

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Greenwood Gaming and Entertainment, :  
Inc.; Mountainview Thoroughbred :  
Racing Association, LLC; Chester :  
Downs and Marina, LLC; Washington :  
Trotting Association, LLC; Stadium :  
Casino LLC; Valley Forge Convention :  
Center Partners, LP, Downs Racing, LP, :  
Petitioners :

v. :

Commonwealth of Pennsylvania, :  
Department of Revenue; C. Daniel :  
Hassell, Secretary of the Department :  
of Revenue, in his official capacity, :  
Respondents :

No. 571 M.D. 2018  
Heard: June 27-28, 2019

**BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge**

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
JUDGE COHN JUBELIRER**

**FILED: July 12, 2019**

Petitioners<sup>1</sup> filed this original jurisdiction action seeking a declaration that Respondents<sup>2</sup> are violating the Pennsylvania Race Horse Development and Gaming

---

<sup>1</sup> Petitioners are Greenwood Gaming and Entertainment, Inc. (Greenwood), doing business as (d/b/a) Parx Casino; Mountainview Thoroughbred Racing Association, LLC (Mountainview), d/b/a Hollywood Casino at Penn National Race Course; Chester Downs and Marina, LLC (Chester Downs), d/b/a Harrah's Philadelphia Casino and Racetrack; Washington Trotting Association, LLC (Washington Trotting), d/b/a The Meadows Casino, Racetrack, Hotel; Stadium Casino, LLC (Stadium); Valley Forge Convention Center Partners, LP, (Valley Forge), d/b/a Valley Forge Casino Resort; and Downs Racing, LP (Downs), d/b/a Mohegan Sun Pocono.

<sup>2</sup> Respondents are the Commonwealth of Pennsylvania, Department of Revenue, and C. Daniel Hassell, Secretary of Revenue, in his official capacity (Secretary) (collectively, Department).

Act (Gaming Act)<sup>3</sup>, the State Lottery Law (Lottery Law)<sup>4</sup>, and temporary regulations attendant to the Lottery Law. In particular, Petitioners allege that certain “iLottery game[s]” that the Department offers violate the law because they simulate the appearance, feel, and player experience of “casino-style games” contrary to the Lottery Law’s express prohibition of such. Currently before the Court is Petitioners’ “Application for Special Relief in the Nature of a Preliminary Injunction” (Application). After a hearing, argument, and written submissions, the Application is ripe for disposition.

### **I. Relevant Provisions of the Gaming Act and Lottery Law**

In 2004, the General Assembly enacted the Gaming Act, authorizing gaming by way of slot machines.<sup>5</sup> The Gaming Act sets forth three categories of slot

---

<sup>3</sup> 4 Pa. C.S. §§ 1101-1904.

<sup>4</sup> Act of August 26, 1971, P.L. 351, *as amended*, 72 P.S. §§ 3761-101 to 3761-2103.

<sup>5</sup> Section 1103 of the Gaming Act defines “slot machine” as:

(i) Any mechanical, electrical or computerized contrivance, terminal, machine or other device approved by the Pennsylvania Gaming Control Board [(Gaming Board)] which, upon insertion of a coin, bill, ticket, token or similar object therein or upon payment of any consideration whatsoever, including the use of any electronic payment system except a credit card or debit card, is available to play or operate, the play or operation of which, whether by reason of skill or application of the element of chance or both:

(A) May deliver or entitle the person or persons playing or operating the contrivance, terminal, machine or other device to receive cash, billets, tickets, tokens or electronic credits to be exchanged for cash or to receive merchandise or anything of value whatsoever, whether the payoff is made automatically from the machine or manually.

(B) May utilize spinning reels or video displays or both.

machine licenses: Category 1, Category 2, and Category 3. The type of slot machine license governs the location of the facility and the fee an applicant must pay. Sections 1302-1305 of the Gaming Act, 4 Pa. C.S. §§ 1302-1305.<sup>6</sup> The number of Category 1 licenses is limited to seven, Category 2 licenses to five, and Category 3 licenses to two. The General Assembly expanded the Gaming Act in 2010<sup>7</sup> (2010 Amendments) to allow slot machine licensees to offer table games after obtaining a table game operation certificate (table game certificate). To obtain a table game

---

(C) May or may not dispense coins, tickets or tokens to winning patrons.

(D) May use an electronic credit system for receiving wagers and making payouts.

(ii) Associated equipment necessary to conduct the operation of the contrivance, terminal, machine or other device.

(iii) A skill slot machine, hybrid slot machine and the devices or associated equipment necessary to conduct the operation of a skill slot machine or hybrid slot machine.

(iv) A slot machine used in a multistate wide-area progressive slot machine system and devices and associated equipment as defined by the [Gaming Board] through regulations.

(v) A multi-use computing device which is capable of simulating, either digitally or electronically, a slot machine.

(2) The term does not include a fantasy contest terminal within the meaning of Chapter 3.

4 Pa. C.S. § 1103.

<sup>6</sup> In 2017, General Assembly amended the Gaming Act to provide for a Category 4 license, the fee for which is determined by auction. *See* Sections 1305.1 and 1305.2 of the Gaming Act, 4 Pa. C.S. §§ 1305.1, 1305.2. The Gaming Board may issue no more than 10 Category 4 slot machine licenses. Section 1307(b) of the Gaming Act, 4 Pa. C.S. § 1307(b).

<sup>7</sup> Act of January 7, 2010, P.L. 1, 4 Pa. C.S. §§ 13A01 - 13A63.

certificate, slot machine licensees had to pay a non-refundable fee that depended on the category of the licensee and when the licensee applied for a certificate. Section 13A61 of the Gaming Act, 4 Pa. C.S. § 13A61.

The General Assembly amended the Gaming Act once again in 2017 with Act 42,<sup>8</sup> which authorizes slot machine licensees to offer “interactive games.” The Gaming Act defines “interactive game” as:

Any gambling game offered through the use of communications technology that allows a person, utilizing money, checks, electronic checks, electronic transfers of money, credit cards or any other instrumentality to transmit electronic information to assist in the placement of a bet or wager and corresponding information related to the display of the game, game outcomes or other similar information. The term shall not include:

- (1) A lottery game or Internet instant game as defined in the . . . Lottery Law.
- (2) iLottery under Chapter 5 (relating to lottery).
- (3) A nongambling game that does not otherwise require a license under the laws of this Commonwealth.
- (4) A fantasy contest under Chapter 3 (relating to fantasy contests).

4 Pa. C.S. § 1103.

The Gaming Act also defines “interactive gaming” as:

The placing of wagers with an interactive gaming certificate holder or interactive gaming operator using a computer network of both Federal and non-Federal interoperable packet switched data networks through which an interactive gaming certificate holder may offer authorized interactive games to registered players. The term shall include the placing of wagers through the use of a multi-use computing device.

---

<sup>8</sup> Act of October 30, 2017, P.L. 419, No. 42, 4 Pa. C.S. §§ 13B02 - 13B63.

*Id.*

Slot machine licensees may apply for and obtain an interactive gaming certificate and, once approved, may offer peer-to-peer interactive games, non-peer-to-peer interactive games that simulate slot machines, and non-peer-to-peer interactive games that simulate table games. For Category 1, 2, and 3 slot machine licensees, the Gaming Board may award one certificate for peer-to-peer interactive games, one certificate for non-peer-to-peer interactive games that simulate table games, and one certificate for non-peer-to-peer interactive games that simulate slot machines. Section 13B12(a.2)(1) of the Gaming Act, 4 Pa. C.S. § 13B12(a.2)(1). Like the table game certificate, the fee associated with an interactive gaming certificate is dependent on when the slot machine licensee applied for the certificate. Section 13B51(a)(1) of the Gaming Act, 4 Pa. C.S. § 13B51(a)(1). An additional fee is imposed for each type of interactive gaming certificate. 4 Pa. C.S. § 13B51(a)(2).

Act 42 also authorized the Department, through its Lottery Division (Lottery), to launch “iLottery” as a separate and distinct type of online entertainment; “iLottery [g]ame[s]” are defined as “Internet instant games and other lottery products offered through iLottery.” Section 502 of the Gaming Act, 4 Pa. C.S. § 502. “The term does not include games that represent physical, Internet-based or monitor-based interactive lottery games which **simulate casino-style** lottery games, specifically including poker, roulette, slot machines or blackjack.” *Id.* (emphasis added).

“iLottery” is defined as the

system that provides for the distribution of lottery products through numerous channels that include, but are not limited to, web applications, mobile applications, mobile web, tablets and social media platforms that allow players to interface through a portal for the purpose of obtaining lottery products and ancillary services, such as account management, game purchase, game play and prize redemption.

*Id.* Act 42 defines “lottery products” as “[p]lays, shares or chances offered by the State Lottery as well as lottery property that may be exchanged for plays, shares or chances. The term includes instant tickets, terminal-based tickets, raffle games, play-for-fun games, lottery vouchers, subscription services and gift cards authorized for sale under the [ ] Lottery Law.” *Id.*

In between enactment of the 2010 Amendments to the Gaming Act and Act 42 in 2017, the General Assembly amended the Lottery Law in 2014.<sup>9</sup> The 2014 amendments to the Lottery Law authorized the Department to offer “Internet instant games.” The Lottery Law defines “Internet instant game” in relevant part as “[a] lottery game in which, by the use of a computer, tablet computer or other mobile device, a player removes the covering from randomly generated numbers or letters which reveal whether the instant ticket is a winning ticket for which money is paid.” Section 302 of the Lottery Law, 72 P.S. § 3761-302. However, the Gaming Act defines “Internet instant games” somewhat differently, as follows:

A lottery game of chance in which, by the use of a computer, tablet computer or other mobile device, a player purchases a lottery play, with the result of play being a reveal on the device of numbers, letters or symbols indicating whether a lottery prize has been won according to an established methodology provided by the lottery.<sup>[10]</sup>

4 Pa. C.S. § 502.

Pursuant to the Gaming Act, instead of a player “remov[ing] the covering” from numbers or letters, 72 P.S. § 3761-302, the result of play is “revealed,” and in addition to revealing numbers and letters, there may also be symbols, 4 Pa. C.S. § 502. Also, instead of revealing whether the “instant ticket is a winning ticket for

---

<sup>9</sup> Act of October 31, 2014, P.L. 3041, No. 201.

