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 per-sons, individually and jointly,

CASE NO: 2012-8149

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDNANTS' MOTION FOR RECONSIDERATION

On behalf of Plaintiffs

Counsel of Record for this Party:

Gregg R. Zegarelli, Esq.
PA I.D. #52717

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.
2585 Washington Road, Suite 134
Summerfield Commons Office Park
Pittsburgh, PA 15241-2565
412.559.5262
mailroom.grz@zegarelli.com

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TO DEFENDANTS' MOTION FOR RECONSIDERATION

Plaintiffs hereby incorporate, by this reference, Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss for Lack of Subject-Matter Jurisdiction. In all prudence and caution, Plaintiffs supplement hereby.

Defendants' motion for reconsideration is groundless and without any basis for reconsideration: no new facts, and no new law, although Defendants now assert an implied, vague, statutorily unstated, mandatory, non-permissible, exclusive, requirement to "intervene" into secret Gaming Control Board investigations, which is, respectfully, clearly utter nonsense.

Defendants are not above the law and are held liable to trial and judgment for wrongs they commit. Any assertion that the General Assembly has statutorily denied the protective jurisdiction from the judicial branch of the Courts of this Commonwealth, if at all, and when the claims arise from common law rights, must be "**unambiguous language**" "**specific,**" and "**constitutionally adequate**". *See, 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.[1] Beyond the precise question before this Court, why that standard of review makes jurisprudential common-sense is well known, or should be, to every licensed attorney.

1. Defendants' core premise stated in ¶2 of its Motion is flatly incorrect. Every action by a licensed facility is, by its very nature, part of a license, but it is beyond any rational legal basis to assert that the court impliedly lacks subject-matter jurisdiction because one of the parties is a licensee.

2. Defendants' claim in ¶2 is a *non-sequitur.* "Sole regulatory authority" does not mean this Court is regulating or is challenging the regulating authority of the administrative agency for casinos (or hairdressers, or automobile licensees). It simply does not follow that because there is a tortfeasor with a governmental license, that this Court lacks jurisdiction to hear the controversy.

Ruling on a citizen's substantive legal rights who is injured by a facility that is licensed does not mean that that the Court has regulated the industry, as such, for casinos (or hairdressers or automobile licensees). Defendants' statement in ¶2 of their motion for reconsideration is not new and is, respectfully, complete ungrounded.

3. In ¶4 of Defendants' motion, they raising timing issues, for which they are estopped by their own choice of conduct. Defendants raised their subject-matter jurisdiction issue three business days prior to their intended presentation at the scheduled preliminary objection argument on October 7, 2013, their receipt of a responsive brief on a motion to dismiss within those three business days is the result of a condition they created.

4. In ¶¶4-6, Defendants merely admit that they are re-hashing what has been argued at a significantly long oral argument that this Court courteously entertained on October 7, 2013, and then ruled upon in due course. Plaintiffs arguments are varied, not resting entirely on due process issues, but the entire context stated, and, to wit, Defendants continue again to fail

[1] Only Count XI of the Third Amended Complaint (the "Complaint") is grounded in the Gaming Act. [Why there are three amended complaints is obviated by Defendants' preliminary objections to every count, last minute motion for dismissal and last minute motion for reconsideration of the order denying the motion for dismissal. It was ultimately determined no amendment to the pleading would satisfy the Defendants' continued position.]

to cite anything whatsoever meeting their burden that the legislature addressed their assertion in **"unambiguous language"** and **"specific," "constitutionally adequate method for the disposition of a particular kind of dispute," other than an exclusive statutory method.** Id.

5. Defendants argument in ¶5 and ¶7 are ungrounded or illogical. First, this Court does not need to render an opinion for a matter that can be summarily determined. Second, Defendants' claim is, once again, illogical and out of order on its face: to wit, Plaintiffs' claim and case in chief does not challenge the constitutionality of the statute or other governmental action. Plaintiffs' filing in this Court is proper. The governmental act of unconstitutionality would be for any appeal on dismissal for lack of jurisdiction.

