

## IN THE COMMONWEALTH COURT OF PENNSYLVANIA

POM of Pennsylvania, LLC,	:	
Petitioner	:	
	:	
v.	:	No. 503 M.D. 2018
	:	
Pennsylvania State Police,	:	Heard: January 15, 2020
Bureau of Liquor Control	:	
Enforcement,	:	
Respondent	:	

**MEMORANDUM AND ORDER**

Before the Court is the Emergency Application of POM of Pennsylvania, LLC (POM) for a Preliminary Injunction (Application) seeking to prohibit the Pennsylvania State Police, Bureau of Liquor Control Enforcement (PSP) from seizing any Pennsylvania POM Amusement Device 402.49 PEN video game machines (POM Game) and directing PSP to return all seized POM Games and all currency found therein.

This matter began on July 20, 2018, when POM filed a petition for review in our original jurisdiction seeking declaratory and injunctive relief against PSP at docket number 503 M.D. 2018.<sup>1</sup> More specifically, POM sought a declaration that the POM Game was a legal device under Pennsylvania law and that PSP lacked the power and authority to seize the POM Game and/or to initiate administrative or criminal proceedings with regard to the same. POM further sought to permanently enjoin PSP from seizing or threatening to seize POM Games and/or

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<sup>1</sup> POM filed a petition for review in a related matter on June 8, 2018, against the Commonwealth, Department of Revenue, and the City of Philadelphia (City). *POM of Pennsylvania, LLC v. Department of Revenue and City of Philadelphia (POM I)* (Pa. Cmwlth., No. 418 M.D. 2018).

initiating administrative enforcement or criminal proceedings with regard to the same.

According to POM's petition for review, POM distributes software for the POM Games, which are located in taverns, restaurants, and social clubs throughout Pennsylvania where alcohol is served under license from the Pennsylvania Liquor Control Board. The POM Games are also distributed in other commercial establishments that do not serve alcohol. The POM Game is a coin-operated video machine that offers several games, including a tic-tac-toe style puzzle, a potentially unlockable bonus session, and a "Follow Me™ colored dot-matching second phase of game play." (Petition ¶¶12-13.) If a player is ultimately successful, he or she is awarded with a combined total of 105% of the original amount spent to play. (Petition ¶27.) Cash rewards are also available.

POM maintained that the POM Game is not an illegal game of chance under section 5513 of the Crimes Code, 18 Pa.C.S. §5513, which governs illegal gambling devices. (Petition ¶¶35-36.) POM noted that in *In re Pace-O-Matic, Inc. Equipment, Terminal I.D. No. 142613* (C.P. Beaver, No. M.D. 965-2013, filed December 23, 2014),<sup>2</sup> the Court of Common Pleas of Beaver County determined that a similar game was a game in which skill predominated and, thus, it was not a gambling device per se under Pennsylvania law. (Petition ¶45.)

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<sup>2</sup> In *Pace-O-Matic*, agents of the Pennsylvania Bureau of Liquor Control Enforcement seized coin -operated video devices from a social club. *Id.*, slip op. at 1-2. Like the POM Game at issue, the devices contained tic-tac-toe style puzzles that were played for money and offered rewards and dot-matching bonus games. *Id.*, slip op. at 2-4. The court of common pleas concluded that a machine is a gambling device per se where three elements are present: (1) consideration; (2) a result determined by chance, instead of skill; and (3) a reward. *Id.*, slip op. at 5. Because the court of common pleas determined that the outcome of both the tic-tac-toe and bonus games was determined predominantly by skill, rather than chance, it held that the Commonwealth failed to prove that the seized devices were gambling devices per se. *Id.*, slip op. at 10-12.

