THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 12-ALJ-17-0405-CC
Appellate Case No. 2015-000292

South Carolina Department of Revenue,.....Respondent,

v.

Meenaxi, Inc., d/b/a Corner Mart,.....Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This matter came before the Administrative Law Court (ALC), the Honorable Deborah Brooks Durden presiding, in accordance with the Administrative Procedures Act, S.C. Code Ann. § 1-23-310, et. seq. (Supp. 2014) for a contested case hearing. The Respondent, South Carolina Department of Revenue (Department), issued its Department Determination to the Appellant, Meenaxi, Inc., d/b/a Corner Mart (Appellant), on May 8, 2013, wherein the Department determined that the Appellant violated S.C. Code Ann. § 61-4-580(5) (2009) by permitting an act on its premises that constitutes a crime. (R. pp. 13 – 19; Department Determination.) Specifically, the Department found that the Appellant possessed illegal gaming machines under S.C. Code Ann. § 12-21-2710 (2000). (R. pp. 13 – 19; Department Determination.) On May 21, 2013, the Appellant timely requested a contested case hearing before the ALC. (R. p. 230; Request for a Contested Case Hearing.) After several continuances, the matter was heard by Judge Durden on December 4, 2014. (R. p. 20; Hr'g Tr. 1.)

At the close of the Department's case, the Appellant moved to dismiss the case for several reasons. (R. p. 107, line 6 – p. 124, line 20; Hr'g Tr. 88:6 – 105:20.) The Appellant's first ground for dismissal was based on a due process argument, wherein the Appellant alleged that the Department failed to name the correct parties to the action and improperly failed to offer the illegal gaming machines into evidence. (R. p. 107, line 6 – p. 117, line 9; Hr'g Tr. 88:6 – 98:9.) The ALC denied the Appellant's motion on this ground. (R. p. 116, line 23 – p. 117, line 2; Hr'g Tr. 97:23 – 98:2.) The Appellant's second ground for dismissal was based on the Appellant's position that the Department failed to meet its burden of proving that the Appellant knew the machines were illegal

and that it violated § 61-4-580(5). (R. p. 117, line 10 – p. 119, line 5; Hr'g Tr. 98:10 – 100:5.) The ALC denied the Appellant's motion on this ground as well. (R. p. 118, line 24 – p. 119, line 5; Hr'g Tr. 99: 24 – 100:5.) The Appellant's third and final ground for dismissal was based on the Appellant's allegation that the Department failed to join an indispensable party. (R. p. 119, line 8 – p. 124, line 20; Hr'g Tr. 100:8 – 105:20.) The ALC also denied the motion on this ground. (R. p. 123, line 25 – p. 124, line 5; Hr'g Tr. 104:25 – 105:5.)

On January 8, 2015, the ALC issued its Order finding that the Appellant violated § 61-4-580(5). (R. pp. 1 – 7; Order.) Specifically, the ALC found that the two machines in question contained games of chance in violation of § 12-21-2710, the two machines were located on the licensed premises, and the Appellant knowingly permitted the two machines to be placed on its premises. (R. p. 3; Order 3.) The ALC also determined that revocation of the Appellant's permit was the appropriate penalty for the Appellant's violation of § 61-4-580(5). (R. p. 7; Order 7.) On January 16, 2015, the Appellant filed its Notice of Motion and Motion for Reconsideration and/or Motion for Relief from Judgment or Order and for Stay (Motion for Reconsideration). (R. pp. 167 - 170.) The Appellant's motion indicated that a supporting memorandum of law would be filed with the ALC. (R. p. 170; Mot. for Recons. 4) The Appellant never filed a supporting memorandum of law, and on January 26, 2015, the ALC denied the Appellant's Motion for Reconsideration. (R. pp. 8; Order Denying Resp't's Mot. for Recons.)

On February 4, 2015, the Appellant filed its Notice of Motion and Motion for Supersedeas with the ALC (Motion for Supersedeas). (R. pp. 171 – 172.) On February 6, 2015, the Department filed its Response in Opposition to Respondent's Notice of Motion

and Motion for Supersedeas. (R. pp. 173 – 177.) The ALC denied the Appellant's Motion for Supersedeas on February 10, 2015. (R. pp. 9 – 11; Order Denying Resp't's Mot. for Supersedeas.) The Appellant filed its Notice of Intent to Appeal and its Petition for Stay and Supersedeas with the South Carolina Court of Appeals on February 19, 2015. (R. pp. 178 – 224.) The Department filed its Return to Appellant's Petition for Stay and Supersedeas on March 3, 2015. (R. pp. 225 – 229.) The Court denied the Appellant's Petition on March 16, 2015. (R. p. 12.)

STATEMENT OF FACTS

The Appellant, Meenaxi, Inc., d/b/a Corner Mart, held an off premises beer and wine permit (32057436-PBG) at 1010 E. Shockley Ferry Road, Anderson, South Carolina (licensed premises) on February 26, 2013. (R. p. 48, line 21 – p. 51, line 14, p. 83, lines 18 – 24, p. 125, line 22 – p. 126, line 2, pp. 156 – 157, p. 166, p. 13; Hr'g Tr. 29:21 – 32:14, 64:18 – 24, 106:22 – 107:2; Dept's Exhibit 1; Dept's Exhibit 8; Department Determination 1.) Meenaxi, Inc.'s sole owner and contact person is Malkesh Patel (Mr. Patel). (R. p. 82, lines 11 – 13, p. 125, line 22 – p. 126, line 2, p. 166; Hr'g Tr. 63:11 – 13, 106:22 – 107:2; Dept's Exhibit 8.)

On February 26, 2013, State Law Enforcement Division (SLED) Agent Thomas Bielawski, along with officers with the Anderson County Sheriff's Office (ACSO), conducted several alcohol license inspections in Anderson County, South Carolina. (R. p. 30, line 11 – p. 31, line 24; Hr'g Tr. 11:11 – 12:24). One of the locations Agent Bielawski inspected belonged to the Appellant. (R. p. 31, line 25 – p. 32, line 2; Hr'g Tr. 12:25 – 13:2). When Agent Bielawski entered the Appellant's business, he identified himself as a SLED agent to Ursula Dean (Ms. Dean), a store clerk and employee of the

Appellant, who was standing behind the counter. (R. p. 52, line 11 – p. 53, line 2, p. 81, line 21 – p. 82, line 9, pp. 156 – 157; Hr'g Tr. 33:11 – 34:2, 62:21 – 63:9; Dept's Exhibit 1.) Agent Bielawski informed Ms. Dean that he was there to conduct an inspection of the licensed premises. (R. p. 53, lines 3 – 6; Hr'g Tr. 34:3 – 6.) Ms. Dean did not object to the inspection. (R. p. 53, line 2 – p. 66, line 12; Hr'g Tr. 34:2 – 47:12)

During the inspection, Agent Bielawski found two video gambling machines (machines) on the left side of the store. (R. p. 53, lines 8 – 12, pp. 156 – 157; Hr'g Tr. 34:8 – 12; Dept's Exhibit 1.) The machines were located in the public area of the store and were visible to anyone who entered the store. (R. p. 53, line 8 – 12, pp. 156 – 157; Hr'g Tr. 34:8 – 12; Dept's Exhibit 1.) The machines were both unplugged because Mr. Patel became aware that SLED and ACSO officers were in the area. (R. p. 54, line 19 – p. 58, line 12; Hr'g Tr. 35:19 – 39:12.) The machines had been in the store approximately three to six months prior to the investigation. (R. p. 127, lines 12 – 15; Hr'g Tr. 108:12 – 15.) Additionally, several receipts/coupons from the machines were crumpled up on the floor, in the trash, and behind the machines. (R. p. 58, line 13 – p. 60, line 16, pp. 156 – 157, p. 165; Hr'g Tr. 39:13 – 41:16; Dept's Exhibit 1; Dept's Exhibit 7.) The receipts/coupons serve as a fraudulent enticement for people to gamble on the machines. (R. p. 60, line 17 – p. 63, line 16, p. 88, lines 1 – 9; Hr'g Tr. 41:17 – 44:16, 69:1 – 9.) After photographing the receipts, Agent Bielawski plugged the machines in so that he could continue his inspection. (R. p. 63, line 19 – p. 64, line 2; Hr'g Tr. 44:19 – 45:2). He then observed that the machines contained poker, spinning reel, keno, and blackjack games on them. (R. p. 64, lines 6 – 13; Hr'g Tr. 45:6 – 13.) Agent Bielawski seized the machines and issued the Appellant a Violation Report (Dept's Exhibit 2) for violating §

61-4-580(5).[1] (R. p. 64, line 14 – p. 65, line 21; Hr'g Tr. 45:14 – 46:21.) Ms. Dean signed the Violation Report on behalf of the Appellant. (R. p. 65, lines 15 – 17, p. 158; Hr'g Tr. 46:15 – 17; Dept's Exhibit 2.)

