

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

South Carolina Department of Revenue )  
 )  
 ) Petitioner, )  
 )  
 vs. )  
 )  
 C&M Market, )  
 )  
 ) Respondent. )  
 \_\_\_\_\_ )

Docket No. 12-ALJ-17-0298-CC

**AMENDED FINAL ORDER  
AND DECISION**

**RECEIVED**

JAN 22 2013

**SC Court of Appeals**

**APPEARANCES:** For the Petitioner: Kathryn R. Brown, Esq.  
For the Respondent: James M. Griffin, Esq.

This matter comes before the Administrative Law Court (ALC or Court) for a contested case hearing pursuant to S.C. Code Ann. §§ 1-23-310 et seq. (2005 & Supp. 2008) and 61-4-580(5) (2009). The Department of Revenue (Department) determined that Respondent's on-premises beer and wine permit should be revoked based on a violation of South Carolina Code Ann. 61-4-580(5). C&M Market (C&M or Respondent) challenges that decision. A hearing was held in this matter on November 6, 2012.

**SUMMARY JUDGMENT**

Prior to the hearing, the Department filed a Motion for Partial Summary Judgment. The Respondent filed a Memorandum in Opposition to the Motion. This matter was heard prior to the hearing on the merits.

**Standard of Review**

Rule 68 of the Administrative Law Court Rules provides that "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules." ALC Rule 68. Rule 56(c) of the South Carolina Rules of Civil Procedure provides that summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c), SCRCF. In order to prevail on its Motion for Summary Judgment, Petitioners thus have the

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January 4, 2013

SC ADMIN. LAW COURT

burden of establishing the lack of any triable issue of fact. See, e.g., Brandt v. Gooding, 368 S.C. 618, 626, 630 S.E.2d 259, 263 (2006); Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008). Furthermore, summary judgment should be granted “when plain, palpable and undisputed facts exist on which reasonable minds cannot differ.” Bayle v. S.C. Dep’t of Transp., 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001). In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. Byers v. Westinghouse Elec. Corp., 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). In fact, “[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005). “Summary judgment should [also] not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.” Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009) (quoting Brockbank v. Best Capital Corp., 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000)).

### **Undisputed Facts**

Eric Zacour holds an on-premises beer and wine permit (permit) issued by the Department for a convenience store located at 2105 Highway 1, Elgin, South Carolina. On January 26, 2012, South Carolina Law Enforcement Division (SLED) Special Agent W.F. Bickley and Kershaw County Sheriff’s Department (KCSD) Sergeant Jamey Jones conducted an investigation at the Respondent’s premises. Sgt. Jones entered the location in an undercover capacity with twenty dollars in marked funds. Upon entering the location, he observed two Magic Minutes, LLC (Magic Minutes) gaming machines which were openly available for use on its premises. Sgt. Jones put the marked twenty dollar bill into one of the machines and numerous card games appeared on the screen. He then played a poker game.

Agent Bickley then entered the location. After he inspected the machines, he determined the machines (Seized Machines) contained unlawful games of chance under S.C. Code Ann. § 12-21-2710 (2000) and seized the machines. He therefore issued an administrative citation to

Respondent for permitting an act which constitutes a crime upon its premises in violation of S.C. Code Ann. § 61-4-580(5) (2009).

On January 27, 2012, the KCSD brought the Seized Machines before Kershaw County Magistrate William Corbett (Magistrate or Magistrate Corbett) for examination. After examining the machines, the Magistrate issued order 2012CV2810100148, finding the Seized Machines possessed unlawful games of chance under Section 12-21-2710.

### **Analysis**

The Department contends that the above facts establish that Respondent knowingly allowed the Seized Machines, and thus unlawful gaming devices, on its premises. S.C. Code Ann. § 12-21-2710 provides that:

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, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name and kind, including those machines, boards or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

(Emphasis added).

Importantly, the law clearly provides that the Magistrate's Court possesses the authority to determine whether machines seized by any law enforcement officer are unlawful, pursuant to S.C. Code Ann. § 12-21-2712 (2000). See Mims Amusement Co. v. S.C. Law Enforcement Div., 366 S.C. 141, 621 S.E.2d 344 (2005); Allendale County Sheriff's Office v. Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004). Moreover, a gaming machine is "contraband per se," not "derivative contraband," at the moment of seizure. Mims Amusement Co., 366 S.C. at 155, 621 S.E.2d at 351; State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000).