<sup>10</sup> The Department’s temporary regulation at 61 Pa. Code § 876.2 defines “Internet instant game” consistent with the Gaming Act.

which **money is paid**,” 72 P.S. § 3761-302 (emphasis added), pursuant to the Gaming Act, the reveal indicates “whether a **lottery prize** has been won,” 4 Pa. C.S. § 502 (emphasis added). The Gaming Act definition was added in 2017; the Lottery Law definition was added in 2014. Importantly, Section 303(a.1) of the Lottery Law<sup>11</sup> prohibits the Secretary from offering any “Internet-based or monitor-based interactive lottery game or **simulated casino-style** lottery game, including video poker, video roulette, slot machines or video blackjack, through the State Lottery.” 72 P.S. § 3761-303(a.1) (emphasis added). *See also* 61 Pa. Code § 876.2 (definition of iLottery game).

On May 22, 2018, the Department launched its iLottery offerings for online and mobile device play. (Petition for Review ¶ 40.)

## **II. Petition for Review**

### *A. Licensing of Petitioners*

On August 22, 2018, Petitioners filed the Petition for Review (Petition) alleging as follows. Upon enactment of the Gaming Act, each Petitioner applied to the Gaming Board and received therefrom a slot machine license. Greenwood, Mountainview, Chester Downs, Washington Trotting, Stadium, and Downs Racing, as Category 1 and Category 2 slot machine licensees, each paid a \$50 million license fee. Valley Forge, a Category 3 licensee, paid a \$5 million fee. According to the Petition, Petitioners have invested more than \$2 billion in their casinos, including entertainment and resort destinations, and employ more than 18,000 Pennsylvanians. They aver that their businesses have been an unqualified boon to Pennsylvania’s economy, having produced more gaming tax revenue than other states’ gaming laws.

---

<sup>11</sup> Section 303(a.1) of the Lottery Law was added by Section 2 of the Act of October 31, 2014, P.L. 3041.

In 2016-17, it is alleged, Petitioners generated more than \$2.3 billion in slot machine tax revenue and more than \$132 million in local share funding, and Petitioners spend more than \$230 million annually with local businesses.

When the General Assembly enacted the 2010 amendments to the Gaming Act, which allowed table gaming, each Petitioner holding a Category 1 or Category 2 slot machine license paid a fee between \$16.5 million and \$24.75 million for a table game certificate, depending on when it procured the certificate. A Category 3 licensee, like Valley Forge, paid a fee between \$7.5 and \$11.2 million, depending on when it procured the certificate. The Petition alleges that in 2016-17, Pennsylvania casinos, including Petitioners, generated more than \$866.4 million in table game tax revenue and more than \$17 million in local share funding.

Like the 2010 Amendments to the Gaming Act, Act 42 allows slot machine licensees to expand their gaming options by applying for an interactive gaming certificate. If a slot machine licensee applied for an interactive gaming certificate by July 16, 2018, the fee was \$10 million. If a licensee sought an interactive gaming certificate after July 17, 2018, but before August 14, 2018, the fee was \$4 million. The maximum number of interactive gaming certificates the Gaming Board may award is one certificate per type of interactive gaming per slot machine licensee. Every five years, interactive gaming certificate holders must pay a \$250,000 renewal fee.

As of the date of the Petition, Petitioners Greenwood, Mountainview, Chester Downs, Stadium, and Valley Forge applied for interactive gaming certificates. At the time of the Petition, the Gaming Board had not yet authorized Petitioners to offer interactive gaming due to regulatory coordination and testing requirements.



Petitioners aver that the temporary regulations require that all interactive gaming by certificate holders will start simultaneously.

*B. Alleged Violations of the Gaming Act, the Lottery Law, and the Lottery Law's Temporary Regulations*

Petitioners allege that, contrary to the express prohibition in the Lottery Law, the Department offers interactive lottery games and games that simulate slot machines and casino-style games. (Petition ¶ 41.) The Petition avers that the Department continues to market its iLottery games as “Slot-Style games” and “Casino[-]Style games,” even though the Department at one time announced that such advertisements were inaccurate and subsequently corrected them. (*Id.* ¶¶ 42-43.) Petitioners allege that several of the iLottery games, including Volcano Eruption Reveal, Robin Hood, Super Gems, Slingo, Big Foot, and Monster Wins, share the same names, titles, or themes as games Petitioners offer on their gaming floors, and games that can be found on the floors of other Pennsylvania casinos and/or by online gaming operators in other jurisdictions. (*Id.* ¶ 45.)

According to the Petition, some iLottery games feature the same user interface as a slot machine and have the same interactive appearance, feel, and play experience a player would expect from land-based and online slot machines, including graphics, animation, suspenseful music, flashing lights, bells or sounds when certain combinations are hit, and similar visual and auditory features. (*Id.* ¶ 46.) Further, the iLottery games require players to “Bet,” “Set Bet,” “Choose Bet,” “Select Bet,” “Select Bet Amount,” or press a “Bet” button, as typically seen in casino-style games and slot machines. (*Id.* ¶ 47.) Several iLottery games feature symbols, such as dice, cherries, or the like, and use terms like “pick-a-card,” which are also commonly associated with casino-style games. (*Id.* ¶ 48.) Multiple iLottery games feature a

spin function, with reels or cascading symbols found in casino-style games, according to Petitioners. (*Id.* ¶ 49.) Numerous iLottery games have an instant reveal function, associated with slot machines, and allow players to proceed immediately to the next game with the press of a button. (*Id.* ¶ 50.)

The iLottery games are offered in denominations such as a penny or a dime, which are typically offered in casino slot machines and not in other lottery products. (*Id.* ¶ 51.) In addition, the Petition continues, the betting structure of iLottery games is identical to a slot machine. (*Id.* ¶ 52.) That is, a player can “buy up” or take advantage of multipliers, increasing his bets and can win additional games or higher amounts of money, a classic slot machine feature. (*Id.*) Several iLottery games offer bonus plays and spins, and “pick bonuses,” a common feature of slot machines. (*Id.* ¶ 53.)

Petitioners further allege that some iLottery games adopt the traditional 3 x 3 slot machine structure with three reels, or have adopted more recent slot machine styles increasing the number of reels or rows. (*Id.* ¶¶ 55-56.) Players win by aligning symbols horizontally, vertically, or diagonally, with bonus spins when the same symbols align. (*Id.* ¶ 55.) In multiple iLottery games, the reveal is made across the columns, also a slot machine-style reveal. (*Id.*) Some iLottery games use a “scattered play” feature, which allows a player to obtain additional bonuses by acquiring a certain number of particular symbols in a scattered or non-linear pattern. (*Id.* ¶ 57.)

The Petition alleges that all winners of lottery games are predetermined. (*Id.* ¶ 58.) Certain iLottery games, however, give the illusion of choice or decision-making like a slot machine. (*Id.*) Other games give the illusion of randomness, which is inconsistent with a lottery game. (*Id.*)

Gaming Laboratories International certifies both iLottery games and slot machines. (*Id.* ¶ 59.) Overall, according to Petitioners, the iLottery games have the same backbone as a slot machine: “an outcome determined by a random number generator with animated graphics and computer operations to provide a visual depiction of that outcome.” (*Id.* ¶ 60.)

The availability of iLottery games to persons under the age of 21<sup>12</sup> is “in direct contrast to the limitations imposed on Petitioners for interactive gaming,” and iLottery games have payouts that match the same statutory payout percentage for slot machines. (*Id.* ¶¶ 61-62.) Finally, the Department is employing similar casino tools, free play, and casino-type loyalty programs. (*Id.* ¶ 63.)

Petitioners allege that the iLottery, as described above, violates the Gaming Act, the Lottery Law, and the temporary regulations.

### *C. The Department’s Answer and New Matter*

On October 9, 2018, the Department filed an Answer and New Matter to the Petition. By way of New Matter, the Department responded that the Lottery Law specifically authorizes iLottery games and that the Gaming Act specifically authorizes the games the Department offers. (Answer and New Matter ¶ 75.) The Department contends the games offered do not simulate slot machines but rather are Internet instant games. (*Id.* ¶ 77.) According to the Department, Petitioners have not lost revenue because of the Department’s iLottery offerings. (*Id.* ¶ 78.)

Further, while the Lottery Law previously prohibited the Secretary from authorizing “the game of keno or an Internet instant game unless specifically

---

<sup>12</sup> As with other lottery products or games, iLottery games are available to those 18 years or older. See Section 309(a)(1) of the Lottery Law, 72 P.S. § 3761-309(a)(1) (“No ticket or share shall be sold to any person under 18 years of age.”).

authorized by law,” *see former* Section 303(a)(1) of the Lottery Law, 72 P.S. § 3761-303(a)(1), that prohibition was repealed by Section 35(5) of Act 42 in 2017. (Answer and New Matter ¶¶ 81-82, 84.) Thus, according to the Department, the Gaming Act and the Lottery Law specifically authorize Internet instant games through iLottery. (*Id.* ¶¶ 85, 87.)

After the close of pleadings, discovery on the Petition ensued. However, no other affirmative steps were taken to move the Petition forward to trial or to stop the Department from offering iLottery games prior to June 3, 2019.