6. Defendants argument in ¶8 and ¶16 are ungrounded or illogical.

Again as said before, we must keep our eye on the shell, lest the casino will cause us to lose the ball with our money.

a. Plaintiffs' rights and claims arise naturally under common law and do not arise by virtue of the statute, unlike collective bargaining rights, which is a statutory construct of rights grants (and which Defendants argued the first time around), or workman's compensation benefits, which Defendants now argue in ¶16 of their motion (the second time around).

b. Indeed, Plaintiffs filed a Complaint, in accordance with the procedures set forth by the Gaming Control Board. The next action for that process was a secret investigation, completely out of the control or knowledge of Plaintiffs. Without the opportunity for legal counsel, the opportunity to cross-examine or to present its claims, evidence or witnesses. Critically, what happened next was not: an adjudicative proceeding. No answer, no discovery, no "or else" deadlines, no conspicuous notice of risk of anyone losing rights or property, etc.

c. The documents relating to the investigation were not part of any open and notorious process, and, indeed, this Court can take judicial notice that documents regarding Docket 3071-2013, is part of an investigation file considered, in part, confidential under the Gaming Act, 4 Pa.C.S. §1206(f) and 65 P.S. §67.708(b)(17) relating to a noncriminal investigation.

d. This lawsuit was filed on December 12, 2012, when docket number 3071-2013 was opened **after** the filing of this lawsuit, on February 28, 2013.

e. The secret investigation remained a secret when this case was filed on December 12, 2012. That is, Plaintiffs had no reason to believe any action would occur at the Gaming Control Board. Defendants' argument of intervention regarding subject-matter jurisdiction appears to also be conditional, such that an earlier filed civil judicial case is nullified upon a later docketed consent order at the Gaming Control Board.

f. The Consent Agreement was signed on February 14, 2013, as part of a secret, non-public, investigation, that was not docketed, as a "proceeding" but as an already-executed Consent Agreement, on February 28, 2013, for a matter that was understood to be closed.[2] This Court can take notice that there was no "adjudication" of rights or such a proceeding, but a consent agreement in anticipation, or under threat by the Gaming Control Board, of instituting a "proceeding." The docket entry was necessarily opened to enter the Consent Order. Plaintiffs have no standing to attack or intervene into the Gaming Board's investigative procedures, or the Board's right to enter into consent agreements. Defendants posit that citizens should intervene into Gaming Control Board investigations and civil penalty procedures; it is not expected that Gaming Control Board would prefer that mechanism.

g. It does not follow that, because an intervention procedure exists, that it is mandatory and exclusive. Defendants raise no law or evidence that Plaintiffs have a duty to intervene, or are on fair constitutional notice of the potential for loss of claims and rights. If there is a duty to intervene, and to release a pending civil lawsuit, that duty is not stated with sufficient clarity to overcome a constitutional challenge on the basis of vagueness.

h. Plaintiffs were Complaintants, and any requirement to "intervene" would be fairly and necessary superseded by the Complaint process itself.

i. Plaintiffs, even as the complaintants giving cause to the investigation, were not permitted to be part of the investigation, were not permitted to present their evidence on their own behalf and were not provided with any notification whatsoever of their rights or process as such. Criti-

[2] See, eg., Exhibit 11 to the Third Amended Complaint, according to the Tribune Review on December 11, 2012, "The complaint has since been closed, according to the gaming board, meaning nothing came of it." Pg. 2 ¶7,

cally, Defendants present no law or evidence that Plaintiffs were even informed at any time, by some **reasonably conspicuous mechanism of legal notice**, of Defendants assertion of an implied mandatory and exclusive process for the resolution of their personal rights, or loss of claims and rights against Plaintiffs and the World.[3]

j. Defendants' convenient interpretation would render the statute vague and unconstitutional. Defendants' claim would effectively make the Gaming Act a dispute resolution procedure, before a non-judicial tribunal, to settle a wide set of tort claims otherwise grounded by other statutes and common law, by general implication, as the non-permissive, but mandatory, exclusive method of resolution, even though the statute is devoid of any statement whatsoever to that effect. To wit:

> **[S]tatute 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.**

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 (emphasis added).

k. Defendants cite to 58 PA Code § 493a.12, Intervention. However, the regulation permits intervention in a proceeding, but it does not require it, nor does it state that intervention is mandatory or exclusive. Nor do Defendants raise any argument that opening a docket to publicize a consent order is a "proceeding" as contemplated, to wit:

> **§ 493a.13(c). Consent agreements.**
>
> **(c) If the consent agreement is proposed in a matter that is the subject of a proceeding before a presiding officer, the proposal of the consent agreement will stay the proceeding until the consent agreement is acted upon by the Board.**

In this case, there was no proceeding, but an investigation to an or-

[3] This mandatory and exclusive process was never raised by any defendant, including in three sets of preliminary objections, and only three business days prior to the preliminary objection hearing on October 7, 2013, nor did Defendants' raise it at oral arguments by this Court's direct questions, with two attorneys participating for Defendants, one arguing and one reviewing the statute for responses.