Here, the undisputed facts demonstrate that Magistrate Corbett found that the Seized Machines were illegal gaming devices under Section 12-21-2710 and ordered that they be

destroyed, thus making possession of the Seized Machines illegal. Therefore, at the hearing into this matter, I found that based upon the Magistrate's order, in which C &M Market was a defendant, there was no genuine issue of material fact that the possession and operation of the Seized Machines was an unlawful act that occurred upon the premises of C &M Market. Nevertheless, I found that the Magistrate's determination alone did not establish that Respondent **knowingly** permitted a crime to occur upon his premises. I thus denied summary judgment upon that ground.

### **FINDINGS OF FACT**

Having observed the witnesses and reviewed the exhibits presented at the hearing and closely passed upon their credibility, and having taken into consideration the burden of persuasion by the parties, I make the following Findings of Fact by a preponderance of the evidence:

#### **Background**

The Department issued an on-premises beer and wine permit (Permit) to Eric Zacour for the Respondent convenience store located at 2105 Highway 1, Elgin, South Carolina. In 2011, McDonald's Amusements (McDonald's) approached Zacour about putting Magic Minutes machines in C&M. McDonald's provided Zacour with an order from a magistrate in Kershaw County purportedly finding that similar machines were legal.

Upon receiving that information, Zacour asserts he contacted his brother who delivers potato chips to local convenience stores. His brother informed him that he had seen similar machines in other stores. Mr. Zacour contends that he therefore agreed to the placement of the machines in his store based upon the magistrate's order and his brother's observations. Accordingly, in November 2011, the two Seized Machines were placed in C&M.

However, Mr. Zacour never sought any legal advice about the legality of the machines nor did he contact anyone concerning the validity or applicability of the magistrate's order. More importantly, Mr. Zacour knew that poker and blackjack were games that were available for play on the Seized Machines. Zacour and McDonald's split the money from the Seized Machines 50/50.

#### **Inspection**

On January 26, 2012, Wes Bickley (Bickley), a Special Agent with South Carolina Law Enforcement Division (SLED), was investigating a report of illegal gambling machines at C&M

with Sergeant Jamey Jones (Jones), an officer with the Kershaw County Sheriff's Department (Sheriff).<sup>1</sup>

Jones, who was working undercover, entered C&M and found two machines in the center of C&M. He sat at one of the Machines, inserted money into the machine, and noted that several games, including poker, keno, and blackjack, were available to play. Jones chose to play poker. The machine had "a free play feature," which allowed the player to redeem the points earned. While Jones was playing poker on the machine, one of the clerks in C&M received a call. As a result of the call, the clerk went over to the machine that Jones was playing, pulled the receipt out of the machine, and told Jones to call the number on the receipt.

Jones left C&M and reported to Agent Bickley, who was waiting outside, that there were two illegal gaming machines in the store. Jones and Bickley, with other officers from the Sheriff's office, then entered the market and seized the two Magic Minute machines as illegal gaming machines. Bickley also issued a violation report to C&M for permitting an act that constituted a crime under Section 12-21-2710.

#### **Magistrate's Determination**

By Order dated January 27, 2012, Magistrate Corbett held that the Machines violated S.C. Code Ann. § 12-21-2710 and ordered the destruction of the machines. Neither Zacour nor C&M requested a Post-Seizure Hearing to contest the determination that the machines were unlawful. However, another party, Magic Minutes, requested a Post-Seizure hearing in the matter, and pursuant to that request, a Post-Seizure hearing was held on March 5, 2012. At that time, Magic Minutes, waived ownership of one of the machines, claiming that it was counterfeit. Afterwards, in an order dated March 26, 2012, Magistrate Corbett found that Magic Minutes lacked standing pursuant to S.C. Code Ann. § 12-21-2744 (2000) and that, therefore, the original Orders of Destruction stood and the machines would be destroyed. See Kershaw County Sheriff's Office v. Magic Minutes Machine and U.S. Currency, 2012CV2810100148, dated March 26, 2012.