### **III. Application and Answer**

On June 3, 2019, Petitioners filed the Application, seeking to preliminarily enjoin the Department from continuing to offer iLottery games, which Petitioners aver run afoul of the legislative prohibition against the Department offering iLottery games that simulate casino-style games. In addition to the facts pled in the Petition, Petitioners add that Parx Casino (Greenwood), Hollywood Casino (Mountainview), Harrah’s Philadelphia Casino (Chester Downs), Mohegan Sun Pocono (Washington Trotting), Stadium Casino, and Valley Forge Casino have since been issued interactive gaming certificates by the Gaming Board. (Application ¶ 9.) Petitioners further aver that, on April 16, 2019, the Gaming Board notified them that certificate holders were authorized “to commence interactive gaming operations during the week of July 15, 2019.” (*Id.* ¶ 10.) On the merits of their request for injunctive relief, Petitioners assert more details about the active iLottery games being offered, allege that those games are being advertised or marketed as casino or slot-style games, and allege that those games simulate casino-style gaming in contravention of the statutory prohibitions. They contend that, when their evidence and the equities

are considered, they have met all the requirements for obtaining a preliminary injunction.

The Department filed an Answer, denying the majority of the averments in the Application as conclusions of law to which no response is required. The Department specifically denied that it is “offering games that simulate slot machines and casino-style games” or that it is offering iLottery games “‘similar’ to games offered on Petitioners’ gaming floors.” (Answer to Application ¶¶ 22, 30.)

#### **IV. Hearing<sup>13</sup>**

The Court held a two-day hearing on the Application on June 27 and 28, 2019, at which Petitioners and the Department presented expert and lay testimony, as well as documentary and video evidence. Closing arguments on the Application were heard on July 1, 2019, and the parties submitted post-hearing memoranda of law for the Court’s consideration.

##### *A. Petitioners’ Evidence*

Petitioners first presented the testimony of John Dixon, Chief Operating Officer of Greenwood. Dixon is responsible for all computer systems and gaming at Parx Casino, including the placement of land-based slot machines. Currently, Parx Casino has an online presence in sports betting and online gaming for fun, but does not yet offer online gaming because the Gaming Board’s start date for online gaming is July 15, 2019. In deciding whether to place a slot machine on Parx Casino’s floor, Dixon relies on “ReelMetrics,” which analyzes the use and

---

<sup>13</sup> Given the timing of the Application and the urgency of the requested relief, the recitation of the testimony set forth is based on the Court’s notes and recollections, and the parties’ post-hearing memoranda, and not an official hearing transcript.

popularity of games nationally, as well as on his observations at the local level, examining the games consumers play, what games consumers like, and the availability of new games. Dixon testified that Internet gaming should be an extension of the existing land-based business. It provides the player with the same experience as if the player was in a casino and is intended to have similar games as found in a casino. Casinos reach their intended online players by general or targeted marketing, such as Facebook ads, Player's Clubs, and emails, and can tailor the games based on what online users play into a unique experience for each customer on a granular basis.

It is Dixon's opinion that the iLottery games currently offered online are very similar to casino games. For example, the Wizard of Oz game on iLottery is the same game offered on the Parx Casino floor. Dixon testified that he was involved in the legislation that became Act 42 and that the General Assembly was very cautious in determining the areas in which iLottery could operate so as not to compete with the casinos. To that end, casinos are required to sell Lottery tickets to protect against cannibalization of the Lottery. It was the General Assembly's intent to protect each revenue stream, according to Dixon, and he does not agree that the people who play the Lottery are not the same people who visit casinos.

Dixon testified that Greenwood has invested about \$20 million for the ability to offer Internet games, including the \$10 million fee for the interactive gaming certificate. It also invested \$50 million in its slot machine offerings and \$16.5 million in its table game certificates. In addition, Dixon stated, Greenwood has spent approximately \$250 million in its casino and expansions thereof, to offer dining, a poker room, and a theater. He estimated Greenwood's total investment in its Parx Casino is around the \$500 million mark. Dixon testified that Parx Casino's

experience is similar to other casinos in Pennsylvania, but that other casinos' investments would be based on their size. Dixon noted that there are additional regulations for interactive gaming certificate holders, as well as a new class of vendor license for online games.

On cross-examination, Dixon testified that he believes Greenwood has complied with all regulations allowing it to offer online interactive gaming but could not state the same for the remaining Petitioners. Further, Dixon opined that the iLottery offerings would have a significant impact on the casinos' interactive gaming offerings because the Lottery has the first opportunity to market its products. However, he acknowledged that he was unable to quantify that impact. He believes the iLottery has a competitive advantage because: (1) it has a "trust" element since it is offered by the Commonwealth; (2) iLottery does not pay taxes on the revenue it generates, whereas casinos pay a 54% tax on their total terminal revenue and must Return To Player (RTP)<sup>14</sup> no less than 85% of the revenue that slot machines generate; (3) the Department can reinvest and improve its offerings because it does not pay tax on the revenue it generates; (4) the casinos must submit games it wishes to offer to the Gaming Board for approval; and (5) casino employees must be licensed. He stated that Greenwood earned \$170 million in 2018 before taxes, interest, and depreciation.

Petitioner called Kara Sparks, Director of Products for the Lottery, as on cross-examination.<sup>15</sup> She and her team are the primary contacts for the Lottery's vendor, Scientific Games International (SGI), and assist in the development of new lottery games, with the ultimate goal being to maximize revenue from lottery games,

---

<sup>14</sup> The RTP percentage refers to the certain percentage of revenue generated by slot machines that is returned to players over the long term.

<sup>15</sup> For clarity, we discuss Sparks' direct testimony and testimony as on cross concurrently.

all of which is used to fund programs for older Pennsylvanians. From her experience developing lottery games, Sparks explained that it is common for popular themes or brands to transcend various products. In other words, popular themes or brands of products may be offered in a variety of game options. For example, a Wizard of Oz ticket may be offered at two different price points. She testified that when choosing games, the Lottery avoids certain types of games, such as those that are overtly sexual in design or are culturally insensitive, and games like roulette, poker, blackjack, and slot machines.

Sparks testified that traditional instant lottery tickets, also known as “scratch-offs” or “instant tickets,” were played as early as the 1970s. She described them as a series of tickets that are printed and programmed together to award a single prize fund divided up between the tickets. Scratch-off material is placed over programmed images on the ticket, which are play symbols. Players uncover the symbols to play the game. Sparks testified that, since their inception, instant tickets have used the word “bet” because it is part of the “law.” The price of a single ticket can range from \$1 to \$30; the Lottery could use a lower amount, but because scratch-off tickets, as physical objects, take up space at vendors, the Lottery uses higher price points to maximize the revenues from tickets. Sparks testified that instant tickets provide multiple ways to win, such as requiring the player to match different symbols either on the playing card as a whole via a scattered approach, where the symbol can be anywhere on the ticket, or in a line or column, for example, Tic-Tac-Toe style. They also have multiple games on the same card and have bonus plays. They utilize color and shapes, for example, uncovering a heart symbol on a Valentine’s Day instant ticket. Players can scratch off the covering of the symbols individually or by row or column, or can forego that process and just scratch off a



bar code on the bottom that, when scanned, indicates whether the player wins a prize. Instant tickets have a predetermined outcome. For non-winning tickets, the Lottery offers second-chance drawings where a player sent, or, now, submits online to the Lottery, the non-winning ticket for another chance to win.

Sparks was involved in the May 2018 launch of iLottery and testified that the iLottery offerings were not developed as slot machines. In developing iLottery games, Sparks looked to other jurisdictions' online lottery games for possible content or elements to borrow. She and her team then worked with artists, attorneys, and SGI to develop the iLottery games. The Lottery must approve all games offered to the public before distribution, Sparks testified, and it does not approve all games that SGI suggests. SGI develops the games, but Sparks and her team edit them to comply with the restrictions imposed upon the games. That editing can include changes to the appearance of the game (the "skin") and prize structure, but not to the game's mechanics. After the Lottery approves a game, it is returned to SGI for programming of the technical aspects of the game and for testing. Her goals are to make sure the games have a reason to be in the Lottery and to provide products that fills gaps in the product line. Sparks thinks of Internet instant games as the use of digital space to offer games similar to scratch-off games, where the funds are awarded through a reveal of symbols and numbers to show a winning or non-winning ticket. The outcome of these games is predetermined, that is, the player cannot increase the odds of winning by paying more for the play, and some games have a "reveal all" option. In her opinion, the iLottery's offerings do not simulate any casino games, including slot machines, poker, blackjack, and roulette.

Petitioners cross-examined Sparks on her "progress notes" relating to the iLottery offerings. (*See* Pet'rs' Ex. 17.) These notes included statements such as:

“[w]e are avoiding overtly Casino style games, so no Poker, Roulette, Slots, etc.”; “[i]Lottery games] are NOT online versions of our scratch-off tickets”; “[p]lanned payout will average 85% (scratch aggregate is @ 70.5%)”; “iLottery games are designed for longer play experience (across many plays) vs. a few minutes (at most) with individual traditional games”; and “[p]lease also note that these demos are from draft games received from the beginning of our project, so you could see things like euro and English pound symbols, words like ‘wager[,]’ ‘bet’ or ‘slots’ that we will be editing out as much as possible.” (*Id.*) While Sparks agreed that these were her notes, she indicated they were for herself and not for legal purposes. She later explained that these notes were not a final product or reflective of the Lottery’s position.