After issuing the Violation Report, Agent Bielawski opened up the machines using keys provided by Ms. Dean to determine if any money was inside. (R. p. 65, line 22 – p. 66, line 6; Hr'g Tr. 46:22 – 47:6.) Ms. Dean then called Mr. Patel and handed the phone to Agent Bielawski. (R. p. 66, lines 6 – 8, pp. 156 – 157; Hr'g Tr. 47:6 – 8; Dept's Exhibit 1.) Mr. Patel told Agent Bielawski that the Corner Mart was his store. (R. p. 66, lines 8 – 9; Hr'g Tr. 47:8 – 9.) Mr. Patel then explained that the machines belonged to Encore Entertainment, that he split the profits with Encore Entertainment fifty-fifty, and that Mitesh Patel with Encore Entertainment came to the store every Monday or Tuesday to collect the money from the machines. (R. p. 66, lines 9 – 21, p. 128, lines 6 – 7, pp. 156 – 157; Hr'g Tr. 47:9 – 21, 109:6 – 7; Dept's Exhibit 1.) Additionally, Mr. Patel testified that if a person playing a game on one of the machines won a hand, the Appellant paid the person whatever the machine said to pay him. (R. p. 127, line 23 – p. 128, line 3; Hr'g Tr. 108:23 – 109:3.)

After Agent Bielawski completed his inspection of the licensed premises, he took the machines to the ACSO Armory where they were viewed by Magistrate Lollis. (R. p. 66, line 23 – p. 67, line 1, pp. 156 – 157; Hr'g Tr. 47:23 – 48:1; Dept's Exhibit 1.) Magistrate Lollis determined that the machines were illegal and issued an Order of

[1]Agent Bielawski received training regarding how to identify illegal video gambling machines. (R. p. 31, lines 1 – 9; Hr'g Tr. 12:1 – 9.) Specifically, he learned to look for games on the machines such as poker, keno, blackjack, and craps, which pursuant to § 12-21-2710 are clearly illegal games of chance in South Carolina. (R. p. 31, lines 10 – 20; Hr'g Tr. 12:10 – 20.)

Destruction on March 1, 2013. (R. p. 67, line 5 – p. 71, line 14, pp. 159 – 160; Hr'g Tr. 48:5 – 52:14; Dept's Exhibit 3.) On December 18, 2013, Magistrate Eubanks issued a Final Order upholding the March 1, 2013 Order of Destruction. (R. p. 71, line 15 – p. 72, line 9, pp. 161 – 162; Hr'g Tr. 52:15 – 53:9; Dept's Exhibit 4.) Finally, pursuant to Magistrate Lollis' Order, the machines were destroyed. (R. p. 72, lines 20 – 25; Hr'g Tr. 53:20 – 25.)

ARGUMENTS

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. Olson v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008); Turner v. S.C. Dep't of Health & Envtl. Control, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); Clark v. Aiken County Gov't, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). S.C. Code Ann. § 1-23-610(B) (Supp. 2014) provides the applicable standard:

> The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:
>
> > (a) in violation of constitutional or statutory provisions;
> > (b) in excess of the statutory authority of the agency;
> > (c) made upon unlawful procedure;
> > (d) affected by other error of law;
> > (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole

> record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This Court may not reverse the ALC's decision unless it is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The South Carolina Supreme Court explained that in making this determination, "this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALC reached." Barton v. S.C. Dep't of Prob. Parole & Pardon Servs., 404 S.C. 395, 401, 745 S.E.2d 110, 113 (2013) (citing Hill v. S.C. Dep't of Health and Envtl. Control, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010)). "The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." Original Blue Ribbon Taxi Corp. v. S.C. Dept. of Motor Vehicles, 380 S.C. 600, 605, 670 S.E.2d 674, 677 (2008) (internal citations omitted). Therefore, this Court should affirm the ALC's decision if it is supported by substantial evidence in the record. Original Blue Ribbon Taxi Corp., 380 S.C. at 604, 670 S.E.2d at 676 (internal citations omitted).

Additionally, this Court should not reverse the ALC's decision unless there is an error of law. "Questions of statutory interpretation are questions of law, which [this Court is] free to decide without any deference to the court below." Centex Int'l, Inc. v. S. C. Dep't of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013), reh'g denied (Sept. 20, 2013). Resolution of two of the issues in this case – whether the "knowingly" requirement of § 61-4-580(5) applies to knowledge of facts or knowledge of the law and whether § 61-4-580(3) serves as a safe harbor provision or an exception to § 12-21-2710

– involve questions of law and may depend upon the rules of statutory interpretation. The Department maintains that the language of all of the statutes at issue in this case is plain and unambiguous. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning." Ward v. West Oil Co., Inc., 387 S.C. 268, 278, 522 S.E.2d 516, 522 (2010).

The Appellant, on the other hand, appears to assert that the language of the statutes at issue is ambiguous. When construing a statute, the cardinal rule is to ascertain the intent of the Legislature. Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Georgia-Carolina Bail Bonds, Inc., 354 S.C. at 23, 579 S.E.2d at 336. The words of the statute "must be given their plain and ordinary meaning without resort[ing] to subtle or forced construction to limit or expand [the statute's] operation." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (internal citations omitted). Finally, "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Brown v. S.C. Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting Dunton v. S.C. Bd. of Examin'rs in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)); see also Nucor Steel v. S.C. Pub. Serv. Comm'n, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992)

(recognizing that where an agency is charged with the execution of a statute, the agency's interpretation should not be overruled without cogent reason).

Finally, "the admissibility of evidence is within the sound discretion of the trial judge." State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (2007) (internal citations omitted). Thus, "[e]videntiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." Rice, 375 S.C. at 314, 652 S.E.2d at 415 (internal citation omitted). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Id. at 315, 652 S.E.2d at 415 (internal citations omitted). Therefore, this Court may not reverse the ALC's evidentiary ruling unless the ruling is based on an error of law or a factual conclusion that is without evidentiary support.

I. THE ADMINISTRATIVE LAW COURT PROPERLY CONCLUDED THAT THE SOUTH CAROLINA DEPARTMENT OF REVENUE BROUGHT THIS ACTION AGAINST THE CORRECT PARTY.

The Appellant, Meenaxi, Inc., d/b/a Corner Mart, is the holder of the permit at issue in this case. (R. p. 166; Dept's Exhibit 8.) The photograph of the permit taken by Agent Bielawski shows that the permit was issued to the Appellant. (R. p. 166; Dept's Exhibit 8.) Furthermore, the testimony of Agent Bielawski and Mr. Patel support the fact that the Appellant holds the permit. (R. p. 49, line 24 – p. 51, line 14, p. 82, line 11 – p. 83, line 24, p. 125, line 22 – p. 126, line 2; Hr'g Tr. 30:24 – 32:14, 63:11 – 64:24, 106:22 – 107:2). Thus, the ALC properly concluded, based on the substantial evidence that was presented to the ALC, that the Department brought this action against the correct party.

Despite the evidence in the record, the Appellant asserts that the Department failed to name Malkesh Patel as a party, that the corporate entity named by the Department – Meenaxi, Inc., d/b/a Corner Mart – does not exist, that the Appellant's due process rights were violated, and that the ALC improperly denied the Appellant's motion to dismiss on that basis. Initial Brief of Appellant 6 – 7. The Appellant incorrectly states that "[t]he only evidence introduced at the hearing was that the license in question or at issue in this case was in the name of Malkesh Patel and Meenaxi, Inc." Initial Brief of Appellant 7. While Mr. Patel testified that the license was in his name and Meenaxi, Inc.'s name, Mr. Patel was obviously mistaken. (R. p. 126, lines 6 – 8; Hr'g Tr. 107:6 – 8.) Mr. Patel is the sole owner and contact person of the Appellant. (R. p. 82, lines 11 – 13, p. 125, line 22 – p. 126, line 2, p. 166; Hr'g Tr. 63:11 – 13, 106:22 – 107:2; Dept's Exhibit 8.) Mr. Patel even testified that the business at issue in this matter was owned and operated by his corporation, Meenaxi, Inc. (R. p. 125, line 22 – p. 126, line 2; Hr'g Tr. 106:22 – 107:2.) Thus, the fact that Mr. Patel owns Meenaxi, Inc. clearly confused Mr. Patel and caused him to believe that the permit was also in his name individually.

Contrary to the Appellant's argument, the name and address on the bottom of the license reads "Corner Mart, 1010 E. Shockley Ferry Road, Anderson, SC 29624." (R. p. 166; Dept's Exhibit 8.) Corner Mart is the name of the store and 1010 E. Shockley Ferry Road is the physical location of the store. (R. p. 50, line 24 – p. 51, line 10, p. 158; Hr'g Tr. 31:24 – 32:10; Dept's Exhibit 2.) The name and address at the top of the license reads "Malkesh Patel, Meenaxi, Inc., 713 Britton St., Anderson, SC 29621-2614." (R. p. 166; Dept's Exhibit 8.) Meenaxi, Inc. is the permit holder and 713 Britton St. is the mailing address. (R. p. 83, lines 18 – 24, pp. 156 – 158; Hr'g Tr. 64:18 – 24; Dept's

Exhibit 1; Dept's Exhibit 2.) Mr. Patel's name clearly is on the permit as the contact person, similar to addressing an envelope "attention to" a designated person of a business entity. Thus, Meenaxi, Inc. is the permit holder, Mr. Patel is the owner of and contact person for Meenaxi, Inc., and Corner Mart is the name of the store owned by Meenaxi, Inc.