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<sup>1</sup> Bickley investigates criminal activities also activities involving alcohol and gambling laws. He has been with SLED for seven (7) years but also had twenty-six (26) years of previous experience. Jones has worked with the Sheriff's office since 1996 and in the criminal division since 2006.

## CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude the following as a matter of law:

### **General Conclusions**

S.C. Code Ann. § 1-23-600 (2011) grants jurisdiction to the ALC to hear contested cases under the Administrative Procedures Act. Specifically, S.C. Code Ann. § 61-2-260 (2009) grants the ALC the authority to hear contested case hearings in matters governing alcoholic beverages, beer, and wine.

The Department seeks the revocation of Respondent's beer and wine permit for violating S.C. Code Ann. § 61-4-580(5). In general, permits and licenses issued by this State for the sale of liquor, beer, and wine are not property rights. Rather, they are privileges granted in the exercise of the State's police power to be used and enjoyed only so long as the holder complies with the restrictions and conditions governing them. See Feldman v. S.C. Tax Comm'n, 203 S.C. 49, 26 S.E.2d 22 (1943). More specifically, Section 61-4-580 provides that:

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

Section 61-4-580 goes on to say that: "A violation of any provision of this section is a ground for the revocation or suspension of the holder's permit." Therefore, to substantiate a violation of Section 61-4-580(5), the Department must prove by a preponderance of the evidence that: (1) Respondent or his agent/employee(s); (2) knowingly; (3) permitted an act which constituted a crime; (4) on the licensed premises.<sup>2</sup>

### **Act Which Constitutes a Crime**

Zacour admitted that he knew the Machines had poker and blackjack games on them. The undercover officer inserted money into one of the Machines and played poker on that Machine for an opportunity to earn points which could be redeemed. As set forth above, Section 12-21-2710 provides that:

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<sup>2</sup> There is no dispute that the Seized Machines were located upon the licensed premises and that Zacour permitted them to be on the licensed premises. The Seized Machines were located on the licensed premises as defined in 23 S.C. Code Ann. Regs. 7-700 (Supp. 2007). And Zacour admitted that the machines were placed in C& M in November 2011 and that the Machines were located there in January 2012. Therefore, these elements will not be further addressed.

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 . . . 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, [or] keno. . . .

As explained above, the Magistrate determined that the Seized Machines violated Section 12-21-2710. A gaming machine is “contraband per se,” not “derivative contraband,” at the moment of seizure. Mims Amusement Co., 366 S.C. at 155, 621 S.E.2d at 351; State v. 192 Coin-Operated Video Game Machines, 338 S.C. 176, 525 S.E.2d 872 (2000). Furthermore, in SunLight Prepaid Phonecard Co. v. State, 360 S.C. 49, 600 S.E.2d 61 (2004), the South Carolina Supreme Court considered whether machines that dispensed long distance phone cards and electronic phone card dispensers were illegal gambling devices in violation of the law at issue here, Section 12-21-2710. In that case, patrons would put money into a slot in return for a phone card that contained a game piece. The card contained a pull back cover that when pulled back revealed a toll-free number and pin number to activate the phone service. In addition, the cards had game pieces that if arranged in certain order would result in the holder winning a prize. The Court found the phone cards themselves contained an element of chance and were a type of gaming device known as a “pull tab,” which was illegal under Section 12-21-2710. See also Ward v. West Oil Co., Inc., 387 S.C. 268, 692 S.E. 2d 516 (2010). Additionally, the Court noted the “phone portion of the cards is mere surplusage to the game piece.” Id. at 55, 600 S.E.2d at 64. Likewise, the Court rejected the argument that the phone card dispensers were legal. In making that determination, the Court noted the dispensers resembled slot machines, had gambling-themed video, played celebration music if a customer won, and did not give change.

Similarly, in this case, the Seized Machines required patrons to insert money into a slot in order to play games by which patrons could gain points that could then be redeemed for value. Therefore, I find that the machines were unlawful and that possession and operation of these machines constituted an occurrence of a crime upon Respondent’s premises.

#### **Knowingly Permitting a Crime on the Premises**

As explained above, the Department must show that Respondent knowingly permitted a crime to occur upon its premises. The term “knowingly” includes not only actual knowledge, but also knowledge that could be gained by reasonable inquiry when the circumstances are such as would cause a prudent man to inquire. See Feldman, 203 S.C. 49, 26 S.E.2d 22. A person may be found to act “knowingly” where it appears that the person “[shut] 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).