Further, Petitioners asked Sparks about an email from a team member, wherein the team member stated that she looked at SGI’s website and noted that SGI’s then current offerings play like slot machines and that the team “may need to press [SGI] to recreate some of [its games] into a mechanic that is iLottery appropriate . . . .” (Pet’rs’ Ex. 11.) Sparks testified that she would visit websites to see demonstrations of games, including Caesar’s Palace, and NYX, another supplier. (*See* Pet’rs’ Ex. 19 (August 1, 2018 email from Sparks to team member).) She explained that her goal was to look for content and conceptual ideas for development, for themes and names, and for other ideas that could be turned into an iLottery game, which is different from an online slots game. She testified that she found a whole section of games on Caesar’s website labeled “scratchers,” which were more like an iLottery game. She stated a button said “play slots version” of the scratcher game, which allowed the player to go to an online slots game; in this way the website offered both a scratcher version and a slots version of the same game. She and her team members

would make proposed edits to games they would like to see offered on iLottery and testified as to some edits made on the “Gorilla Gone Wild” game. These edits included removing the words “slot free games,” removing part of the game that was “slots style,” changing the word “bet” to “play” (as it is less intimidating) and the word “scratch” to “reveal,” and inserting the Lottery logo and an option for autoplay.<sup>16</sup> She testified that the developers were instructed not to simulate slot machines or other casino-style games and that SGI had experience creating slot machines.

Sparks testified that she is aware that the iLottery games are certified by a company in New Jersey but is not informed as to what that certification means. She is also aware that the Lottery’s contract with SGI provides as follows: “*Exclusive iLottery Content*. During the Term of this Contract, SGI agrees that it shall not offer any proprietary SGI digital Games to any licensed casino within the Territory,” (Pet’rs’ Ex. 4 at 7), but as a non-attorney she would not interpret it. In addition, she believed that iLottery games had a finite number or pools of play, similar to instant tickets.

William Egan also testified on behalf of Petitioners as an expert in lottery operations.<sup>17</sup> Egan is the Senior Lottery Associate for Spectrum Gaming Group, a Massachusetts-based company that supplies lottery-related services to Ohio, North Carolina, Louisiana, Rhode Island, and the District of Columbia. Egan reviewed the iLottery website, the game rules, the pay table and the price structure, and played the demonstration games. He also reviewed the games’ working papers. In his

---

<sup>16</sup> “Autoplay” is a feature that allows a player to automatically play multiple games in a row.

<sup>17</sup> Petitioners and the Department stipulated to the qualifications and expertise of the opposing parties’ expert witnesses. All experts were accepted as such in their respective fields.

opinion, the iLottery games are more akin to casino-style games because they have elements traditionally not associated with a lottery game. He identified four traditional features of instant tickets or scratch-offs: (1) a fixed price point; (2) a predetermined winner; (3) a fixed number of plays per game; and (4) a fixed payout. An algorithm is used to spread the prize pool among the number of tickets in the series.

All the iLottery games he reviewed differed from instant tickets because the player is able to choose an amount to bet, which he considered a slot machine feature. In his opinion, the autoplay and reveal all features were more like the mechanics of a slot machine. Egan did not consider the reveal all to be like the “scratch to cash” feature of instant tickets, which is a covered bar code that can be scratched to validate the instant ticket as a winner. This “scratch to cash” method of reveal, according to Egan, is not really playing a game. In traditional instant ticket games, once the top prize is awarded, the tickets are pulled from retailers; however, with iLottery, anchor games are reordered, and a new prize pool is established. The iLottery games show a pay table, but it is unclear as to how a game terminates. He noted that music is not typically associated with traditional instant tickets, nor are animation and autoplay. Egan testified that one iLottery game, Pennsylvania Payout, is similar to a traditional instant ticket, although the player can adjust the amount of the wager; otherwise it looks like an instant game. However, he stated “slots-style elements” were in all iLottery games.

On cross-examination, Egan acknowledged that he is not a computer programmer, or a game designer, he has not worked in Pennsylvania, and he may not be familiar with the full historical product lines of the Lottery. He performed no studies of Pennsylvania players. He further acknowledged that some lottery games,

such as draw games,<sup>18</sup> allow players to increase their bets. He agreed that online social games use graphics, sounds, and animation but do not use slot machine mechanics.

Petitioners next offered the testimony of David Lyons, a Senior Slot Associate for Spectrum Gaming Group, as an expert in industry standards for casino games. Lyons reviewed the iLottery's offerings and most of the documents in this case. He also viewed casino websites and visited land-based casinos. In his opinion, nearly all the iLottery games simulate slot machines. Lyons testified that, historically, a slot machine physically had reels and a lever and was a 3 x 3 matrix. However, slots have evolved over time and made more exciting for the player. For example, matrices have been expanded and technology has allowed for enhanced graphics, high definition graphics that explode on the screen, and sounds. Features that appeal to players, like bonus games, have been added. Modern day slot machines allow a player to put money into a bill selector, select the denomination the player wants to play (the wager), and choose among the various types of machines. The basic is a 3-reel video, but some have 9-10 reels. There can be graphics, such as spinning reels or honey combs where tiles flip over and reveal combinations, with all shapes and sizes. He believes that online slot machines are similar to land-based games because they offer the same play experience: varying of the wager; similar themes; ability to pick games; and use of matrices/grids. Slot machines, including online slot machines, use a random number generator (RNG), meaning that a computer program in the slot machine or online game constantly generates numbers using a mathematic equation to determine the outcome of the game. He explained that the "theoretical

---

<sup>18</sup> A draw game appears to be one where players select numbers in a given range with the hope of matching those numbers when a machine randomly pulls numbered balls. The Lottery offers draw games at various times of the day and participates in multistate games.

payout percentage” for slot machines is between 85% and 99%. Lyons described the game “mechanics” of slot machine play as cascading tiles dropping into place or the (illusion of) spinning reels, and when the cascade or spin is complete, the slot machine reveals a line or row of symbols or numbers in a combination that may result in a win. He explained that slot machines typically offer bonus games (a game within a game), and free games (a separate game), either of which a player earns if a particular symbol or combination of symbols is revealed.

Lyons reviewed the active iLottery games and noted that they have features similar to slot machines, such as bonus plays and matrices. At this point in Lyons’ testimony, a series of videos were played. (*See Pet’rs’ Ex. 29.*) The videos depicted the following casino games next to the iLottery counterparts of games with the same or similar name: Volcano Eruption; Foxin Wins; Monster Wins; Gorilla Go Wild; Tumble Together/Jungle Tumble; and Wizard of Oz. While watching the videos, Lyons explained to the Court the similarities and the differences he noted between each casino online or land-based game and the iLottery version. Similarities included the use of the same symbols, same buttons such as “play” and “bet,” use of autoplay, the ability to modify the pay structure, and the same game names. The casino version of some games shows the end result of a play after a “burst”; some iLottery games use a “pop” to show the symbols or numbers. Some differences included that the words “Play Slot” appear on some casino games, whereas iLottery uses the word “reveal” or “scratch.” Some iLottery games have different symbol matrices than the casino counterpart.

Lyons also testified as to a chart that he created, which was introduced by Petitioners as Exhibit 3. His chart identifies the active iLottery games he reviewed by name and indicates, in Lyons’ opinion, whether the game had “slot features,”

meaning: whether the game mechanics, such as a spin button, are the same; whether the game uses a slot-style mechanic, such as bonus games; whether matrices common to slot machines are used; and whether the game plays like a slot machine, either online or land-based. (*Id.*) In that exhibit, Lyons indicates that, of the 40 iLottery games he reviewed, 24 used all 4 “slot features,” 3 used 3 features, 7 used 2 features, 3 used 1 feature, and 2 used no features. (*Id.*)

On cross-examination, Lyons was unsure whether iLottery games use an RNG, but he later stated that, based on an online conversation he had with an unidentified Lottery employee, the Lottery does use an RNG in determining winning plays. He agreed that the iLottery games do not depict spinning reels or use words such as “slot machine.” Lyons’ review of the iLottery games found nine games using the same names and symbols as slot machines. He agreed, however, that casinos do not own the rights to brands such as the Wizard of Oz. As to pay structure, Lyons testified that slot machines typically pay a higher percentage back to the player, depending on the market. Lyons further testified that traditionally lottery games do not use the word “bet”; however, he did not know that the Lottery Law has used that word since the 1970s. In his opinion, the iLottery offerings give the illusion of choice and interaction by the player, although he was not sure whether all iLottery games are predetermined.

#### *B. The Department’s Evidence*

In opposition to the Application, the Department first offered the expert testimony of Rhydian Fisher, President of Instant Win Gaming, which produces instant win games. Fisher explained that iLottery games are interactive versions of scratch-offs that have evolved from the same roots as physical tickets. There is

animation to reveal whether the ticket is a winner; the reveal is really about entertainment, and they have improved the way a winner is revealed. iLottery games function like a paper ticket; the player has no control over the outcome, and no action of the player can change the odds of winning as the outcome is predetermined. Although iLottery games function like a paper experience, they are not restricted by paper, just as one does not need to turn pages of magazines viewed online. His opinion is that entertainment is more important to lottery players than winning money, and there is a need to make it fun. Using the word “bet” may scare off players who do not consider themselves “gamblers.”

Fisher identified two games that have both iLottery and paper versions: Jungle Tumble and Monopoly. iLottery games replicate physical tickets just with more sophisticated graphics and, like casinos games, borrow from other forms of entertainment. Fisher observed that game makers often borrow graphics from their own games when developing lottery games and slot machines. In some cases, an online casino scratch-off game will have a link to a slot machine of the same theme. Casino games, in Fisher’s opinion, do not inspire iLottery games.