Additionally, S.C. Code Ann. § 61-2-90 (2009) makes it clear that a license or permit may only be issued to one person. That means that the permit could not possibly have been issued to both Meenaxi, Inc. and Mr. Patel. Specifically, § 61-2-90 provides:

> **A person**[2] desiring a license or permit under this title must file with the department an application in writing on forms provided by the department containing a statement under oath setting forth:
>
> (1) the name, address, date of birth, race, and nationality of **the person** applying for the license or permit;
>
> (2) the exact location where the business is proposed to be operated;
>
> (3) a description of the type of business to be operated;
>
> (4) whether **the applicant** or an owner of the business has been involved in the sale of alcoholic liquors, beer, or wine in this or another state and whether he has had a license or permit suspended or revoked;
>
> (5) whether **the applicant** has been a legal resident of this State for at least thirty days before the date of application, and has maintained his principal place of abode in the State for at least thirty days before the date of application;
>
> (6) other information required by the department to determine if the application meets all statutory requirements for the license or permit and to determine the **true owners of the business** seeking the license or permit.

(emphasis added). Throughout § 61-2-90, the words "a person," "the person," and "the applicant" are used. Additionally, S.C. Code Ann. § 61-2-100 (2009), which is entitled

[2]Pursuant to S.C. Code Ann. § 61-2-100(H)(1) (2009), the word "person" as used in Title 61 "includes an individual, a trust, estate, partnership, limited liability company, receiver, association, company, corporation, or any other group."

"Persons entitled to be licensees or permittees," states that "(A) . . . [l]icenses and permits may be issued only to **the person** who is the owner of **the business** seeking the permit or license" and "(C) . . . all principals are deemed to be **the applicant** . . . ." (emphasis added).

When comparing the use of the words "person" and "persons" in §§ 61-2-90 and 61-2-100, it is evident that the Legislature meant only one person can hold a particular license or permit. In § 61-2-100, the Legislature described the different persons who could hold a license. The fact that the Legislature used the word "persons" in some places and "a person" in other places demonstrates that the Legislature intentionally used the singular form of person when discussing applications for licensure. The purpose of using the singular form of the word person is to make it clear that only one person can hold a license or permit. Because only one person can hold a license or permit, it is not possible for the permit at issue in this case to be in the name of Malkesh Patel and Meenaxi, Inc. Thus, Meenaxi, Inc. is the permit holder and Malkesh Patel, as the sole owner of the corporation, is the contact person for the corporation.

Even if Mr. Patel was the permit holder, which he was not, the ALC held that Mr. Patel and the Appellant's due process rights were not violated because Mr. Patel, as the sole owner of the Appellant, had "notice, an opportunity to be heard in a meaningful way, and judicial review" as required. (R. p. 5; Order 5 (citing Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 562, 505 S.E.2d 598, 603).) The Appellant complains that Mr. Patel did not have an opportunity to be heard in a meaningful way because the machines were destroyed. However, as will be explained more fully under Issue II, section A below, the machines' presence was not necessary for the Department to prove the

machines were illegal. Therefore, the fact that the machines were not present had no effect on Mr. Patel's, or the Appellant's, opportunity to be heard in a meaningful way. Thus, assuming Mr. Patel should have been named as a party, which the Department maintains he should not have been, neither his nor the Appellant's due process rights were violated.

Finally, while the Appellant argues that the ALC's conclusion was clearly erroneous, it provides no support for that argument. The Appellant simply states that because the Department carries the burden of proof, the Department is obligated to determine the correct parties. Initial Brief of Appellant 7. Moreover, the evidence in the record demonstrates that the Department named the correct party to this action – the Appellant. Therefore, the ALC properly concluded, based on the substantial evidence presented at the hearing, that the Department brought this action against the correct party – Meenaxi, Inc., d/b/a Corner Mart – and the Appellant's due process rights were not violated.

II. THE ADMINISTRATIVE LAW COURT PROPERLY FOUND THAT THE APPELLANT KNOWINGLY PERMITTED AN ACT ON ITS PREMISES THAT CONSTITUTES A CRIME PURSUANT TO S.C. CODE ANN. SECTION 61-4-580(5).

Under § 61-4-580(5), a holder of a beer and wine permit may not knowingly permit an act on its licensed premises that constitutes a crime. Specifically, § 61-4-580(5) provides:

> No holder of a permit authorizing the sale of beer or wine or a servant, agent, or employee of the permittee may **knowingly commit any of the following acts** upon the licensed premises covered by the holder's permit:
>
> * * *

> (5) permit any act, the commission of which tends to create a public nuisance or which constitutes a crime under the laws of this State;

(emphasis added). Pursuant to § 12-21-2710:

> It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps . . . .

Therefore, knowingly possessing illegal gambling machines under § 12-21-2710 constitutes a violation of § 61-4-580(5).

To sustain the violation of § 61-4-580(5) at issue in this case, the Department had to show that (1) the machines were unlawful gaming devices under § 12-21-2710; (2) the machines were located on the licensed premises; and (3) the Appellant knowingly permitted the machines to be located on its licensed premises. As discussed below, the evidence presented at the hearing satisfied all three of the required elements. Thus, based on the substantial evidence presented at the hearing, the ALC properly found that the Appellant knowingly permitted an act on its premises that constitutes a crime.

A. <u>The Machines Were Unlawful Gambling Devices Under Section 12-21-2710.</u>

The evidence in this matter demonstrates that after Agent Bielawski seized the machines, Magistrate Lollis examined the machines and determined that they were illegal under § 12-21-2710. (R. p. 66, line 22 – p. 71, line 14, pp. 159 – 162; Hr'g Tr. 47:22 – 52:14; Dept's Exhibit 3; Dept's Exhibit 4.) This is significant because pursuant to S.C.

Code Ann. § 12-21-2712 (2000),[3] it is the Magistrate Court that determines the legality of machines seized by any law enforcement officer. See Mims Amusement Co. v. SLED, 366 S.C. 141, 621 S.E.2d 344 (2005); Allendale v. Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004).

Furthermore, it is well settled law that a determination by a court with jurisdiction of the status of a *res* (a "thing") binds all parties, including third-parties. The South Carolina Supreme Court has long held that "[w]here the court has jurisdiction of the *res*, its decree *in rem* upon the character or status of the subject-matter is binding, not only on the parties and their privies, but also upon all persons who might have asserted an interest therein." Ex parte Kenmore Shoe Co., 50 S.C. 140, 27 S.E. 682, 684 (1897) (citing 5 Am. & Eng. Enc. Law, p. 385; 1 Greenl. Ev. 525; Freem. Judgm. § 606). The Kenmore Court went further, stating that:

> A distinction may be noticed between those judgments [*in personam*], and judgments strictly *in rem*. The latter bind third persons. **They are conclusive evidence against all the world.** So, then, this judgment. . . , being undoubtedly a judgment *in rem*, as admitted by the counsel for petitioners, bound not only the parties to the record, but the whole world . . . .

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[3]Section 12-21-2712 prescribes the procedure for seizing and destroying unlawful gaming machines:

> Any machine, board, or other device prohibited by Section 12-21-2710 must be seized by any law enforcement officer and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if satisfied that it is in violation of Section 12-21-2710 or any other law of this State, direct that it be immediately destroyed.

Id. (emphasis added) (citations omitted). Said differently, as the South Carolina Court of Appeals held in Venture Engineering, Inc. v. Tishman Constr. Corp. of SC, "in a proceeding *in rem*, all persons concerned are deemed to be parties to the proceedings." 360 S.C. 156, 162-163, 600 S.E. 2d 547, 550 (Ct. App. 2004). Moreover, the South Carolina Supreme Court held in Fitchette v. Sumter Hardwood Co. that "[j]udgments *in rem* are considered binding on third persons . . . ." 145 S.C. 53, 142 S.E. 828, 833 (1928). The Fitchette Court went on to say that:

> A judicial record is always admissible to prove the fact that a judgment has been rendered, the time of its rendition, and the terms and effect of the judgment, for the mere fact that a judgment was given, this being a thing done by public authority, can never be considered as res inter alios acta, nor can the legal consequences of the rendition of such judgment be so considered.

145 S.C. 53, 142 S.E. at 833. Magistrate Lollis issued an order that determined the status of the machines, specifically that they were illegal, and Magistrate Eubanks upheld that determination. (R. pp. 159 – 162; Dept's' Exhibit 3; Dept's Exhibit 4.) Accordingly, Magistrates Lollis' and Eubanks' determinations of the machines' illegality is binding against the Appellant and dispositive for purposes of this case.

Additionally, the machines were contraband *per se* at the time of seizure. The South Carolina Supreme Court has unequivocally held that it is the Magistrate Court, acting pursuant to § 12-21-2712, that determines the legality of those machines seized by any law enforcement officer. See Mims, 366 S.C. 141, 621 S.E.2d 344; Allendale, 361 S.C. 581, 606 S.E.2d 471. More importantly, an illegal gaming machine is "contraband *per se*," not "derivative contraband," at the moment of seizure, and therefore illegal to

possess regardless of its use. Mims, 366 S.C. at 155, 621 S.E.2d at 351. Our Supreme Court has affirmed this fact in regards to gambling devices:

> Courts have recognized two classes of contraband subject to forfeiture by statute. The first class is contraband *per se*, which are things that may be forfeited because they are illegal to possess and not susceptible of ownership. **This class includes illegal gambling devices such as roulette wheels or craps tables, "moonshine" liquor, illegal narcotic drugs, or unregistered guns.** The second class is derivative contraband, which are things that may be forfeited because they are instrumentalities of a crime, but which ordinarily are not illegal to possess. This class includes items such as currency, vehicles, or real property used in the commission of a crime or traceable to the proceeds of criminal activity. See State v. 192 Coin–Operated Video Game Machines, 338 S.C. 176, 189, 525 S.E.2d 872, 879 (2000) (discussing two classes of contraband and determining that video game machines found by magistrate to be illegal gambling devices or conceded by owner to be such are contraband per se); U.S. v. Rodriguez Aguirre, 264 F.3d 1195, 1213 n. 13 (10th Cir. 2001) (cocaine is contraband per se);

Id. at 149-50, 621 S.E.2d at 348 (emphasis added).