Zacour admitted that the Seized Machines had poker and blackjack on them. Therefore, he clearly permitted machines he knew possessed games of chance upon his premises. Though he seeks to disavow knowledge of a crime based upon his brother’s observations of similar machines at other locations and the order provided by McDonald’s, those facts do not reflect a lack of knowledge.<sup>3</sup> Under the circumstances of this case, it is clear Respondent knew, or should have known, that the machines were illegal. The machines had games available to play that were obvious gambling-type games. That fact, in conjunction with the incentives for playing the machines, certainly put Respondent on notice as to the machines’ illegality. Moreover, he was also clearly profiting from the use of these machines by his patrons. I therefore find that Respondent knowingly permitted an act which constitutes a crime in this State.

#### **Penalty**

Respondent maintained machines on the premises which are prohibited by Section 12-21-2710 and did so knowingly. He therefore violated Section 61-4-580 by knowingly permitting an act “which constitutes a crime under the laws of this State.” The Department, and therefore the ALC, has jurisdiction to revoke or to suspend Respondent’s Permits. § 61-4-580. Furthermore, in lieu of suspension or revocation, a beer and wine permittee may be fined not less than twenty five dollars or more than one thousand dollars for an infraction against Title 61, Chapter 4 or “for a violation of any regulation pertaining to beer or wine . . . .” S.C. Code Ann § 61-4-250 (Supp. 2007). Where the General Assembly authorizes a range of alternatives for an administratively-imposed penalty, the administrative fact-finder may set the amount of the penalty after a hearing on the dispute. Walker v. South Carolina ABC Comm'n, 305 S.C. 209, 407 S.E.2d 633 (1991). To that end, an Administrative Law Judge must consider relevant evidence presented in mitigation. Mitigation is defined as a lessening to any extent, great or small. It may be anything between the limits of complete remission on one hand and a denial of any relief on the other. In a legal sense, it necessarily implies the exercise of the court’s judgment as to what is proper under the facts of the particular case. 58 C.J.S. Mitigation p. 834, 835 (1948).

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<sup>3</sup> The order supplied by McDonald’s was never filed with the magistrate court and, even if lawful, was not based upon a review of the machines before the magistrate. Moreover, the evidence did not establish that the machines that were the subject of that order had poker or blackjack games upon them

Here, given the unique circumstances of this case, and the fact that there is no evidence that Respondent, or its agent, has been sanctioned for any violation in the past, I find that mitigation is proper.

### **Respondent's Motion to Alter or Amend Judgment**

Respondent filed a Motion to Alter or Amend Judgment, in which it asserted that the Court did not address several of its arguments in its original Final Order and Decision. The Court takes this opportunity to address those arguments in turn.<sup>4</sup>

At the outset, the background of this case is important in order to properly address Petitioner's contentions. After SLED seized the machines in C&M Market, a Magistrate held an initial seizure hearing on January 26, 2012, in which Respondent was a named Defendant. The Magistrate made a determination that the machines were unlawful on that date. C&M, however, did not appeal that decision. Nevertheless, also on January 26, 2012, Magic Minutes, the manufacturer of the Seized Machines, requested a Post-Seizure Hearing, which was held before the Magistrate on March 5, 2012. On March 26, 2012, the Magistrate ruled that Magic Numbers lacked standing and thus affirmed its decision ordering destruction of the machines. On May 29, 2012, the Department determined that Respondent's on-premises beer and wine permit should be revoked based on a violation of South Carolina Code Ann. 61-4-580(5).