He opined that the Lottery and casinos do not draw players from the same pool of people and that casinos and online lottery games coexist all over the world. He further stated that iLottery games do not work well in casinos. To that end, Fisher viewed casino websites, noting that the websites have different tabs for accessing scratch-off games and slot machines. To Fisher, this is a recognition by the casinos that scratch-off games are not slot machines. He further observed that the certification of iLottery games by an independent agency is not certification of the type of game (slot machine versus iLottery game, for example), but is really a



certification that the game plays as described in the game's rules. In his opinion, the iLottery games do not simulate poker, roulette, blackjack, or slot machines.

On cross-examination, Fisher stated that lotteries are a game of math and distribution. Online lottery games, such as iLottery, work like and have the same prize structure as a paper instant ticket. He reiterated that a player cannot change the odds of winning regardless of what the player does to enhance his gaming experience. Additionally, if a player pays more for an online instant ticket, it does not increase the odds of winning, unlike a slot machine player who, by increasing the wager or by playing multiple play lines, can increase the player's odds of winning. Fisher testified that the RTP of an online lottery ticket is typically lower than a slot machine and that online slot machines usually have a higher RTP than land-based slot machines because the online field is highly competitive. Fisher reiterated he did not see iLottery as competition for casinos and that the two types of online games coexist in other jurisdictions and other countries, although he acknowledged that he does not know whether those jurisdictions have legislation similar to Act 42.

The Department next presented the expert testimony of Timothy Ryan, Senior Project Manager at SGI. Ryan began his career designing consumer video games, later designed land-based and online slot machines and social poker games, and now is responsible for the design and development of Pennsylvania's iLottery offerings. As a game developer, he uses graphics, animation, and sounds, like those found in consumer video games, to make the iLottery games more entertaining and to meet consumer expectations. Ryan testified that the iLottery games are not slot machine games. Ryan explained that slot machines consist of a series of reels, which move independently. An RNG is used to stop the reels at intervals. If the symbols align,

the player wins in proportion to the amount wagered. Each reel is a different length, and the symbols thereon are weighted differently. The use of pay lines, which allows a player, prior to starting the game, to select the number of lines that increases the prize awarded if the correct symbols align, are unique to slot machines. The RTP is not a static figure but is controlled by the casino, and may require adjustment to draw players to the slot machines.

Ryan testified that game designers are like musicians, and they are influenced by games they play just as musicians are by the songs they hear; both mix and match features to come up with something new. It is common for game designers to borrow from other game genres. For example: slot machines have borrowed the concept of a progressive meter (a jackpot that grows similar to a lottery draw game in which every person who plays the game gives a little and the player who wins gets a huge payout) from the lottery; free games from the lottery (offered in scratch-offs since the 1970s); the wild symbol from poker; and bonuses and multipliers from pinball machines. Slot machine designers borrowed various features from the video game industry include the “explosive scatter,” for which Ryan has a patent, platforms from games like Mario Brothers, and cascading tiles/reels, as in Jungle Tumble, from the game Tetris. Similar to video games, slot machines began “layering,” that is, offering more ways to win on a single play.

Ryan testified that, in designing the iLottery games, he started from scratch as it was not the intent to convert slot machines into iLottery games. A different math model is used to determine winning and losing plays in iLottery games while keeping the RTP in mind. He recognized that the Gaming Act and Lottery Law place restrictions on iLottery games and opined that: the reveal all on an iLottery game is permissible; iLottery games have no weights or reels; a change in the amount

paid for a play does not increase the chances of winning; and iLottery games are predetermined in outcome and are based on the targeted prize, which is in contrast to slot machines, where the wins are calculated using an RNG.

Ryan viewed the videos offered during Lyons' testimony and noted that the iLottery versions of the games played in the videos were not the typical methods of playing those games. iLottery games can be played by clicking on individual squares within the matrix to reveal the symbol, or a player can choose the reveal all function, where all symbols are revealed at once. The reveal all feature, he believed, is similar to the traditional instant ticket's option of revealing the bar code to see if the ticket is a winner. Ryan testified that the autoplay feature is not available on land-based slot machines in the jurisdictions with which he is familiar.

Ryan identified other differences between slot machines and iLottery games. Slot machines offer the availability to win on a number of pay lines, a feature absent from iLottery games. Slot machines offer "wild" symbols, which are not available on iLottery games due to functionality. Prize tables are visible on iLottery games but not on slot machines. iLottery rules are simple and easy to understand, according to Ryan. Slot machines are more complex to understand, and this is part of the reason that the two differ in the demographics of players. According to Ryan, the different game mechanics is what keeps a player going back to either iLottery games or slot machines. Based on his experience playing slot machines and iLottery games, he believes slot machines are more entertaining and complicated and offer a variety of ways to win, but iLottery games attract players that want something easier to understand. In his opinion, iLottery games do not simulate poker, blackjack, roulette, slot machines, or casino-style games.

On cross-examination, Ryan was asked what “simulate” means and agreed that a player’s experience is important. He further noted that most current slot machines only appear to have spinning reels, and he acknowledged that some slot machines use cascading tiles. He disagreed with the suggestion that iLottery games have pay lines similar to slot machines, as a player cannot wager on a pay line in an iLottery game. Ryan also explained that a “scatter” on a slot machine allows a player to win if the required combination appears anywhere on the screen, rather than just on a pay line. Slot machine developers did not create the “explosion” that indicates a winner but borrowed the feature from films and video games. He indicated that all games use graphics, animation, and sounds in order to help a player appreciate a win more. He stated that early video games did not contain graphics and were pixelated, but as technology developed, games started to include graphics. While the appearance of a game, the skin, can be a draw to the game, it is the mechanics of the game that keep the player returning to it. On re-direct, Ryan clarified that the player experience is not the only consideration when speaking of what “simulate” means. Upon the Court’s inquiry, Ryan testified that when a player opts to play an iLottery game, the game is randomly pulled from a pool of games with predetermined outcomes.

The Department’s last expert witness was Michael Lightman, an independent consultant in the slot and internet gaming industry. He explained the historical precedent for electronic instant games going back to 1989, as self-service, free-standing terminals located at a retailer where scratch-off style games could be played on a screen. They spread to stores, bars and taverns around the world in the mid-1990s. Lotteries began taking advantage of the personal computer era and looked at how lottery games could be offered online. Some games allowed a player to

purchase a paper ticket, uncover a code, and then input that code into a website to reveal whether the ticket was a winner. Not every jurisdiction participated in this method of play. As a result, the lotteries created a type of second chance play. This required the player to purchase a ticket at retail, and if not a winner, the player could take the ticket home and play for a second chance to win on the lottery's website. Continuing to evolve, European lotteries began playing online games, where the player opens an account, deposits money, and plays games on a website. Canada followed. In 2007, Minnesota was the first state to offer online lottery games, and, in 2011, Michigan began offering interactive instant lottery games on the Internet. Several states now offer Internet lotteries: Pennsylvania, New Hampshire, Rhode Island, and soon, Massachusetts.

Lightman also described the evolution of electronic scratch games over the years, with online games mimicking the scratching off of the cover one symbol at a time using animation and graphics. Lightman reiterated that there is a history of using brands and themes in lottery games as far back as 1995. He indicated that there is a crossover of brands in both lotteries and casinos, and some casinos offer both scratch-off tickets and slot machines in the same brand or theme.

Lightman testified that the features to which Petitioners object as "casino style," such as bonuses and the word "bet," have long been associated with lottery games. The use of matrices are not exclusive to slot machines; they have been used in lottery games for years. Autoplay and reveal all are both features commonly used in the lottery industry; autoplay is used as a matter of convenience for players, and reveal all was used to reinforce that the outcome was predetermined and to cater to those players that do not want to take the time to uncover the symbols individually. He stated that the mechanics of slot machines and iLottery games are not the same.

iLottery games are traditional predetermined instant games repurposed for iLottery. The “bet” structure is always proportionate to the price to play, whereas in casino slot machines an increase in payout entices the player to bet more. Pay lines are specific to slot machines and allow a player to maximize a prize by betting more money. Lightman indicated that the certification of games does not mean that the game is certified as a particular type of game. Certification, rather, indicates that the game is truly random, its payouts are as advertised, and the game is fair to the player.

When iLottery was being developed, Lightman agreed that he recommended to the Department that iLottery contracts have an exclusivity provision, but he has not read the particular provision contained in the iLottery’s contract with SGI and its affiliate vendors. He opined that lottery games generally do not attract the same type of players as casino games and that iLottery games do not simulate slot machines, poker, roulette, or blackjack.

On cross-examination, Lightman testified that he was unsure whether any other jurisdiction had legislation similar to Act 42. He further testified about the Volcano Eruption video, depicting a casino’s version of the game and the iLottery game. He opined that both versions are intended as scratch-off games because the casino’s online version has a link to “Play Slots,” which when followed transfers the player to the casino’s online slot machine version of that game. In his experience in talking with casino operators, online games that are considered scratch-offs by the casinos include links to follow in order to play the slot machine version. In this particular instance, he questioned if a casino intended its online version of Volcano Eruption to be a slot machine, why there would be a link to “Play Slots” on that game. Petitioners also questioned Lightman regarding an article in which he was quoted as stating that 74% of slot machine players also play the lottery. He agreed

that he was quoted but would not agree to the quote's accuracy. Nevertheless, he did not state that the reverse is true, that a certain percentage of lottery players also play slot machines. Lightman could not comment on questions related to Category 2 slot machine licenses and electronic pull-tab games and whether their results are predetermined, as well.

Stephanie Weyant-Fidler, the Deputy Executive Director for Marketing and Product Development for the Lottery, also testified on behalf of Respondents. Relevantly, Weyant-Fidler testified that before the launch of iLottery, the Lottery had a website and engaged consumers by social media, such as Facebook. In 2009, it began offering, and continues to offer, a VIP Players' Club, which is free to join and offers a variety of coupons and alerts related to lottery products or promotions and play-for-fun games to its online visitors.