Here, the machines were seized by SLED on February 26, 2013, and were deemed illegal at the moment they were seized. (R. p. 66, line 22 – p. 67, line 1, pp. 156 – 157; Hr'g Tr. 47:22 – 48:1; Dept's Exhibit 1.) Magistrate Lollis then viewed the machines and issued an Order of Destruction finding them illegal. (R. p. 66, line 22 – p. 71, line 11, p. 159 – 160; Hr'g Tr. 47:22 – 52:11; Dept's Exhibit 3.) The South Carolina Code provides a mechanism whereby that finding of illegality can be reversed. That mechanism is a post-seizure hearing before the magistrate. In this case, a post-seizure hearing was scheduled for December 17, 2013. (R. pp. 161 – 162; Dept's Exhibit 4.) However, prior to the post-seizure hearing, counsel informed the Court that the parties

reached an agreement that resolved the matter. (R. pp. 161 – 162; Dept's Exhibit 4.) Specifically, each party maintained their respective positions regarding the legality of the machines at the time of seizure, but the owner of the machines agreed to withdraw his request for a post-seizure hearing. (R. pp. 161 – 162; Dept's Exhibit 4.) Magistrate Eubanks then issued an order upholding Magistrate Lollis' Order of Destruction in its entirety and ordered that they be destroyed. (R. pp. 161 – 162; Dept's Exhibit 4.) Therefore the machines remained contraband *per se* and were illegal. Accordingly, the preponderance of the evidence demonstrates that the gaming machines were unlawful gaming devices under § 12-21-2710, satisfying the first element.

Despite the evidence presented that establishes the machines were illegal, the Appellant asserts that the Department failed to meet its burden to establish that the machines were illegal. Initial Brief of Appellant 10 – 14. Specifically, the Appellant argues the Department allowed the machines to be destroyed, thus making the best evidence of the machines' illegality unavailable. Initial Brief of Appellant 10 – 14. However, the best evidence of the machines' illegality was the Magistrate Court's orders that were admitted into evidence. (R. pp. 159 – 162; Dept's Exhibit 3; Dept's Exhibit 4.) As discussed above, pursuant to § 12-21-2712, it is the Magistrate Court that has jurisdiction to determine the legality of gaming machines. See Mims, 366 S.C. 141, 621 S.E.2d 344; Allendale, 361 S.C. 581, 606 S.E.2d 471. Therefore, the ALC does not have jurisdiction to view the machines and determine whether or not they are illegal. This is no different than a case where the criminal act was possessing illegal drugs. The Circuit Court, County Court, or Magistrate Court would determine whether the criminal act occurred. See e.g. S.C. Const. art. V, § 11, S.C. Code Ann. § 1-23-600 (Supp. 2014), S.C.

Code Ann. § 14-9-120 (1977), and S.C. Code Ann. § 22-3-540 (2007). In the proceeding before the ALC, a conviction for possessing illegal drugs would be the best evidence that the criminal act occurred. To that extent, the Department had no reason to bring the machines before the ALC, and the best evidence that the machines were illegal was the Magistrate Court's orders.

The Appellant also complains that the SLED agent did not operate the machines. However, it is well settled law in South Carolina that gambling machines do not have to be operable to be illegal. State v. 192 Coin–Operated Video Game Machines, 338 S.C. 176, 187 – 189, 525 S.E.2d 872, 878 – 879 (2000). In 192 Coin–Operated Video Game Machines, our Supreme Court stated that "[t]he plain language of [§ 12-21-2710] makes clear the Legislature's intent to outlaw mere possession of such machines." 338 S.C. at 188, 525 S.E.2d at 879. The Court went on to say that "[t]he circuit court correctly ruled possession of these machines is illegal, regardless of their intended use or operation." Id. at 189, 525 S.E.2d at 879. If possession of video gambling machines is illegal regardless of their operation, then the operation of the machines is irrelevant. Gambling machines are contraband *per se* and are illegal to possess. Mims, 366 S.C. at 155, 621 S.E.2d at 351. Thus, the Appellant's argument that its due process rights were violated because the agent never operated the machines is without merit. The machines at issue were contraband *per se*, they were illegal to possess, and the Magistrate Court determined they were illegal. Therefore, the Department met its burden of proving that the machines found on the licensed premises were illegal.

B. The Machines Were Located On The Licensed Premises.

Agent Bielawski testified that he found two video gambling machines on the left side of the store located at 1010 E. Shockley Ferry Road, Anderson, South Carolina. (R. p. 53, line 8 – p. 54, line 13, pp. 156 – 157, p. 163; Hr'g Tr. 34:8 – 35:13; Dept's Exhibit 1; Dept's Exhibit 5.) He also photographed the machines in the store prior to seizing them. (R. pp. 156 – 157, pp. 163 – 164; Dept's Exhibit 1; Dept's Exhibit 5; Dept's Exhibit 6.) These two video gambling machines are the same machines that the Magistrate Court determined were illegal. (R. p. 66, line 22 – p. 67, line 7, pp. 159 – 162; Hr'g Tr. 47:22 – 48:7; Dept's Exhibit 3; Dept's Exhibit 4.) Additionally, Mr. Patel testified that the two machines had been in the store approximately three to six months prior to the seizure. (R. p. 127, lines 12 – 15; Hr'g Tr. 108:12 – 15.) The testimony of Agent Bielawski and Mr. Patel combined with the photographs taken by Agent Bielawski prove that the machines at issue were on the licensed premises. Moreover, there is no evidence showing that the machines were located anywhere other than on the licensed premises. Therefore, the preponderance of the evidence demonstrates that the machines were located on the licensed premises, satisfying the second element.

C. The Appellant Knowingly Permitted The Machines To Be Located On The Licensed Premises.

The final element that the Department had to satisfy is that Appellant knowingly permitted the machines to be placed on its premises. The Department was not, however, required to prove that the Appellant had *actual* knowledge that the machines were on the premises. Rather, constructive knowledge based on the reasonable person standard is sufficient. See Feldman v. S.C. Tax Comm'n, 203 S.C. 49, 26 S.E.2d 22 (1943) (holding

that a sale of alcoholic liquors to a minor was made knowingly where the clerk had knowledge that the purchaser was a minor or had such information that would lead a reasonably prudent person to believe that the purchaser was a minor, and if followed by inquiry must bring knowledge of that fact to the clerk). The South Carolina Supreme Court expanded on the reasonable person standard by finding:

> The term Knowingly is defined as including, not only actual knowledge of the contents of the subject matter of the material, but also knowledge of its contents which could have been gained by reasonable inspection, when the circumstances are such as would have put a reasonable man on inquiry. One may be found to knowingly violate the statute when it appears that he shuts his eyes to avoid knowing what would otherwise be obvious.

State v. Thompkins, 263 S.C. 472, 484, 211 S.E.2d 549, 554 (1975).

Here, the evidence demonstrates that the machines were located on the licensed premises in a place that was readily viewable by law enforcement (R. p. 53, line 8 – p. 54, line 13, pp. 156 – 157, p. 163; Hr'g Tr. 34:8 – 35:13; Dept's Exhibit 1; Dept's Exhibit 5), and, thus, the machines were also readily viewable by the Appellant and Appellant's servants, agents, employees, and patrons. Additionally, Agent Bielawski found several receipts/coupons from the machines crumpled up on the floor, in the trash, and behind the machines. (R. p. 58, line 13 – p. 60, line 16, pp. 156 – 157, p. 165; Hr'g Tr. 39:13 – 41:16; Dept's Exhibit 1; Dept's Exhibit 7.) This demonstrates that the Appellant's patrons used the machines recently. The fact that the machines were readily viewable and recently used establishes that the Appellant had actual, and if not, constructive knowledge that the machines were on the licensed premises.

Moreover, Mr. Patel testified that if a person playing a game on one of the machines won a hand, the Appellant paid the person whatever the machine said to pay

that person. (R. p. 127, line 23 – p. 128, line 3; Hr'g Tr. 108:23 – 109:3.) He also testified that the machines had been in the Appellant's store for three to six months. (R. p. 127, lines 12 – 15; Hr'g Tr. 108:12 – 15.) Mr. Patel's testimony proves that he had actual knowledge that the machines were on the premises. Because Mr. Patel, the sole owner of the Appellant, had actual knowledge of the machines' presence, the Appellant had actual knowledge of the machines' presence. In that regard, the Department proved that the Appellant knowingly permitted the machines to be located on the premises.