In its Motion to Alter or Amend Order and Judgment, Respondent first argues that although it was a named Defendant when the Magistrate determined the legality of the Seized Machines, and appeared through counsel at the hearing on this determination, the Magistrate denied Respondent a meaningful opportunity to participate in the hearing, and Respondent should therefore not be bound by the Magistrate's Order finding that the seized machines were unlawful pursuant to S.C. Code Ann. § 12-21-2710. Respondent was the named Defendant in the Magistrate's January 27, 2012 Order of Destruction/Notice of Post Seizure Hearing, and was therein given notice, in bold print, that it had 15 days from the date of receipt of the Order to request a Post-Seizure Hearing to contest the illegality of the Seized Machines. However, Respondent chose not to request a hearing to contest the illegality of the Seized Machines. Instead, Magic Minutes, which lacked standing, was the only entity that requested such a

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<sup>4</sup> The Court will also address Respondent's arguments as set forth in Respondent's Memorandum in Opposition to Motion for Summary Judgment, upon which the arguments in Respondent's Motion to Alter or Amend Order and Judgment are based.

hearing. And even in the Post-Seizure Hearing, after which the Magistrate determined that Magic Minutes lacked standing, Respondent still provided testimony, through Eric Zacour, the retail licensee and holder of the beer and wine permit for Respondent. And, on March 5, 2012, Respondent also submitted to the Magistrate a Brief in Support of the Legality of Seized Vending Machines. Therefore, Respondent's assertion that it was denied a meaningful opportunity to participate in the hearing is without merit. Moreover, there is no evidence in the record that Respondent ever objected to the Magistrate as to any denial of a meaningful opportunity to participate in the hearing. At any rate, whether Respondent was given a meaningful opportunity to participate in the March 5, 2012 hearing by the Magistrate concerning the January 27, 2012 determination is immaterial because Respondent was given a full and fair opportunity to litigate the issue of the legality of the Seized Machines before the Magistrate by requesting a hearing to contest the determination within 15 days; but Respondent simply failed to do so. See Zaman v. S.C. State Bd. of Med. Exam'rs, 305 S.C. 281, 285, 408 S.E.2d 213, 215 (1991) ("One cannot complain of a due process violation if he has recourse to a constitutionally sufficient administrative procedure but merely declines or fails to take advantage of it.").

Respondent also argues that it should not be collaterally estopped from arguing the legality of the machines before this Court, because it did not have a full and fair opportunity to litigate the legality of the Seized Machines, and the issue of whether Respondent violated Section 61-4-580 by possessing the Seized Machines was not litigated in the hearing before the Magistrate. Respondent correctly cites Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994) for the rule that the doctrine of offensive collateral estoppel cannot be invoked against a party unless the party had a full and fair opportunity to litigate in the prior proceeding. In this case, it is true that the Magistrate did not reach the issue of whether Respondent's possession of the Seized Machines violated Section 61-4-580, because he found that Magic Minutes, the only party that requested a hearing, lacked standing. However, this issue had been litigated in a prior proceeding, and, as mentioned above, Respondent was on notice from the Order issued from that proceeding that it had 15 days to exercise its right to request a Post-Seizure Hearing to contest the illegality of the Seized Machines. Thus, Respondent had a full and fair opportunity to litigate the issue by requesting a hearing in which it could argue that the Seized Machines were authorized by Section 61-4-580(3), and were therefore not illegal activity under Section 12-21-2710 for purposes of Section 61-4-580(5).

However, because the only entity that requested a Post-Seizure Hearing was a party without standing, the Magistrate’s original determination that the Seized Machines were illegal is the law of the case. See Bone v. U.S. Food Serv. and Indem. Ins. Co. of N. Am., 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) (“The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so.”). Respondent is therefore collaterally estopped from reintroducing the issue of the legality of the Seized Machines.

Respondent further argues that it cannot be collaterally estopped from relitigating the issue of the legality of the Seized Machines because it was not in privity with Magic Minutes. **“Where one is not a party to the prior action**, the only way he can be precluded from relitigating an issue is if he is in privity with a party to the prior action against whom an adverse finding is made.” Roberts, 316 S.C. at 496, 450 S.E.2d at 619. (Emphasis added). “[T]he term ‘privity,’ when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right.” Carrigg v. Cannon, 347 S.C. 75, 80, 552 S.E.2d 767, 770 (Ct. App. 2001). (internal citations and quotation marks omitted). Respondent argues that because the Magistrate determined that Magic Minutes did not have standing to litigate the legality of the Seized Machines, Magic Minutes did not represent the same legal rights as Respondent. In this case, however, the Court need not determine whether Respondent was in privity with Magic Minutes, because Respondent was a party to a prior action involving the same issue – the legality of the same two gaming machines seized from Respondent’s premises on January 26, 2012.