Weyant-Fidler stated that it was necessary for the Lottery to branch into digital areas. In 2010, the Lottery anticipated the eventual authorization to offer online games and thus began the process of putting the required infrastructure in place. It advertised the May 2018 launch of iLottery by television, direct mail, advertisements on buses and billboards, and social media. She indicated that the Lottery has invested over \$10 million in advertising iLottery. As part of its advertising campaigns, the Lottery has been working with vendor partners, affiliates, and gaming providers. The Affiliate Marketing Program for iLottery is a customer referral program, through which lottery retailers and online companies that sign up are compensated if they refer players who play. Online marketing affiliates contract with Income Access, a subsidiary of SGI, which, through SGI, contracts with the Department. The contract with the marketing affiliates contains provisions regarding marketing materials that affiliates may use or create. (*See Resp'ts' Ex. J.*)

Weyant-Fidler testified as to three incidents where marketing affiliates, without authorization or approval from the Lottery, advertised iLottery games using “slot-style,” “casino[-]style,” or other “slot” phrasing. In particular, Weyant-Fidler learned of a June 27, 2018 letter to the Secretary from the 13 licensed casino operators in Pennsylvania. (Resp’ts’ Ex. D.) The letter expresses the casinos’ opposition to the iLottery offerings and reasons in support of that opposition. Of particular note, the letter references advertisements for the iLottery that include the words “Slot[-]Style Games” and “Casino[-]Style Games.” (*Id.*) In response to the June 27, 2018 letter, Weyant-Fidler contacted SGI, which then contacted the affiliate, to remove the phrase “slot-style.” (Resp’ts’ Ex. F.) SGI thereafter suggested that the Department create a style guide to help affiliates understand what would be acceptable advertising of iLottery games, which it did. (Resp’ts’ Ex. H.) A second incident occurred when SGI alerted her that the same affiliate again used a prohibited phrase in an ad for iLottery. As a result of the incident, and because it was the same affiliate involved in the first incident, the Lottery suspended the affiliate’s ability to advertise iLottery games for a period of time. A third incident occurred with a different affiliate that used the term “slots.” The affiliate was required to modify its advertisement. Weyant-Fidler testified that none of the offending advertisements had been authorized or approved by the Department.

Weyant-Fidler testified that iLottery is modeled after, but not identical to, Michigan’s internet lottery program. She testified that iLottery games are not intended to simulate slot machines and that the games borrowed from other jurisdictions were modified to comply with the Gaming Act and the Lottery Law. She likewise confirmed that brands or themes are used in various outlets, not limited to the gaming industry, and named several brands that the Lottery has used over the



years, such as Monopoly, Wizard of Oz, and Grumpy Cat. Like Fisher, Weyant-Fidler reviewed the videos to which Lyons testified. She indicated that the videos used all features of the iLottery games including autoplay and reveal all, but the default model of the game requires a player to click on each square of the matrix to reveal a symbol. A video of her playing “Volcano Eruption” in default play mode was presented. (Resp’ts’ Ex. M.) She testified that the clicking of individual squares in the matrix is akin to scratching off the cover on an instant ticket. She opined that iLottery does not desire to be associated with casino games, as iLottery and casinos have different types of games and players. She believes the Lottery’s goal is to develop games that maximize profits to fund programs for older Pennsylvanians.

On cross-examination, Weyant-Fidler indicated that iLottery launched by giving players \$5 in free play and later added other promotions. She also stated the Lottery offered promotions, such as coupons and buy one-get one free deals for traditional lottery games. In order to use the iLottery, players must be VIP Players’ Club members and have funds deposited in their iLottery accounts. As to the incidents of affiliate advertisements, Weyant-Fidler stated that the affiliate with the two incidents was one of the best sources of referral to the Lottery. When asked about the use of the phrase “interactive gaming” in the iLottery’s style guide, which Petitioners’ counsel explained was the specific term given by the legislature for the type of gaming casinos were now authorized to provide, Weyant-Fidler explained she did not associate the guide’s use of that phrase within the Gaming Act, but with a layperson’s understanding of that phrase. She further stated that the way she played Volcano Eruption, as shown in the video, was more like a scratch-off game and that all games allow a player to reveal the symbols as she did on the video.

As to the effects of an injunction, Weyant-Fidler testified that an injunction would cause the Lottery to halt advertising iLottery and the related promotions. Further, iLottery has over 100,000 player accounts, which carry different balances composed of players' money and promotional money. Although she acknowledged that the temporary regulations include ways to deposit and withdraw funds into an iLottery account, she could not comment on what the Lottery would have to do with the account balances if the Lottery is enjoined from offering iLottery.

The Department's final witness was Drew Svitko, Executive Director of the Lottery. He testified that iLottery is the Department's effort to offer convenient, relevant products everywhere with modern technology and modern trends. Svitko stated that iLottery games are not the Lottery's first online offerings. In 2004, the Lottery began broadcasting online midday drawings using animation. In 2008, the Lottery began taking steps to offer Internet games, knowing that it would be necessary to offer online games in order for the Lottery to be competitive. At that time, the Lottery sought to improve its infrastructure.

Svitko stated that he was involved in the legislation authorizing online gaming. Initially, he informed the General Assembly that the Lottery was not asking to offer online play but that if the General Assembly granted casinos that authority, the Lottery would also seek it. In addition, the Lottery would need some relief as to restrictions on its profit margin and relief to expedite procurement of services and regulatory review, which is typically an 18-month process. As to profit restrictions, the Lottery must give 25% of sales revenue to older Pennsylvanians' programs. iLottery is not part of that 25% mandate, but the average payout for the iLottery games is 87%. Further, the Lottery was allowed to procure SGI's services on an expedited basis (without the issuance of a request for proposals for the initial five-

year contract), and the General Assembly anticipated the iLottery's 2018 revenue in the 2017-18 state budget. Similarly, the General Assembly has anticipated the iLottery revenue in successive budgets. Svitko testified that the Lottery demonstrated iLottery games to key legislators before the games launched and that the minimum age to play lottery games was set by the General Assembly.

Svitko testified that iLottery currently has more than 100,000 player accounts and has generated \$375 million in revenue. The Lottery has made a \$32 million profit on iLottery games, which all goes to programs that benefit older Pennsylvanians. Svitko further offered that the iLottery provides a public benefit in that lottery winnings over \$2500 are used to offset players' obligations, such as past due child support and taxes. While he agreed the Lottery is not taxed like casinos, Svitko noted that all proceeds go to programs for older Pennsylvanians.

Svitko testified that an injunction would all but cripple the iLottery, that the projected revenue included in the budget would be lost, and that the Lottery could not recoup the money it has spent on advertising its products. If the Department is unsuccessful in defending this Application, it would be hard to regain its position. Moreover, this harm does not include the reputational harm that would befall the Lottery, in the form of negative press and accusations, morale, and lost efforts. He acknowledged that the iLottery games have multiple modes of play and that if some features were removed, game play could continue. However, he saw a risk in taking features away from players and called it a poor business decision.

On cross-examination, Svitko testified with regard to whether the Commonwealth collects taxes from most businesses, including the casinos. He did not know whether, as Petitioners represented, the Commonwealth taxed slot machine revenue at the rate of 54% of gross terminal revenue. He further stated that the

Lottery and casinos have coexisted since casinos opened in Pennsylvania and that they can coexist in the online world, as well. He also stated that players gravitate to the Lottery for a variety of reasons, which include that they feel good about the Lottery's mission and some may be intimidated by the casino experience. He acknowledged that the Lottery enjoys the public trust because it is offered by the Commonwealth. Svitko testified regarding certification of games, the point of which appears to be that certain iLottery games meet New Jersey standards.

Petitioners further questioned Svitko about the incidents of affiliate advertising that used prohibited phrases. He received a copy of a May 4, 2018 letter from the Pennsylvania casinos prior to the launch of iLottery wherein the casinos requested information about the games and asked for a demonstration. (Pet'rs' Ex. 33.) He believed that such an offer was made but he himself had no communications with the casinos. He saw the initial letter from some casinos advising the Lottery of the affiliate's advertisements. (*See Resp'ts' Ex. D.*)

## V. Analysis

### A. *Relevant Legal Standards*

Although Petitioners initially requested that the Court enjoin the Lottery from offering **all games** currently offered through iLottery, Petitioners now request the Court to issue a preliminary injunction enjoining the Lottery from offering games that include four features: autoplay, reveal all, adjustable bet, and bonus games. According to Petitioners, these four features, which are "uniquely characteristic of slot machines," (Petitioners' Post-Hearing Memorandum at 2), can be removed or disabled from the iLottery games, and then the Lottery would be able to continue to offer those modified iLottery games.

“The sole object of a preliminary injunction is to preserve the subject of the controversy in the condition in which it is when the order is made, it is not to subvert, but to maintain the existing status until the merits of the controversy can be fully heard and determined.” *Appeal of Little Britain Township*, 651 A.2d 606, 610 (Pa. Cmwlth. 1994). “A preliminary injunction [does not] serve as a judgment on the merits since by definition it is a temporary remedy granted until that time when the party’s dispute can be completely resolved.” *Id.* A party seeking a preliminary injunction bears a heavy burden of proof. Applicants for a preliminary injunction 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 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 Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003) (same). “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 the original).

Preliminary injunctions are generally preventive, designed to maintain the status quo until there is a determination on the merits. However, there is a distinction between a prohibitory injunction, which enjoins an act that will change the status quo, and a mandatory injunction, which requires the performance of a positive act to preserve the status quo. It appears that Petitioners are requesting a mandatory injunction. Because the Department launched iLottery on May 22, 2018, an injunction now would require the Department to either remove all of its games or to remove and reprogram them to exclude the features Petitioners claim violate the Gaming Act, Lottery Law, and the temporary regulations. “[W]hen a preliminary injunction contains mandatory provisions which will require a change in the position of the parties, it should be granted even more sparingly than one which is merely prohibitory.” *Zebra v. Sch. Dist. of City of Pittsburgh*, 296 A.2d 748, 750 (Pa. 1972).