D. The Department Did Not Have To Prove The Appellant Knew The Machines Were Illegal.

The Appellant argues that to sustain a violation of § 61-4-580(5), the Department had to prove that the Appellant knew the machines were illegal. Initial Brief of Appellant 14 – 15. However, the "knowingly" requirement clearly applies to one's knowledge of fact, not one's knowledge of the law, as everyone is presumed to know the law. See S.C. Wildlife & Marine Resource Dept. v. Kunkle, 287 S.C. 177, 179, 336 S.E.2d 468, 469 (1985); see also Smothers v. U.S. Fid. Guar. Co., 322 S.C. 207, 211 – 12, 470 S.E.2d 858, 860 (Ct. App. 1996) (stating "[e]veryone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests."). If everyone is presumed to know the law, interpreting the "knowingly" requirement to mean that one must know the law in order to violate the statute leads to the "knowingly" part of the statute becoming superfluous. The South Carolina Supreme Court has stated that in interpreting statutes, courts must presume the Legislature did not intend a futile act, but rather intended its statutes to accomplish something. TNS Mills, Inc. v. S.C. Dep't. of Revenue, 331 S.C.

611, 620, 503 S.E.2d 471, 476 (1998); State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964).

Moreover, the Feldman case sheds some light regarding the meaning of the term knowingly. In Feldman, the statute at issue prohibited a license holder from knowingly selling alcohol to a minor. 203 S.C. 49, 26 S.E.2d 22. When interpreting the "knowingly" requirement, the South Carolina Supreme Court held:

> [I]f the clerk knew that the [customer] was a minor or had such information, from his appearance or otherwise, as would lead a prudent man to believe that he was a minor, and if followed by inquiry must bring **knowledge of that fact** home to him, then the sale was made knowingly.

Id. (emphasis added). Under the Appellant's theory of the law, the issue in Feldman would have been whether the clerk knew it was illegal to sell beer to a minor, not whether the clerk knew the customer was minor. As the language of Feldman demonstrates, that is not the analysis given by our Supreme Court. To the contrary, the Court's analysis clearly demonstrates that the "knowingly" requirement applies to one's knowledge of fact, not one's knowledge of law.

In the case at bar, the statute prohibits a license holder from knowingly permitting an act on its premises that constitutes a crime. Contrary to the Appellant's argument, the knowingly requirement of § 61-4-580(5) addresses whether the permittee knew the facts of what was occurring on its premises. The issue is not whether it knew the act was illegal, rather whether it knew the act was taking place. Thus, any permittee who knows that an act occurs on its premises is liable for a violation of § 61-4-580(5) if the act is illegal regardless of whether the permittee was actually aware that the act was illegal. Therefore, the ALC's interpretation of the law and ultimate conclusion that "the

Respondent knowingly permitted the machines to be placed on its premises" was not erroneous. (R. p. 3; Order 3.)

Finally, assuming the "knowingly" requirement did apply to one's knowledge of the law, which the Department maintains it does not, the Department presented substantial evidence to support a conclusion that the Appellant knew the machines were illegal. First and foremost, Mr. Patel admitted that he knew the machines were illegal on the day they were seized. (R. p. 133, line 23 – p. 134, line 2; Hr'g Tr. 114:23 – 115:2.) Secondly, Ms. Dean, the store clerk, told Agent Bielawski that Mr. Patel unplugged the machines because he heard SLED was in town. (R. p. 57, line 4 – p. 58, line 12; 38:4 – 39:12.) A reasonable person could infer that Mr. Patel unplugged the machines because he knew they were illegal and was afraid of getting caught by SLED. (R. p. 4; Order 4.) Thus, the preponderance of the evidence demonstrates that the Appellant knew the machines were illegal.

The Appellant points out that Mr. Patel testified that he did not know how the machines operated and he believed they were legal when they were placed in the store. Initial Brief of Appellant 14. While Mr. Patel did testify to that effect, the ALC found that testimony was not credible. (R. p. 3; Order 3.) The weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. See S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Since it was the ALC that heard first hand Mr. Patel's contradicting testimony (R. p. 129, line 17 – p. 130, line 9, p. 133, line 23 – p. 134, line 2; Hr'g Tr. 110:17 – 111:9, 114:23 – 115:2), the ALC was in the best position to determine the credibility of his testimony. Furthermore, it was up to the ALC to weigh

the testimony of Agent Bielawski, where he said Mr. Patel unplugged the machines because SLED was in town (R. p. 57, line 4 – p. 58, line 12; 38:4 – 39:12), against the testimony of Mr. Patel. Mr. Patel made the three following inconsistent statements at trial: First, Mr. Patel stated that he learned SLED thought the machines were illegal and asked the owner to pick them up (R. p. 129, line 17 – p. 130, line 9; Hr'g Tr. 110:17 – 111:9.) Then Mr. Patel stated that the owner of the machines called him and told him to unplug the machines (R. p. 134, lines 1 – 2; Hr'g Tr. 115:1 – 2.) Additionally, Mr. Patel stated that he thought the machines were legal because of a court order that he never read (R. p. 133, lines 7 – 22; Hr'g Tr. 114:7 – 22). Based on Mr. Patel's testimony, it is not clear what really happened with regard to the machines. To the contrary, Agent Bielawski's testimony makes it clear that Mr. Patel unplugged the machines because he heard SLED was in town. Therefore, after weighing the evidence, the ALC properly found the Appellant knew the machines were illegal.

E. Section 61-4-580(3) Is Not A Safe Harbor Provision Or An Exception To Section 12-21-2710.

The Appellant asserts that S.C. Code Ann. § 61-4-580(3) is "clearly a 'safe harbor' provision for promotion chance games which meet the criteria set forth in Section 580(3), subparts (a), (b), and (c)." However, the Appellant cites no authority for this assertion. The proposition that § 61-4-580(3) contains an exception to the prohibition contained in § 12-21-2710 is misguided for two reasons:

First, § 61-4-580(5) on its face prohibits holders of beer and wine licenses from permitting any act which constitutes a crime. A violation of § 12-21-2710 is a criminal act – i.e. a crime. There is nothing that would allow any conclusion other than a violation

of § 12-21-2710 is a violation of § 61-4-580(5). "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning." Ward, 387 S.C. at 278; 522 S.E.2d at 522. It is abundantly clear that the provisions of §§ 61-4-580(3) and 61-4-580(5) are not contradictory and do not require any further analysis since "the legislative intent can be reasonably discovered in the language used." Id. Section 61-4-580(3) prohibits, with some exceptions, gambling or games of chance, while § 61-4-580(5) prohibits any criminal act. Clearly, each subsection of § 61-4-580 serves as an independent prohibition.[4] In the current case, the machines clearly violate § 12-21-2710 and thus, possessing those machines is prohibited by § 61-4-580(5).

Even assuming that the rules of statutory construction must be employed, § 12-21-2710 is the more specific statute and therefore controls over § 61-4-580. Section 12-21-2710 is a narrow statute that prohibits certain kinds of machines and devices such as slot machines, video poker machines, pull-tab machines, and similar devices. Section 12-21-2710 covers only machines and devices and has no applicability otherwise. Section 61-4-580, in contrast, sets forth a list of seven activities that holders of beer and wine permits may not allow. These activities are far-ranging and most have nothing to do with gambling. Thus, because § 12-21-2710 controls over § 61-4-580, the Appellant's

[4]Subsection (1) prohibits selling beer or wine to a person under twenty-one, subsection (2) prohibits selling beer and wine to an intoxicated person, subsection (4) prohibits lewd acts, subsection (6) prohibits selling or possessing alcoholic liquor that is unlawful to possess, and subsection (7) prohibits various "drinking games."

argument that subsection (3) of § 61-4-580 serves as a safe harbor provision is without merit.

Further, "[i]t is axiomatic that legislation must be construed so as to be constitutional. A basic rule of statutory interpretation requires a construction which is constitutional. 'Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation.'" State v. Peake, 345 S.C. 72, 80, 545 S.E.2d 840, 843 (Ct. App. 2001) (citing Henderson v. Evans, 268 S.C. 127, 132, 232 S.E.2d 331, 333-34 (1977)). Construing § 61-4-580(3) as a valid exception to § 12-21-2710 would create an absurd result and one that violates equal protection. The Appellant suggests that the enactment of § 61-4-580(3) allows for beer and wine permit holders to engage in otherwise illegal games of chance. Using this same logic, that means that the Legislature has intentionally denied persons or entities that are not permit holders the same ability to engage in games of chance. Such a construction would contravene the Equal Protection Clause; no rational basis exists for allowing a beer and wine permit holder the ability to allow illegal gambling or games of chance on its premises, while not allowing gambling or illegal games of chance for those who do not hold a beer and wine permit. Thus, the Appellant's argument must fail as it requires an unconstitutional interpretation of the statutes at issue.

Second, legislative history of both statutes makes it clear that *had* the Legislature intended to make § 61-4-580(3) an exception to § 12-21-2710, it would have done so – and it *has not*. It should be noted that in this regard § 61-4-580(3), as it was written at the time of this violation, was passed on May 26, 1999 (Gov. signed on June 1, 1999). See

H.B. 3951, 1999 – 2000, 113th Sess. (S.C. 1999). Section 12-21-2710, in its current form, was passed on July 1, 1999. (Gov. signed on July 2, 1999). See H.B. 3834, 1999 – 2000, 113th Sess. (S.C. 1999). Hence, the purported "exception" (as argued by the Appellant) was, in fact, passed *before* the statute that it is purportedly an exception to. The Appellant's argument is, therefore, misguided.