der. Moreover, intervention is apparently not intended as the vehicle for the private redress of this context, but for challenges to regulatory action.[4] Intervening at the **end** of a proceeding is fundamentally useless as an intervention in "proceedings," particularly when the subject of educating the public on its creation is a secret.

l. The stretch by Defendants requires intervention into a process that Plaintiffs started. Moreover, the institution of the civil penalty is not reasonably calculated to be adverse to Plaintiffs' civil rights.

m. Defendants' entire argument for civil procedure and due process rights rests upon accidents. This case was filed on December 12, 2012, and, but for the accident of preliminary objections, there would have not be any known case into which to even claim to intervene. Or, on the accident that the investigation continued at all, or on the accident that the investigation continued and became known before the expiration of time periods to bring a civil claim. The argument is legally nonsensical.

There is absolutely no statutory notice or procedure whatsoever that Plaintiffs' rights, and the entire World's rights, will be or have been cut off and waived by the accident of an investigation reduced to a regulatory two-party consent order.

n. If the Court lacks jurisdiction, and if the Gaming Board never reduced its investigation into public docket number, or did so after the statute of limitations, into what proceeding would Plaintiff intervene? The case was known to be closed. See Exhibit 11; fn 2, *supra*.

o. Plaintiffs followed exactly the complaint procedure pursuant to the stated policy of the Gaming Board and nothing happened, with no hope of anything happening. Defendants' entire new case for intervention rests on the creation of a docket number, which resulted from a secret investigation, for which no proceeding ever occurred. This Court can again take notice that interveners apparently do not even have full party rights.[5]

7. In ¶13 of their motion, Defendants indicate that Plaintiffs were not permitted to file this lawsuit in December 2012, because the Court lacked

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[4] § 493a.12. Intervention. (h) Notwithstanding the provisions of this section, petitions to intervene in licensing hearings for slot machine licenses shall be governed by § 441a.7(z) (relating to licensing hearings for slot machine licenses).

[5] § 491a.2. Definitions. Participant—A person admitted by the Board to limited participation in a proceeding.

jurisdiction *ab initio,* because of a docket that was not yet opened of record until February 28, 2013, for a secret investigation that was then publicly unknown. Then how should Plaintiffs, and the entire World, know to have standing to challenge a two party consent agreement that was arrived at secretly during an investigation.[6] For this stage of fictions, Defendants cite to *Eastern Pa. Citizens Against Gambling v, Pa. Gaming Control Bal,* 2013 WL 3542685 (Pa. Commw. Ct. April 18, 2013) (reviewing, *inter alia,* denial of a petition to intervene as untimely), which has nothing to do with the question before this Court.

The case cited was a regulation case whereby a potential intervener (apparently an anti-gaming fanatic) was trying to stop an action which was the creature of the Gaming Act. This case is not even remotely similar to Plaintiffs' case, derived at common law for almost all of the counts claimed, rather than arising under the power of a statute. That is, only in Count IX of Plaintiffs' Complaint do Plaintiffs state a cause of action derived by the Gaming Act.[7] The proposition cited by Defendants with this case is immaterial to the question before this Court.

8. In ¶14 of their motion to dismiss, Defendants try to argue that Plaintiffs are collaterally attacking the regulatory authority's consent decree. This is ungrounded argumentative speculative conjecture. Nowhere in Plaintiffs' pleadings is a claim attacking the Consent Agree. In fact, it is Plaintiffs' expressed position that the Consent Degree is public governmental record evidence that is admissible at trial and supports Plaintiffs' common law judicial action. Indeed, as previously stated, there is no statement in the public record and docketed consent decree which indicates that the Consent Decree cannot be used as an admission against Defendants.[8] The Consent Agreement is helpful to Plaintiffs' civil trial in the same manner as a de-

[6] Defendants argument is an illogical question-begging bootstrap. The world must be fully on notice, and be patiently awaiting the accidents of internal Gaming Board investigations, to create a docket to approve an agreement secretly entered into, or else have their property and legal rights taken away from them without any of the important conspicuous notices otherwise required to deprive someone of rights and property.

[7] The court could uphold subject-matter jurisdiction whether or not it hold that there is a private right of action under the Gaming Act. The questions are legally distinct.

[8] As already stated at the first oral argument, the Consent Agreement nowhere states, as is otherwise customary, that there is no admission by Defendants in having executed the Consent Agreement.

fendant losing a driver's license and failing a sobriety test might be helpful in a civil trial.