With these principles in mind, we consider the evidence presented to determine whether Petitioners have “fully and completely established” each of the elements required for the issuance of a preliminary injunction. *Pa. AFL-CIO*, 683 A.2d at 694.

#### *B. Immediate and Irreparable Harm*

Petitioners must first demonstrate that an injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by money damages. *SEIU Healthcare*, 104 A.3d at 502. Petitioners argue that they can launch their interactive gaming operations in mid-July and the proximity of this date satisfies the standard for immediacy of harm. Petitioners point out that if it was

determined that the Department, as a Commonwealth agency, is immune from liability for monetary damages, the injury caused to them by the unlawful government action would be irreparable. Furthermore, Petitioners argue that the Department's violation of the Gaming Act and the Lottery Law and its temporary regulations is irreparable harm *per se*. See *Commonwealth ex rel. Corbett v. Snyder*, 977 A.2d 28, 41 (Pa. Cmwlth. 2009).

The Department argues that to meet their burden, Petitioners had to provide "concrete evidence" demonstrating "actual proof of irreparable harm." *Greenmoor, Inc. v Burchick Constr. Co.*, 908 A.2d 310, 314 (Pa. Super. 2006)<sup>19</sup> (citation omitted). The Department asserts that Petitioners did not demonstrate actual harm, so instead argue that violation of a statute is *per se* irreparable harm. However, there is no *per se* harm here, the Department argues, because there is no violation of the statute, and, therefore, Petitioners have not met this factor.

Petitioners presented the testimony of Dixon to demonstrate evidence of actual harm. Dixon testified that Greenwood, through obtaining its licenses and expanding Parx Casino's facilities, has invested more than \$500 million in the casino and that the other Petitioners have a similar experience depending on their size. Dixon testified that the continued offering of iLottery games would have a significant impact on the casinos' interactive gaming because the Lottery has had the first opportunity to market its products. Dixon acknowledged, however, that he was not able to quantify the impact the iLottery games would have on Parx Casino's offerings. He further provided reasons why iLottery will have a competitive advantage over the casinos' online gaming, including there being a "trust" factor, as iLottery is offered by the Commonwealth, and that iLottery does not have to pay

---

<sup>19</sup> Superior Court decisions are not binding on this court, but the Court may look to them for guidance. *A.S. v. Pa. State Police*, 87 A.3d 914, 919 n.9 (Pa. Cmwlth. 2014).

taxes on the revenue it generates. Dixon also testified that casinos are required to sell lottery tickets and that he believed slot players also buy lottery tickets. In contrast, several of the Department's witnesses, including Ryan and Lightman, questioned that those who play the lottery, including iLottery, would be the same as those who would want to play the online games offered by the casinos.

We agree that loss of a business opportunity and market share may constitute irreparable harm. *The York Grp., Inc. v. Yorktowne Caskets, Inc.*, 924 A.2d 1234, 1242-43 (Pa. Super. 2007). However, in this case, there has been no concrete evidence that Petitioners will lose a business opportunity. As of July 15, 2019, Petitioners will be able to offer online gaming that includes different gaming opportunities than are available through iLottery. As to any loss of market share, Dixon's statement that the Department was able to market its iLottery offerings to the public before Petitioners could offer online gaming is too general to support a conclusion that Petitioners will lose a share of the market for online offerings. Further, Dixon's acknowledgment that he could not quantify the impact, reflects speculation regarding any potential harm. Moreover, there is competing testimony about whether the markets, or players, for the two types of online offerings are the same that will have to be resolved with the merits.

While there is precedent that violation of a statute is *per se* irreparable harm, for the reasons discussed below, it is not clear at this time, that the Department's iLottery games violate the Gaming Act and Lottery Law. For these reasons, Petitioners did not meet their burden of demonstrating that they will suffer irreparable harm if an injunction is not issued.



*C. Greater Harm Will Result from Refusing to Grant the Injunction*

Petitioners must show that greater harm will result from refusing an injunction rather than from granting it and that the issuance of an injunction will not substantially harm other interested parties to the proceedings. *SEIU Healthcare*, 104 A.3d at 502. Petitioners couch this in terms of the equities and argue that the Respondents are ultimately the Commonwealth, not the Lottery, which is the agency through which the Commonwealth is acting. Petitioners argue the Commonwealth will suffer no harm should a preliminary injunction be issued because there is no harm in requiring it to follow the law or requiring the Lottery to act within the strict constraints of its enabling legislation. Further, Petitioners assert, the evidence shows that the Commonwealth would receive essentially the same return from the casinos' payment of 54% tax on their interactive gaming revenue as from the iLottery revenue. Petitioners argue that they will suffer irreparable harm, as described above, and refusing to grant the preliminary injunction allows Department to offer competing games in violation of statute, which "significantly impairs the property rights . . . pursuant to [Petitioners'] respective licenses and certificates." (Pet'rs' Post-Hearing Memorandum at 17.)

The Department contends that it will suffer greater harm if the preliminary injunction is issued. Through the testimony of Weyant-Fidler and Svitko, the Department argues it has shown that an injunction would cause the Lottery to suffer loss of significant money it spent to develop and advertise the iLottery system, loss of customer base, and reputational harm. The preliminary injunction would also harm other interested parties, such as the iLottery affiliates that would lose their anticipated revenue, the vendors that have bid on the procurement process for the

next iLottery contract, and the more than 100,000 players who have accounts with the Lottery, particularly those accounts containing balances.

In balancing the relative harms in granting, or denying, the requested preliminary injunction, the Court is mindful of the timing of the Application. The Department launched the iLottery games in May 2018. Soon thereafter, Petitioners twice advised the Department, by letter, of their position regarding the legality of those games. Petitioners obtained their interactive gaming certificates, paid their \$10 million fee, and filed the Petition alleging that the iLottery games violated the Gaming Act and Lottery Law, all in August 2018. However, Petitioners did not do anything else to stop the Department from offering those games when the Department did not change its iLottery game offerings. During the more than one year since the launch of iLottery, the Department has expended substantial funds to develop and advertise iLottery and create consumer demand. There are now more than 100,000 customer accounts, some of which have funds, which would be impacted by a preliminary injunction, as would the Lottery's affiliates. Thus, a preliminary injunction could adversely affect the Department more than Petitioners, even without consideration of whether the loss of revenue would affect programs for older Pennsylvanians and other public benefits the Lottery supplies.

A preliminary injunction does not resolve the merits of an action but is intended to be “a temporary remedy granted until that time when the part[ies’] dispute can be completely resolved.” *Little Britain Township*, 651 A.2d at 610. As such, weighing the relative harms is performed with the understanding that the preliminary injunction may need to be dissolved upon the final resolution, should the petitioner ultimately not prevail. Balancing these harms militates against the granting of the Application.

*D. Restore the Parties to the Status Quo*

Petitioners must also show that a preliminary injunction will restore the parties to the status quo as it existed immediately prior to the alleged wrongful conduct. *SEIU Healthcare*, 104 A.3d at 502. The status quo for a preliminary injunction is “the last peaceable and lawful uncontested status preceding the underlying controversy.” *Hatfield Township v. Lexon Ins. Co.*, 15 A.3d 547, 555 (Pa. Cmwlth. 2011) (quoting *In re Milton Hershey Sch. Trust*, 807 A.2d 324, 333 (Pa. Cmwlth. 2002)). Petitioners argue the status quo is the point in time before the Department started offering these games in May 2018. However, the resolution of this factor is complicated because of the time that has passed during which the Department has been offering its iLottery games. The purpose of the preliminary injunction is to keep the parties in the positions they were in when the case began so as to preserve the court’s ability to decide the matter. *Little Britain Township*, 651 A.2d at 610 (stating the purpose of a preliminary injunction is “to preserve the subject of the controversy in the condition in which it is when the order is made”). When litigation begins shortly before or after the alleged wrongful conduct began, the status quo is more readily ascertainable. Here, the status quo when the case began is that the Department was offering iLottery games, a situation that has not changed. Because of the passage of time between when the Department began offering iLottery games and the filing of the Application, it is now difficult to consider placing the parties in the positions they would have been in May 2018 as the status quo. Thus, the Court questions whether granting a preliminary injunction would restore the status quo.

*E. Clear Right to Relief/Likely to Prevail on the Merits*

The majority of the evidence presented during the hearing and the argument on the Application at the hearing and in the parties' written submissions addressed this factor: whether Petitioners as "the party seeking injunctive relief ha[ve] a clear right to relief and [are] likely to prevail on the merits." *SEIU Healthcare*, 104 A.3d at 502. As reflected in the recitation of the evidence presented at the hearing, the parties have offered conflicting expert testimony, as well as lay testimony, and other evidence.

Petitioners' evidence sought to demonstrate that the active iLottery games being offered "simulate casino-style games," 4 Pa. C.S. § 502, particularly land-based and online slot machines, in how those iLottery games look, sound, play, and pay out, and were intended to be such simulations as reflected in the iLottery games' development and advertising. Petitioners' evidence, therefore, focused on the appearance of the games, which includes the use of symbols, sounds, and animation, as well as features of the games that allow a player to increase the amount of a bet, to play multiple games in succession, and to win bonus games. In addition, Petitioners' evidence further emphasized the player's interaction with the iLottery games, thus making the games "interactive games."<sup>20</sup> Petitioners' evidence suggests that the appearance and use of sounds, animation, and features give the player the feel of playing an actual slot machine, and consequently, iLottery games "simulate" "casino-style" slot machines. Petitioners cite *Telesweeps of Butler Valley, Inc. v.*

---

<sup>20</sup> It was not clear whether Petitioners base their argument that the iLottery games are "interactive" games in violation of the law strictly on a player's ability to increase "bets" on the iLottery games or generally on the overall ability of the player to click on individual squares within a matrix to reveal the underlying symbol or to use the reveal all option. As noted above, the Gaming Act's definition of "interactive gaming" seemingly relates to the placing of wagers. 4 Pa. C.S. § 1103.