Furthermore, had the Legislature intended for § 61-4-580(3) to be an exception to § 12-21-2710, it could have expressly stated so when it passed § 12-21-2710 by adding one more sentence to the 65-page bill. See H.B. 3834, 1999 – 2000, 113th Sess. (S.C. 1999). "[T]here is no evidence that the South Carolina Legislature expressly banned all gaming machines and devices set forth in § 12-21-2710 . . . yet, at the same time, intended to allow the use of such machines or devices in connection with a promotion or sweepstakes through a provision found in the prohibited acts for beer and wine license holders contained in an entirely different code section." Op. S.C. Atty. Gen., 2013 WL 3243060 (June 14, 2013). To the contrary, § 61-4-580(3), as amended in 1999, only allowed "certain legitimate promotions and sweepstakes where specific requirements were met which did not otherwise violate South Carolina Law." Op. S.C. Atty. Gen., 2013 WL 3243060 (June 14, 2013). As the ALC correctly explained:

> [Section 61-4-580(3) served as an] exemption from the previous absolute prohibition on all "gambling or games of chance" contained in § 61-4-580(3), not a broad exception to all of the laws pertaining to gambling or games of chance in South Carolina and certainly not an exception specific to the prohibitions of § 12-21-2710. Notably, § 61-4-580(5), whose language has appeared in the statute since its inception, made clear that permit holders were still absolutely prohibited from engaging in any act "which constitutes a crime under the laws of this State", a prohibition that would clearly include any and all violations

> of § 12-21-2710 or any and all violation of any of South Carolina's other criminal laws.

Op. S.C. Atty. Gen., 2013 WL 3243060 (June 14, 2013).

Additionally, the Legislature clarified § 61-4-580 in 2013. Specifically, the Legislature wanted to make it clear that § 61-4-580 "does not authorize the use of an activity, device, or machine that is prohibited by section 12-21-2710 or other provisions that prohibit gambling." S.B. 3, 2013-2014, 120th Sess. (S.C. 2013). Thus, it is clear from the face of the Act that the intent of the Legislature was not to change the law, but to clarify the law to clear up some people's mistaken belief that § 61-4-580(3) is a safe harbor provision or exception to § 12-21-2710. To that extent, if machines are illegal pursuant to § 12-21-2710, then the possession of those machines are a violation of § 61-4-580(5). Therefore, the ALC correctly held that § 61-4-580(3) did not make the Appellant's possession of the machines at issue legal at the time of seizure, and that the machines were in fact illegal pursuant to § 12-21-2710.

Assuming § 61-4-580(3) was an exception to § 12-21-2710, the ALC properly found that the evidence supports the conclusion that the machines at issue did not meet all of the requirements set forth in § 61-4-580(3). (R. p. 4; Order 4.) Specifically, § 61-4-580(3)(b) sets forth the requirement that "no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize." Agent Bielawski testified that a patron has to put money into the machine in order to play the illegal games. (R. p. 73, line 23, p. 75, lines 3 – 7, p. 81, lines 3 – 8, p. 105, lines 6 – 20; Hr'g Tr. 54:23, 56:3 – 7, 62:3 – 8, 86:6 – 20.) Thus, payment is required in order to play a game on the machine. While the Appellant argues that the payments were for the

receipts/coupons and not to play the games, the fact that Agent Bielawski found receipts/coupons all over the ground, in the trash, and behind the machines demonstrates that those receipts/coupons lacked any value to the patrons. (R. p. 58, line 13 – p. 63, line 16, p. 88, lines 1 – 9, pp. 156 – 157, p. 165; Hr'g Tr. 39:13 – 44:16, 69:1 – 9; Dept's Exhibit 1; Dept's Exhibit 7.) In turn, a reasonable person could conclude that the patrons were paying to play the games not to obtain the receipts/coupons. Based on those facts and the reasonable inferences drawn therefrom, the ALC properly found that the machines did not meet the requirements set forth in § 61-4-580(3). Thus, the Department met its burden of proving the machines were illegal and possession of the machines violated § 61-4-580(5).

III. THE ADMINISTRATIVE LAW COURT PROPERLY FOUND THAT THE STATE LAW ENFORCEMENT DIVISION AGENT'S INSPECTION OF THE LICENSED PREMISES WAS PROPER.

S.C. Code Ann. § 23-3-15(A)(7) and (C) (2007) provide SLED with the exclusive authority to conduct inspections under Title 61. Agent Bielawski's inspection of the licensed premises fell within the authority granted to SLED under Title 61. Specifically, S.C. Code Ann. §§ 61-4-230 and 61-6-4190 (2009) make it a crime for a person to refuse to allow an officer or agent of the Department to fully inspect the licensed premises. If it is a crime to refuse to allow an officer to inspect a licensed premise, then clearly SLED agents, as officers, are permitted to inspect licensed premises. In this case, Agent Bielawski found machines on the licensed premises while conducting an inspection. (R. p. 52, line 11 – p. 53, line 12, pp. 156 – 157; Hr'g Tr. 33:11 – 34:12; Dept's Exhibit 1.) He then proceeded to inspect the machines just like he would inspect a beer cooler in a store. (R. p. 63, line 19 – p. 64, line 2; Hr'g Tr. 44:19 – 45:2.) He plugged the machines

in so that he could inspect them, just like he would turn the lights on in a storage closet to inspect the storage closet (R. p. 63, line 19 – p. 64, line 2; Hr'g Tr. 44:19 – 45:2), which the Appellant conceded SLED could do when it conceded that SLED can inspect the licensed premises. Based on those facts, the ALC properly concluded that Agent Bielawski's inspection was proper. (R. pp. 5 – 6; Order 5 – 6.)

The Appellant argues that the ALC erred in ruling that the inspection was proper. Specifically, while the Appellant concedes that the agent had a right to inspect the premises and the machines, it asserts that plugging the machines into the wall constituted an unlawful search not an inspection. Initial Brief of Appellant 15 – 16, 22. Additionally, the Appellant argues the right to inspect is not absolute and is tempered by the Fourth Amendment of the United States Constitution. Initial Brief of Appellant 15 – 16, 22.

Contrary to the Appellant's arguments, the agent did not need a warrant to plug the machine in, open it, or turn it on. First, Ms. Dean, an employee of the Appellant, consented to the search. Consent is one of the recognized exceptions to the warrant requirement. See State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). No evidence exists showing Ms. Dean objected to Agent Bielawski plugging the machines in or turning them on. (R. p. 53, line 2 – p. 66, line 12; Hr'g Tr. 34:2 – 47:12.) Furthermore, Ms. Dean gave Agent Bielawski the keys to the machines so that he could open them. (R. p. 65, line 22 – p. 66, line 6; Hr'g Tr. 46:22 – 47:6.) Clearly, the evidence demonstrates that Ms. Dean consented to the agent's search of the machines.

Second, the machines were in plain view. "Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may

be introduced as evidence." State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) (internal citation omitted). "[T]he two elements needed to satisfy the plain view exception are: (1) the initial intrusion which afforded the authorities the plain view was lawful and (2) the incriminating nature of the evidence was immediately apparent to the seizing authorities." Wright, 391 S.C. at 443, 706 S.E.2d at 327. As previously stated, the Appellant conceded that the agent was lawfully on the premises. Additionally, because gaming machines are contraband *per se* as discussed under Issue II, section A above, and Agent Bielawski is familiar with the appearance of illegal gambling machines, including the discarded receipts/coupons surrounding the machines (R. p. 31, lines 1 – 20; Hr'g Tr. 12:1 – 20), it is clear that the incriminating nature of the machines was immediately apparent to the agent. Therefore, the search of the machines falls under the plain view exception to the warrant requirement, making the search lawful.

Even if the search of the machines was not lawful, the ALC's finding that the search was lawful is harmless error. Since the machines are contraband *per se*, the agent could have seized the machines without examining them. As discussed under Issue II, section A above, the only evidence the Department needed to establish the machines were illegal was the Magistrate Court's orders. Those orders would have been issued regardless of whether the agent examined the machines, because the Magistrate viewed the machines himself and determined that they were illegal. (R. p. 66, line 22 – p. 67, line 7, pp. 159 – 162; Hr'g Tr. 47:22 – 48:7; Dept's Exhibit 3; Dept's Exhibit 4.) Thus, because the search did not provide any information that the Department needed to prove its case or information that the Department did not also obtain from another source, the ALC's finding that the search was lawful is harmless.

IV. THE ADMINISTRATIVE LAW COURT PROPERLY ADMITED THE STATE LAW ENFORCEMENT DIVISION REPORT, THE MAGISTRATE COURT'S ORDERS, AND THE STATE LAW ENFORCEMENT DIVISION AGENT'S TESTIMONY INTO EVIDENCE.

This Court may not reverse the ALC's evidentiary rulings unless the rulings are based on an error of law or a factual conclusion that is without evidentiary support. Rice, 375 S.C. at 314, 652 S.E.2d at 415. During the hearing in this matter, the ALC admitted the following into evidence: (1) the SLED Report, which included statements made by Ms. Dean to Agent Bielawski; (2) the Magistrate Court's orders, and (3) Agent Bielawski's testimony regarding the Appellant's permit, the statements made by Ms. Dean, and his experience with gambling machines. The Appellant argues that the aforementioned evidence should not have been admitted. However, as will be discussed in greater detail below, the ALC's decision to admit the evidence was not based on an error of law. Furthermore, the ALC's decision to admit the evidence was supported by other evidence. Thus, the ALC properly admitted the SLED Report, the Magistrate Court's orders, and Agent Bielawski's testimony into evidence.