Defendants draw a self-serving conclusion because the accident of the after-the-fact docket approving a consent decree, because of not terminating the civil action and intervening,[9] that Plaintiffs are barred from challenging the Order resolving the complaint process for which they did not afforded to have legal counsel, present evidence or witnesses or to cross-examine the Defendants. *Citizens Against Gambling Subsidies v, Pa. Gaming Control Bd.,* 916 A.2d 624, 628 (Pa. 2007). Defendants, once again, cite a completely inapplicable.[10] No count or claim of Plaintiffs' case is challenging the Consent Order; the Consent Order is supports Plaintiffs' civil action by the admission of Defendants.

9. In ¶15 of Defendants' motion, they argue the exclusive jurisdiction of the Gaming Control Board would not offend due process, even if it resulted in a forfeiture of Plaintiffs' claims, rights and property. While it is convenient for Defendants to conclude their own exculpation, that conclusion has nothing to do with the standard of review.

Back to the beginning: Defendants present no evidence whatsoever that their claim makes any practical sense, legal sense or has **unambiguous language that the legislature provided a specific, exclusive, constitutionally adequate method for the disposition whereby no action may be brought in Common Pleas to adjudicate Plaintiffs' "common law" form of action other than the exclusive statutory method."**

10. In ¶16 of their brief, Defendants argue that the Pennsylvania General Assembly may, in its discretion, substitute access to the courts with an administrative process without offending due process. *Kline v. Arden H Verner Co.,* 469 A.2d 158, 159 (Pa. 1983) (upholding the constitutionality of the Workers' Compensation Act). *Kline* is inapplicable because the rights are

[9] Apparently, Plaintiffs were to intervene, to prevent the two-party consent, because Plaintiffs should have known that the "civil penalty" was rather to be divided by some mechanism, such as a class action, to the World for all those injured, and if not allowed to intervene, appeal to the commonwealth court, so that if remanded for intervention, plaintiff would challenge the consent payment, for a new amount to be paid to plaintiffs, and possibly the world, who would need to also intervene, or if not permitted to intervene, have lost the right to file a civil action for expiration of time to sue.

[10] Defendant have already represented to this court that the question is of first impression.

statutorily created rights, bound into the statute that created them. Plaintiffs' rights for almost all counts are not statutorily created by the Gaming Act. Plaintiffs' right exist by virtue of common law, which has already been fully argued. Defendants present no evidence whatsoever that their claim makes any practical sense, legal sense or has **unambiguous language** that the legislature provided a **specific**, **exclusive**, **constitutionally adequate** method for the disposition whereby no action may be brought in Common Pleas to adjudicate Plaintiffs' common law form of **action other than the exclusive statutory method.**

11. If the process really worked the way Defendants imply, Plaintiffs initiating the very complaint procedure established by the Gaming Control Board, which Plaintiffs did, would have systematically placed Plaintiffs rights into a clear resolution procedure whereby a procedure would have been instituted for the resolution of Plaintiffs' claims, with legal counsel, presentation of evidence and clear timelines for discovery and evidence, with clear notices to the parties of the potential for loss of rights or property.

Because Defendants' arguments are completely ungrounded, argumentative and speculative, everything happened completely consistent with Plaintiffs' position. The regulatory body began internal investigation procedures and, without the necessity of a hearing on the merits regarding the license at issue, it resolved licensure and penalty issues by two-party consent and civil penalty. In the meantime, injured private parties may, such as the law makes otherwise available to them, resolve the panoply of any applicable legal rights by judicial process.

Defendants' position is so ungrounded as to be instructive.

WHEREFORE, Plaintiffs hereby request that Defendants' motion for reconsideration be denied.

October 7, 2013

Respectfully submitted,

TEV LAW GROUP, PC

By: s/Gregg Zegarelli/
Gregg R. Zegarelli

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.
2585 Washington Road, Suite 134
Summerfield Commons Office Park
Pittsburgh, PA 15241
412.559.5262
mailroom.grz@zegarelli.com

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.
BENJAMIN I. FELDMAN, ESQ.
PATRICK L. ABRAMOWICH, ESQ.
FOX ROTHSCHILD LLP
625 LIBERTY AVENUE, 29TH FLOOR
PITTSBURGH, PA 15222-3115

October 7, 2013

s/Gregg Zegarelli/
Gregg R. Zegarelli, Esq.
PA I.D. #52717

Z E G A R E L L I
Technology & Entrepreneurial
Ventures Law Group, P.C.
2585 Washington Road, Suite 134
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Pittsburgh, PA 15241-2565
412.559.5262
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