*Kelley*, No. 3:12-CV-1374, 2012 WL 4839010, at \*10 (M.D. Pa. Oct. 10, 2012), as interpreting “simulate” in an analogous context by focusing on the player experience. Petitioners also demonstrated that certain themes or brands of games are the same between iLottery games and slot machine games, whether land-based or online. Petitioners argue that the player experiences no genuine differences between iLottery games and online slots.

Conversely, the Department’s evidence sought to establish the differences between iLottery games and “casino-style” games, to show that iLottery games were neither intended to, nor do they simulate casino-style games, and that their mechanics and features utilize technology to transform historical instant games into a digital space. The Department’s evidence, therefore, emphasized the mechanics of iLottery games and slot machines. According to the Department’s evidence, iLottery games are like paper instant tickets or scratch-offs in the online world. The outcome of a play is predetermined, and no action of the player can increase the odds of winning. While a player can increase a bet, any prize is proportionate to the increase. The Department contrasts this with slot machines, which are programmed with an RNG that determines when a win occurs and the rate at which a slot machine will pay out. According to the Department, the results of a slot machine are not predetermined, and players may increase their chances for winning by increasing the amount of the bet and the length of time they play. The Department’s witnesses described the evolution of gaming across genres and platforms, and how the developers of slot machines, casino games, video games, and iLottery games all borrowed features, themes, and art from each other in order to enhance their players’ experience. The Department also explained that affiliates were responsible for errors

in advertising, which the Department attempted to remedy through sanctions and warnings.

Both parties ably presented their witnesses and cross-examined the other's witnesses, pointing out potential inconsistencies and flaws in that testimony and in the other evidence presented. And both parties presented video evidence of iLottery games played in different ways – in default mode and with all of the extra features activated. Both parties agree that the General Assembly intended iLottery and casino interactive gaming to coexist, but disagree on where the General Assembly intended to draw the line between them.

Currently, Petitioners focus on four features in iLottery games as violating the Gaming Act and Lottery Law: autoplay, reveal all, adjustable bets, and bonus games. Construing these statutes and the legislative intent with regard to the games and features at issue is challenging, as this is not a situation where the statutory language is clear and unambiguous. *C.f. SEIU Healthcare*, 104 A.3d at 506-08 (finding a clear right to relief and a likelihood to succeed on the merits was met because the statutory language was clear). Instead, the relevant statutory language is ambiguous, as demonstrated by the parties' different and reasonable interpretations of the Gaming Act and Lottery Law. *See A.S. v. Pa. State Police*, 143 A.3d 896, 905-06 (Pa. 2016).

Many important terms are not defined, or only partially defined, in the Gaming Act and/or the Lottery Law. For example, the term “simulate” is not defined in either statute, although it is used throughout both. “Simulate” is used to describe what is not included by a term, such as “Internet instant games” (“interactive lottery games which **simulate** casino-style lottery games”), 4 Pa. C.S. § 502 (emphasis added), or what is included in an “interactive gaming certificate” (“interactive games which

**simulate** table games” or “interactive games which **simulate** slot machines”), 4 Pa. C.S. § 13B12(a.2) (emphasis added). Neither statute defines “casino-style lottery games” although both times it is mentioned as limiting iLottery offerings, it is accompanied by language specifying what the term does include. For example, in the Gaming Act, iLottery cannot offer “casino-style lottery games, specifically including poker, roulette, slot machines or blackjack.” 4 Pa. C.S. § 502. In the Lottery Law, the Lottery cannot offer a “simulated casino-style lottery game, including video poker, video roulette, slot machines or video blackjack . . . .” 72 P.S. § 3761-303(a.1). The games listed, poker, roulette, blackjack, and slot machines, are traditional casino-style games. The extent to which the term “casino-style” is intended to include other, less traditional, games or features of games that may be found in casinos or on their websites, is not delineated by either statute.

Some terms are defined only in part. For example, the term “interactive,” is not itself defined, but is defined when used in conjunction with another term. The Gaming Act (Act 42) defines “**interactive game**” as not including an Internet instant game or iLottery game, 4 Pa. C.S. § 1103 (emphasis added), a definition of exclusion. The Gaming Act also defines “**interactive gaming**” as placing wagers with an interactive gaming certificate holder (slot machine licensees that have the certificates). *Id.* (emphasis added). However, the Gaming Act, as amended by Act 42, also states, as previously described, that the term “Internet instant game” “does not include games that represent physical, Internet-based or monitor-based **interactive lottery games** which simulate casino-style lottery games . . . .” 4 Pa. C.S. § 502 (emphasis added). Like the other terms, “interactive lottery game” is not defined by either statute. Which raises the question, does “Internet instant game” include “interactive lottery games” which do **not** simulate casino-style games?

Otherwise, why not just end the sentence after interactive lottery games? And, as previously described, another key term, “internet instant games” is defined differently, and potentially more expansively, in the Gaming Act than in the Lottery Law.

As mentioned, both parties have offered different, and reasonable, interpretations of the Gaming Act and Lottery Law, highlighting the ambiguity of the relevant statutory language. *A.S.*, 143 A.3d at 905-06. Interpreting the statutory language requires the terms to be understood in context. The context of these provisions is, as testified to by Dixon and Svitko, the General Assembly’s intent to provide both casinos and the Lottery the opportunity for growth and development of revenue producing Internet games, and the technological advancements and enhancements that the Internet offers. The statutes must necessarily use terms that will not impose unnecessary limitations on as-yet unknown future opportunities; however, the flexibility needed to address evolving industries creates interpretive dilemmas.

Importantly, this factor requires the Court to determine whether Petitioners have “**fully and completely**” established a **clear right** to relief and are likely to prevail on the merits when the dispute is resolved, and **not** to determine the merits at this time. *Pa. AFL-CIO by George*, 683 A.2d at 694 (emphasis added). While the side-by-side video comparisons of the iLottery games with the online or land-based casino games did highlight striking similarities, which gives the Court pause, based on the evidence presented, it is not yet clear to this Court whether the General Assembly intended to preclude iLottery games from utilizing features that appear to have been used in paper-based instant tickets or scratch-off games, or the ability to use technology to make those instant games more entertaining and attractive to



players. Thus, given the conflicting testimony and the ambiguity in the statutes, the Court cannot find that Petitioners have “fully and completely,” *id.*, established a clear right to relief at this time.

*F. Reasonably Suited to Abate the Offending Conduct*

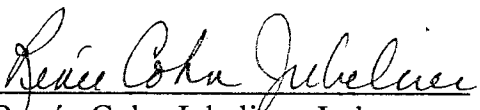
Petitioners must also demonstrate that an injunction is reasonably suited to abate the offending conduct. *SEIU Healthcare*, 104 A.3d at 502. As concluded above, it is not clear at this time that the Department’s iLottery offerings violate the Gaming Act and the Lottery Law and, thus, constitute offending conduct. Petitioners initially sought a preliminary injunction requiring withdrawal from the iLottery platform all iLottery games, and now seek to specifically enjoin the autoplay, reveal all, adjustable bets, and bonus games features of iLottery games. The record, however, lacks evidence establishing that the features to which Petitioners object may be disabled absent reprogramming of each game and whether it is reasonably feasible to do so.

*G. Adversely Affect the Public Interest*

Petitioners are required to show that a preliminary injunction will not adversely affect the public interest. *SEIU Healthcare*, 104 A.3d at 502. Petitioners correctly argue that there is a public interest in requiring the Department and the Lottery to comply with the statutory requirements. However, it is not clear that the Department is not complying with the statutory requirements. There is evidence that the public interest would be affected by an injunction to the extent that there would be less funds available to support programs that benefit older Pennsylvanians.

## VI. Conclusion

Upon review of the evidence, Petitioners have not met their heavy burden of demonstrating that they meet all of the factors required for a preliminary injunction, whether prohibitory or mandatory in nature, and therefore, the Application is denied. However, given the showing Petitioners have made, the Court will endeavor to proceed expeditiously with a resolution of the merits of the Petition in accordance with the parties' preparations for trial.

  
Renée Cohn Jubelirer, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Greenwood Gaming and Entertainment, :  
Inc.; Mountainview Thoroughbred :  
Racing Association, LLC; Chester :  
Downs and Marina, LLC; Washington :  
Trotting Association, LLC; Stadium :  
Casino LLC; Valley Forge Convention :  
Center Partners, LP, Downs Racing, LP, :  
Petitioners :


v. :

Commonwealth of Pennsylvania, :  
Department of Revenue; C. Daniel :  
Hassell, Secretary of the Department :  
of Revenue, in his official capacity, :  
Respondents :

No. 571 M.D. 2018

**ORDER**

NOW, this 12th day of July, 2019, Petitioners' Application for Special Relief in the Nature of a Preliminary Injunction is **DENIED**. The parties shall file a proposed joint pre-trial schedule, setting forth proposed deadlines for the close of fact discovery, the exchange of primary and rebuttal expert reports, and the filing of dispositive motions, by August 30, 2019. If the parties cannot agreed on a joint proposal, they shall file separate proposed schedules.

  
Renée Cohn Jubelirer, Judge

Certified from the Record

JUL 12 2019

And Order Exit