A. The Administrative Law Court Properly Admitted The State Law Enforcement Division Report Into Evidence.

The ALC determined that the SLED Report (Dept's Exhibit 1) was admissible as a business record under Rule 803(6), SCRE. (R. p. 5; Order 5.) Additionally, the ALC determined that the statements made by Ms. Dean within the SLED Report were admissible as statements by a party opponent. (R. p. 5; Order 5.) Appellant appears to argue that the SLED Report should have been excluded from evidence in its entirety

because it contained hearsay within hearsay.[5] Initial Brief of Appellant 18. However, this is simply not true. Pursuant to Rule 805, SCRE, "hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Thus, each layer of hearsay must be examined to determine whether an exception exists and whether each layer is admissible.

The first layer of hearsay at issue in this case is the document itself – the SLED Report. The ALC determined that the SLED Report was admissible under Rule 803(6), SCRE. (R. p. 44, lines 15 – 20, p. 5; Hr'g Tr. 25:15 – 20; Order 5.) In order for a document to meet the exception set forth in Rule 803(6), SCRE, the following four elements must be established: (1) the record must be made and kept in the course of a regularly conducted business activity; (2) it must be the regular practice of that business activity to make the record; (3) the record must be made at or near the time of the event that it records; and (4) the record must be made by, or from information transmitted by, a person with knowledge acting in the regular course of business. The SLED Report is an investigative report. (R. p. 32, lines 16 – 19; Hr'g Tr. 13:16 – 19.) SLED regularly creates and keeps such investigative reports during the normal course of its business, and it is the regular practice of that business activity to make the record. (R. p. 32, lines 3 – 13; Hr'g Tr. 13:3 – 13.) In this case, Agent Bielawski created the SLED Report the same

[5]The Appellant also argues the SLED Report should not have been admitted because "the report was generated pursuant to an unlawful search . . . ." Initial Brief of Appellant 17. However, as explained under Issue III above, the search was not unlawful. Thus, this argument has no merit. However, even if the search was unlawful, that would not cause the entire report to be inadmissible; only the parts of the document related to the unlawful search would be inadmissible.

day he conducted the investigation using information he gathered during the investigation of the Appellant's business. (R. p. 32, lines 3 – 25, pp. 156 – 157; Hr'g Tr. 13:3 – 25; Dept's Exhibit 1.) Thus, the SLED Report is a record of regularly conducted activity, and the ALC properly found that it was admissible as an exception to hearsay under Rule 803(6), SCRE.

The next layer of hearsay involves some of the statements contained within the document. Many of the statements contained in the SLED Report are simply a recitation of Agent Bielawski's observations, such as the statement that he "noticed two video poker machines located in the front of the business by the main window . . . ." (R. pp. 156 – 157; Dept's Exhibit 1.) This statement and other similar statements are not at issue as they are not hearsay statements. Furthermore, any statements purporting to give a legal opinion are not at issue. The Appellant argues that the ALC improperly admitted the legal opinions of Agent Bielawski. Initial Brief of Appellant 18 – 19. However, Judge Durden clearly stated that she would disregard any statement in the document that constituted a legal conclusion. (R. p. 45, lines 3 – 12; Hr'g Tr. 26:3 – 12.) Therefore, the only statements within the SLED Report that are properly before this Court are the statements made by Ms. Dean.

In the SLED Report, Agent Bielawski recounts a conversation with Ms. Dean, wherein Ms. Dean informed Agent Bielawski "that the owner of the business had been aware that SLED and ACSO were in the area. She said that the owner, Mr. Malakesh [sic] Patel, emptied the money from the machines, turned off the power switches, and unplugged them from the wall before [SLED's] arrival today." The Appellant argues that these statements constitute hearsay and, therefore, are inadmissible. Initial Brief of

Appellant 17- 18. However, pursuant to Rule 801(d)(2)(D), SCRE, these statements are not hearsay.

Rule 801(d)(2)(D), SCRE provides that a statement is not hearsay if the statement is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Thus, for Ms. Dean's statements to not be considered hearsay, (1) Ms. Dean must be an agent or servant of the Appellant, (2) her statements must have concerned a matter within the scope of her employment, and (3) her statements must have been made while she was still employed by the Appellant. All three of these requirements are clearly met. Agent Bielawski testified that Ms. Dean was standing behind the counter when he entered the licensed premises, and she acted in the role of a store clerk similar to store clerks in other stores the agent had been in. (R. p. 52, line 19 – p. 53, line 2; Hr'g Tr. 33:19 – 34:2.) Additionally, after Agent Bielawski issued the Violation Report (Dept's Exhibit 2), which Ms. Dean signed on behalf of the Appellant, Ms. Dean gave Agent Bielawski the keys to the machines so he could open them. (R. p. 65, lines 15 – 17, p. 66, lines 4 – 6; Hr'g Tr. 46:15 – 17, 47:4 – 6.) Ms. Dean then called her boss, Malkesh Patel, and handed the agent the phone. (R. p. 66, lines 6 – 12, p. 82, lines 1 – 9; Hr'g Tr. 47:6 – 12, 63:1 – 9.) Based on these facts, one can reasonably infer that Ms. Dean was an employee of the Appellant at the time she spoke with Agent Bielawski. Moreover, no facts exist in the record that would suggest Ms. Dean was not employed by the Appellant. (R. pp. 20 – 155; Hr'g Tr.) Thus, the first and third requirements of Rule 801(d)(2)(D), SCRE are satisfied.

The second requirement is also satisfied, as Ms. Dean's statements regarding the machines were within the scope of her employment. In Allotta v. National R.R. Passenger Corporation, the U.S. Court of Appeals for the Seventh Circuit elaborated on the phrase "concerning a matter within the scope." 315 F.3d 756, 761 – 762 (7th Cir. 2003). The Court said that "admissions can be made 'concerning [*any*] matter within the scope of the . . . employment.'" 315 F.3d at 762. The Court further elaborated by stating that "[t]he only requirement is that the subject matter of the admission match the subject matter of the employee's job description. . . . To qualify as an admission, an employee need only be performing the duties of his employment when he comes in contact with the particular facts at issue." Id. Here, Ms. Dean had keys to the machines. (R. p. 66, lines 4 – 6; Hr'g Tr. 47:4 – 6.) Therefore, working with the machines was clearly part of her job duties. Furthermore, she witnessed Mr. Patel take the money out of the machines, turn them off, and unplug them while working in the store. (R. p. 57, line 4 – p. 58, line 12; Hr'g Tr. 38:4 – 39:12.) She also heard Mr. Patel explain why he took those actions while working in the store. (R. p. 57, line 4 – p. 58, line 12; Hr'g Tr. 38:4 – 39:12.) Thus, Ms. Dean's job responsibilities include working with the machines, and she came in contact with the facts at issue while performing the duties of her employment. Therefore, Ms. Dean's statements regarding the machines were within the scope of her employment, satisfying the second and final requirement. Because all three requirements were satisfied, the ALC properly determined that Ms. Dean's statements were not hearsay.

B. The Administrative Law Court Properly Admitted The Magistrate Court's Orders Into Evidence.

Pursuant to § 12-21-2712, it is the Magistrate Court that determines the legality of machines seized by any law enforcement officer. See Mims, 366 S.C. 141, 621 S.E.2d

344; Allendale, 361 S.C. 581, 606 S.E.2d 471. Furthermore, as explained under Issue II, section A above, a determination by a court with jurisdiction of the status of a *res* binds all parties, including third-parties. See Ex parte Kenmore Shoe Co., 50 S.C. 140, 27 S.E. at 684. In this case, the Magistrate Court determined the status of the machines, specifically that they were illegal. Accordingly, that determination of the machines' illegality serves as conclusive evidence against all the world, including the Appellant. Thus, the Magistrate's Orders are controlling and dispositive in the case at bar for the purpose of determining whether the machines were illegal.

The Appellant, however, argues that the ALC erred in admitting the Magistrate Court's orders because "neither decision was made by a court of record [and, thus,] they have no binding effect on the matters before the court." Initial Brief of Appellant 19. The Appellant goes on to say that because the Appellant was not a party to the proceedings before the Magistrate, the orders cannot be used against it. Initial Brief of Appellant 19. Not only does the Appellant fail to cite any authority to support its position, its argument is contrary to the laws in this State. As discussed above, the Legislature charged the Magistrate Court with the authority to determine the legality of machines like the ones at issue here, and judgments *in rem*, like the Magistrate's orders here, are binding against third parties. Thus, the ALC properly admitted the Magistrate Court's orders into evidence.

C. The Administrative Law Court Properly Allowed Agent Bielawski To Testify Regarding The Appellant's Permit, The Statements Made By Ms. Dean, And The Agent's Experience With Gambling Machines.

First, the Appellant argues that Agent Bielawski's testimony regarding the "business arrangement between the parties to this matter and the individuals/entities

identified on the off premises beer and wine permit . . . " constituted speculation. Initial Brief of Appellant 20. However, Agent Bielawski did not speculate about the business arrangement. All he did was explain the contents of the Appellant's permit to the ALC, which clearly shows that Meenaxi, Inc. was the permit holder and Corner Mart was the name of the store located at 1010 E. Shockley Ferry Road, Anderson, South Carolina. (R. p. 48, line 21 – p. 51, line 14, p. 83, lines 18 – 24, p. 166; Hr'g Tr. 29:21 – 32:14, 64:18 – 24; Dept's Exhibit 8.) Thus, his testimony regarding the permit and the business arrangement was not speculative.

