapposite to the question. Examination of that case actually reveals the support for Plaintiffs' position. In Retail Clerks, the Court cited to Lilian v. Commonwealth, 467 Pa. 15, 354 A.2d 250 (1976), which further cited to West Homestead Borough School District v. Allegheny County Board of School Directors, 440 Pa. 113, 269 A.2d 904 (1970), 440 Pa. at 118, 269 A.2d at 907, stating:

> **This statute says in unambiguous language that, if the legislature provides a specific, exclusive, constitutionally adequate method for the disposition of a particular kind of dispute, no action may be brought in any 'side' of the Common Pleas to adjudicate the dispute by any kind of 'common law' form of action other than the exclusive statutory method. This excludes an action for injunction, or other equitable form of relief, unless the statute provides for it or unless there is some irreparable harm that will follow if the statutory procedure is followed.**

Id. (emphasis added). Of course, Defendants cannot cite to language that is not there, and the above standard is surely not satisfied for Defendants' proposition: no such language exists in the Act. Moreover, again, Plaintiffs' rights are legally natural and do not arise only by virtue of the statute, unlike collective bargaining which is a statutory construct.

In the instant case, the Act does not say that, once the licensed facility has violated the law and license, that every injured party's rights, however measured or situate, are subsumed and waived thereby for a specific statutory relief or mechanism. Even the Dispute/Complaint form addresses the initiation of an *investigation*, but does not address matters of private remedy. As averred, the Plaintiffs themselves were actually

the complainants who initiated the investigation that yielded the civil penalty, and yet Plaintiffs remain injured, and even while Defendants' demurrers admit all averments.

Indeed, to any expert in practical statistics, using Defendants' novel interpretation of the Act would actually incentivize Defendants and the licensed facilities to violate the Act again. In no cited provision does the law provide Defendants' proposition that: 1) that the Act itself does not grant a cause of action to Plaintiffs; and 2) even though the common law and other law independently provide alternative substantive theories of recovery, the Act itself subsumes every other independent substantive theory of recovery, whether in contract, tort or statute, thereby preventing relief for the injury to Plaintiffs.

The Act does not express any exclusivity to right of action in an unambiguous, specific, exclusive, constitutionally adequate method; accordingly, there is certainly subject-matter jurisdiction for the claimed injury pursuant to the other independent substantive counts, and there is no legal basis to dismiss the other common law or statutory law counts.

As to Count XI itself, Plaintiffs are certainly within the scope of the protection of the Act and certainly of the class for whose especial benefit the statute itself was enacted. Indeed, obviously from the essential core nature of the Act and the Consent Agreement, a significant portion of the Act deals with publication of, and compliance with, rules of a game in which the Plaintiffs *necessarily* participate. Second, the Act itself is clear that it exists to protect the public interests. Finally, a remedy by virtue of the Act is completely, if not necessarily, consistent with the underlying purposes of the legislative scheme to protect active injured participants in the games permitted and described by the Act. See, Estate of Witthoeft v. Kiskaddon, 557 Pa. 340, 733 A.2d 623 (1999).

In conclusion, Defendants' motion must be denied because: 1) there is no legal or factual basis for dismissal of the action, because there are causes of action which independently set forth a proper claim by common law or other applicable statutory provision; and 2) Count XI sets forth a proper theory of recovery at law pursuant to the Act.

WHEREFORE, Plaintiffs hereby request that Defendants' motion be dismissed in its entirety.

October 6, 2013

Respectfully submitted,

TEV LAW GROUP, PC

By: s/Gregg Zegarelli/
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on all Defendants on this date, by depositing the same in the United States Mail, First Class, Postage Pre-Paid, and hand delivery, upon the following:

WILLIAM L. STANG, ESQ.
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October 6, 2013

s/Gregg Zegarelli/
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