PSP filed an answer, new matter, and counterclaim in response to POM's petition for review. In its counterclaim, the PSP alleged that the POM Game was considered a slot machine under section 1103 of the Pennsylvania Race Horse Development and Gaming Act (Gaming Act), 4 Pa.C.S. §1103. (Counterclaim ¶18.) PSP also averred that the POM Game had not been inspected or certified by the Pennsylvania Gaming Control Board (Gaming Control Board) and that POM had been acting in violation of the Gaming Act.<sup>3</sup> (Counterclaim ¶¶20-21.) PSP also maintained that POM was a manufacturer of slot machines under section 1103 of the Gaming Act, and that it had violated the Gaming Act by manufacturing slot machines without a manufacturer's license. (Counterclaim ¶¶25-27, 29-30.) Similarly, PSP contended that POM is a supplier of slot machines under the Gaming Act and that POM violated the Gaming Act by distributing slot machines without a supplier license. (Counterclaim ¶¶37-40, 42.)

POM filed a reply to PSP's new matter and counterclaim, after which PSP filed an application for summary relief in the nature of a motion for partial judgment on the pleadings with respect to its counterclaim. By opinion and order filed November 20, 2019, this Court denied PSP's application, concluding that because the plain language of the Gaming Act indicates that the General Assembly did not intend for the Gaming Act to regulate unlicensed slot machines and/or supplant the Crimes Code's regulation of the same, the POM Game is not subject to the Gaming Act. In so concluding, we relied on our simultaneous decision in *POM I*. However, we specifically noted that our denial of PSP's application did not decide the separate question of whether the POM Game was an illegal gambling device

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<sup>3</sup> 4 Pa.C.S. §§1101-1904.

under the Crimes Code, which both parties appear to acknowledge requires discovery in order to resolve.

On December 9, 2019, PSP seized several POM Games from at least three locations in Dauphin County.<sup>4</sup> (Application at 9-10.) These actions by PSP prompted POM to file the current Application on December 12, 2019. POM sought an order specifically prohibiting PSP from “seizing any [POM Game], including related POM equipment and all currency found therein, under the auspices of Section 5513 of the Crimes Code . . . or any provision of the Gaming Act . . . or otherwise commencing, continuing, instituting, and/or maintaining any adverse actions or proceedings against the [POM Game].” (POM’s Proposed Preliminary Injunction Order.) PSP filed an answer on December 18, 2019. Additionally, Greenwood Gaming and Entertainment, Inc., Downs Racing, L.P., Mountainview Thoroughbred Racing Association, LLC, and Washington Trotting Association, LLC (collectively, Amici), all slot machine licensees, filed a brief in opposition to POM’s Application asserting that the POM Games are illegal slot machines under section 5513 of the Crimes Code.

### **Preliminary Injunction**

It is well established that a party seeking a preliminary injunction bears a heavy burden of proof, as the applicant must meet all of the following criteria:

(1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the

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<sup>4</sup> Additionally, PSP seized a Ticket Redemption Terminal (TRT), a POM device that does not involve any game play, as well as currency contained in the POM Games and the TRT.

preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest.

*SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 502 (Pa. 2014); *see also Summit Towne Centre, Inc. v. Shoe Show of Rocky Mt., Inc.*, 828 A.2d 995, 1001 (Pa. 2003). “Because the grant of a preliminary injunction is a harsh and extraordinary remedy, it is to be granted only when and if **each** [factor] has been fully and completely established.” *Pa. AFL-CIO by George v. Commonwealth*, 683 A.2d 691, 694 (Pa. Cmwlth. 1996) (emphasis in original). Petitioners “must show the need for immediate relief, and the preliminary injunction, if issued, should be no broader than is necessary for the petitioner’s interim protection.” *Three Cty. Servs., Inc. v. Philadelphia Inquirer*, 486 A.2d 997, 1000 (Pa. Super. 1985); *see also Credit Alliance Corp. v. Philadelphia Minit-Man Car Wash Corp.*, 301 A.2d 816, 818 (Pa. 1973) (denial of a preliminary injunction affirmed where no showing of urgent necessity to avoid immediate and irreparable harm that could not be compensated); *Herman v. Dixon*, 141 A.2d 576, 578 (Pa. 1958) (preliminary injunction dissolved where no showing of urgent necessity to prevent irreparable harm); *Adler v. Bristol*, 475 A.2d 1361, 1363 (Pa. Cmwlth. 1984) (denial of a preliminary injunction affirmed where evidence failed to establish that an injunction would maintain the status quo and that denial of the injunction would result in greater injury).