Additionally, the Appellant appears to argue that the aforementioned testimony constituted an improper opinion. Initial Brief of Appellant 20. Pursuant to Rule 701, SCRE, a witness who is not testifying as an expert may give testimony in the form of an opinion or inferences as long as those opinions or inferences "(a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experiences or training." In this instance, Agent Bielawski's testimony regarding the Appellant's permit was rationally based on his perception. As previously explained, Agent Bielawski merely explained the contents of the permit. Additionally, the agent's explanation of the permit helped the ALC understand the identity of the actual permit holder. Finally, any reasonable person could conclude from looking at the permit that Meenaxi, Inc. was the permit holder and Corner Mart was the name of the store. (R. p. 166; Dept's Exhibit 8.) Thus, the agent's testimony did not require any special knowledge. Therefore, while the majority of the agent's testimony regarding the permit was factual, any opinion testimony he gave was permitted under Rule 701, SCRE. To

that extent, the ALC properly allowed Agent Bielawski to testify about the permit and the permit holder.

Next, the Appellant argues that the ALC erred in allowing Agent Bielawski to testify about what Ms. Dean told him because her statements constituted inadmissible hearsay. Initial Brief of Appellant 20. As explained under Issue IV section A above, Ms. Dean's statements were not hearsay, and thus the ALC properly allowed Agent Bielawski to testify about Ms. Dean's statements.

Finally, the Appellant asserts that the ALC erred in allowing Agent Bielawski to testify "as to matters arising out of 'his experience' as a law enforcement officer and which did not touch upon the machines at issue in this case of the facts at issue in this case." Initial Brief of Appellant 20. However, Agent Bielawski testified about the discarded receipts/coupons in the Appellant's store and the games on the machines that were in the Appellant's store. (R. p. 58, line 14 – p. 64, line 13; Hr'g Tr. 39:14 – 45:13.) Those are mere facts regarding the machines at issue in this case and have nothing to do with the agent's experience. Furthermore, Agent Bielawski's explanation as to why the receipts/coupons were discarded is admissible as a lay opinion under Rule 701, SCRE. His explanation was based on his rational perception, it helped the ALC understand the real purpose of the machines at issue, and it did not require any special knowledge. Any reasonable person could infer that if people discarded the receipts/coupons, the receipts/coupons were not being used for their intended purpose and presumably had no value to the people using the machines. Thus, the ALC properly allowed Agent Bielawski to testify about the receipts/coupons and the games on the machines, as they were either mere facts or his lay opinion.

Assuming, however, that Agent Bielawski's opinion testimony was impermissible, the admission of that testimony was harmless error. The ALC did not rely on any of Agent Bielawski's opinions in determining that the Appellant violated § 61-4-580(5). (R. pp. 1 – 7; Order.) Instead, the ALC relied on the facts that the machines contained games of chance, that the Magistrate Court deemed the machines illegal, and that receipts/coupons were found in the trash, on the floor, and behind both machines in determining that the Appellant violated § 61-4-580(5). (R. p. 2; Order 2.) The only time the ALC may have relied on Agent Bielawski's opinion is when it determined that the machines did not satisfy the requirements set forth in § 61-4-580(3). (R. p. 4; Order 4.) However, based on the statement in the Order wherein Judge Durden said "I find that these coupons have no value," it appears that she came to that conclusion on her own based on the facts in evidence. (R. p. 4; Order 4.) Even if Judge Durden did rely on the agent's opinion about the receipts/coupons, it was harmless error. Judge Durden only relied on that opinion in explaining why § 61-4-580(3) did not apply to the machines at issue. However, an analysis of § 61-4-580(3) was completely unnecessary. As explained under Issue II, section E above, § 61-4-580(3) is not a safe harbor provision and is not relevant to this case. Thus, assuming Agent Bielawski's opinions were inadmissible, which the Department maintains they were not pursuant to Rule 701, SCRE, the ALC's admission of his opinions would be harmless error.

V. THE ADMINISTRATIVE LAW COURT APPROPRIATELY DETERMINED THAT REVOCATION OF THE APPELLANT'S BEER AND WINE PERMIT IS THE APPROPRIATE PENALTY FOR THE APPELLANT'S VIOLATION OF S.C. CODE ANN. SECTION 61-4-580(5).

The Department sought to revoke the Appellant's beer and wine permit in this case because the Appellant violated § 61-4-580(5) when it possessed illegal gaming

machines on its licensed premises. Not only does § 61-4-580 provide that "[a] violation of any provision of this section is a ground for the revocation or suspension of the holder's permit," but the Department also set forth in S.C. Rev. Rul. #13-2 its position that the appropriate penalty for a violation of § 61-4-580(5) is revocation of the holder's permit. Additionally, the State of South Carolina has taken a stance against illegal games of chance based upon the public policy of protecting the public welfare. The large sums of money to be made from unlawful gaming devices are exceedingly tempting for permit holders. Moreover, as compulsive behavior is exploited by the combination of beer or wine with gambling in the same location, the offering of both is perceived as a means of victimizing patrons with compulsive tendencies. Thus, revocation is the appropriate penalty for possessing illegal gambling machines.

"'As an administrative agency, [the ALC] is the fact-finder and it is [the ALC's] prerogative . . . to impose an appropriate penalty based on the facts presented." S.C. Dep't of Revenue v. Sandalwood Soc. Club, 399 S.C. 267, 279-80, 731 S.E.2d 330, 337 (Ct. App. 2012) (quoting Walker v. S.C. Alcoholic Beverage Control Comm'n, 305 S.C. 209, 210, 407 S.E.2d 633, 634 (1991)). Here, the ALC determined that revocation was the appropriate penalty. Specifically, the ALC found that the Appellant knew or should have known the machines were illegal and that no mitigating circumstances existed. (R. p. 7; Order 7.) Based on those findings, the ALC determined that revocation was the appropriate penalty in accordance with the law and S.C. Rev. Rul. #13-2. (R. p. 7; Order 7.) The Appellant argues, however, that the ALC abused its discretion in making that determination. Initial Brief of Appellant 22. Specifically, the Appellant states the penalty is "excessive, unreasonable, and unsupported by the facts surrounding the violation."

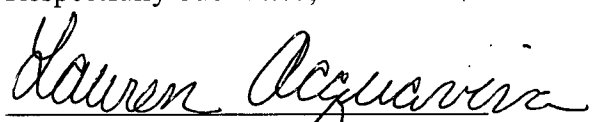
Initial Brief of Appellant 22. The Appellant appears to base its argument on the facts that Mr. Patel testified he always tried to operate the business legally, that the Appellant did not own the machines, that Mr. Patel never operated or played the machines, that Mr. Patel believed the machines were legal, and that when Mr. Patel learned there was a question as to the legality of the machines, he asked the owner of the machines to pick up the machines. However, as the ALC correctly found, these are not mitigating factors.

Moreover, contrary to the Appellant's assertions, Mr. Patel's story is not supported by the testimony of Agent Bielawski. Agent Bielawski testified that Mr. Patel unplugged the machines because he heard SLED was in town, not because he heard they were illegal and wanted them to be removed from his premises. (R. p. 54, line 19 – p. 58, line 12; Hr'g Tr. 35:19 – 39:12.) As explained under Issue II, section D above, the weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. See S.C. Cable Television Ass'n, 308 S.C. at 222, 417 S.E.2d at 589. Here, the ALC determined that Mr. Patel's testimony that he did not know the machines were illegal was not credible and found that he knew or should have known they were illegal. (R. p. 3, p. 7; Order 3, 7.) Because no mitigating factors existed and because the Appellant knew or should have known the machines were illegal, the ALC determined no reason existed to stray from the penalty guidelines set forth in S.C. Rev. Rul. # 13-2. (R. p. 7; Order 7.) Thus, the ALC did not abuse its discretion in determining that revocation is the appropriate penalty, and this Court should affirm the ALC's order on that issue.

CONCLUSION

As explained more fully above, this Court should affirm the ALC's decision as the decision was supported by substantial evidence, the ALC did not make any errors of law that affected the decision, and the ALC did not abuse its discretion.

Respectfully Submitted,



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September 14, 2015

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 12-ALJ-17-0405-CC
Appellate Case No. 2015-000292

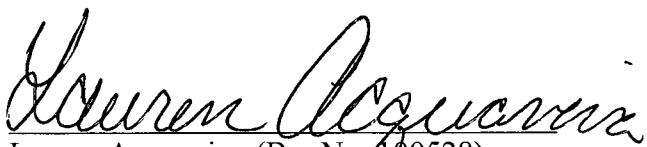
South Carolina Department of Revenue,.....Respondent,

v.

Meenaxi, Inc., d/b/a Corner Mart,.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE DEBORAH BROOKS DURDEN, ADMINISTATIVE LAW JUDGE

CASE NO. 13-ALJ-17-0216-CC
Appellate Case No. 2015-000292

South Carolina Department of Revenue,.....Respondent,

v.

Meenaxi, Inc., d/b/a Corner Mart,.....Appellant.

PROOF OF SERVICE

I, Jean M. O'Connor, hereby certify that I have caused to be mailed via the United States mail, postage prepaid, a copy of the South Carolina Department of Revenue's Brief regarding the above-referenced matter to S. Jahue Moore, Esquire, P.O. Box 5709, West Columbia, South Carolina 29171, this 14th day of September 2015.

Jean M. O'Connor