After careful consideration, this Court finds that POM has not met its burden of proving that the injunction is necessary to preserve the status quo, that the injunction is reasonably suited to abate the offending activity, or that the injunction will not adversely affect the public interest.

At the injunction hearing, counsel for PSP presented the testimony of Pennsylvania State Police Captain James A. Jones, Jr., from the Bureau of Liquor Control Enforcement. Captain Jones testified that during the normal course of various ongoing statewide PSP investigations into illegal liquor and gambling operations over the past several years, PSP has confiscated an average of 590 gaming/gambling devices *annually*. Of these several thousand devices confiscated, approximately five to eight POM Games were actually confiscated. Captain Jones noted that the December 2019 seizures that precipitated the current Application for injunctive relief were not limited to machines supplied by POM. POM did *not* dispute these facts.

Captain Jones also testified that the POM Games have never been the direct target or focus of these investigations or seizures, but were in fact confiscated from various establishments as part of ongoing and in-depth investigations into illegal gambling operations involving a wide range of slot machines and other gaming devices from at least five different manufacturers and suppliers. Additionally, Captain Jones discussed the difficulty PSP would encounter if it were precluded from confiscating just the POM Games in the course of a seizure. Captain Jones expressed concern that the public would regard this as PSP's tacit approval of the POM Games. Further, he noted the great proliferation of these types of machines not just in licensed establishments serving alcohol, but also in establishments open to all members of the public, including minors. This Court finds the testimony of Captain James credible.

During argument, POM agreed that the PSP was clearly acting within its duties in investigating and seizing what it believes to be illegal gambling machines. *See* Section 211 of the Liquor Code, 47 P.S. §2-211 (creating the Bureau of Liquor

Control Enforcement within the PSP and authorizing it to enforce various sections of the Crimes Code, including section 5513). POM recognized that it would be inappropriate, and harmful to the public, to enjoin PSP from performing these essential duties. POM also recognized that some POM Games could likely be confiscated in larger seizures which occur as a result of ongoing and long-term illegal gambling operations. POM clearly asserted that they do not intend to challenge these isolated seizures of the at-issue POM Games *as long as* the POM Games are not the direct target or focus of the PSP investigations, raids, or seizures.

This Court recognizes that unless, or until, POM Games are considered to be illegal gambling devices under the Crimes Code, POM may suffer harms to its reputation and property interests as a result of the seizures. However, given the credible testimony of Captain Jones, POM's acceptance of the PSP's important public function in identifying and curtailing illegal gambling operations with its attendant harms, the tiny fraction of POM machines that have actually been confiscated as part of larger investigations and confiscations into illegal gambling operations, and the fact that POM does not intend to challenge these isolated seizures as long as POM is not specifically targeted, this Court finds no improper conduct by the PSP that warrants the imposition of an injunction at this time.

As it stands now, granting the relief requested by POM<sup>5</sup> would negatively disrupt the status quo by inhibiting the PSP from performing its important functions, would not be reasonably suited to abate the offending activity, and thus may adversely affect the public interest.

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<sup>5</sup> As noted above, POM sought very broad relief in the nature of an order specifically prohibiting PSP from seizing any POM Game, including related POM equipment and all currency found therein, or from commencing, continuing, instituting, and/or maintaining any adverse actions or proceedings against the POM Game.

Accordingly, the Court enters the following order:

NOW, this 21st day of January, 2020, upon consideration of the Emergency Application of POM of Pennsylvania, LLC, for a Preliminary Injunction, the responses thereto submitted by the Pennsylvania State Police, Bureau of Liquor Control Enforcement and Amici Curiae Greenwood Gaming and Entertainment, Inc., Downs Racing, L.P., Mountainview Thoroughbred Racing Association, LLC, and Washington Trotting Association, LLC, and following a hearing on January 15, 2020, POM's Application is hereby **DENIED**.



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Ellen Ceisler, Judge

Certified from the Record

JAN 21 2020

And Order Exit