Finally, Respondent argues that the Seized Machines were specifically authorized by S.C. Code Ann. § 61-4-580(3). The Court need not address this issue because, as addressed above, Respondent is collaterally estopped from arguing the legality of the Seized Machines, as it had the opportunity to request a hearing on the Magistrate’s determination on this issue yet declined to do so.<sup>5</sup> However, the Court takes this opportunity to address Section 61-4-580(3), so as to further clarify its decision as to Sections 12-21-2710 and 61-4-580(5). Section 61-4-580(3) provides in pertinent part:

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:

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<sup>5</sup> Though the issue of collateral estoppel has been argued by the parties, the legal issue of the lawfulness of the machines was likewise determined by the magistrate thus invoking the principal of *res judicata*.

\* \* \*

(3) permit gambling or games of chance except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:

- (a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;
- (b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and
- (c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

Section 61-4-580(3) provides an exception to a general prohibition on gambling or games of chance on a beer or wine permit holder's premises. In order to meet this exception, a permit holder must comply with subparts (a), (b), **and** (c), as the subparts are joined by the conjunction "and." In this case, Respondent fails to satisfy subpart (b).<sup>6</sup> Respondent continuously refers to the games at issue as "sweepstakes machines." Any entry into a sweepstakes by a player of the Seized Machines necessarily requires that the player first insert money into the machine to play a game of chance. Points earned as a result of playing the game may be redeemed for a prize. Unlike an entry into a sweepstakes upon the purchase of a product or service, where the purchaser receives the product or service that he or she purchased and would have received in exchange for value given regardless of the sweepstakes, the entry into the "sweepstakes" in this case is not merely incidental and ancillary to the purchased item or service. Rather, these "sweepstakes" are intertwined with, and their value dependent upon, success at games of chance that require the payment of an entry fee to play. If the player does poorly at the game of chance, then he or she will receive fewer points. Therefore, if the player continues to perform poorly at the games of chance, then he or she will end up spending more money playing the game than he or she will receive in value from the "sweepstakes" in which he or she has entered. Thus, the

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<sup>6</sup> The Court declines to discuss subparts (a) and (c), as it is unnecessary to do so since all three must be shown in order to satisfy the exception and the Court has found that subpart (b) was not satisfied.

“sweepstakes” become a mere extension of the game of chance. Being a game of chance alone, however, does not disqualify the “sweepstakes” from being authorized, but it must comply with Section 61-4-580(3)(a)-(c) in order to fall under the exception to the statutory prohibition, under Section 61-4-580(3), of permitting gambling or games of chance on the permit holder’s premises. But because the underlying transactions of the Seized Machines involved games of chance that required entry fees, in violation of Section 61-4-580(3)(b) and Sections 12-21-2710/61-4-580(5), and the “sweepstakes” were an extension of those underlying illegal games of chance, the “sweepstakes” did not satisfy Section 61-4-580(3)(b) and were therefore also illegal. See SunLight Prepaid Phonecard Co., *supra*. The reasoning of this interpretation is consistent with Section 12-21-2710’s prohibition of “video game machine[s] **with a free play feature** operated by a slot in which is deposited a coin or thing of value . . . [.]” such as the ones at issue in this case. (Emphasis added).

Furthermore, Section 61-4-580(3) provides no exception to Section 12-21-2710 but is rather an exception to Section 61-4-580(3)’s own prohibition of gambling or games of chance on premises covered by a beer or wine permit holder. None of the gambling devices or machines prohibited under Section 12-21-2710 could satisfy the exception under Section 61-4-580(3), because the machines forbidden under Section 12-21-2710 all require a player to deposit a coin or thing of value in order to play them, which, at the very least, fails to satisfy one of the exception’s requisites, under Section 61-4-580(3)(b). To adopt Respondent’s interpretation of Section 61-4-580(3) would allow any statutory prohibition on gambling or games of chance to be undermined by simply adding to the forbidden gambling or game of chance another contest, game of chance, or sweepstakes that costs nothing. In essence, this interpretation would allow patrons to be rewarded for the very activities that Sections 12-21-580(3) and 12-21-2710/12-21-580(5) seek to prohibit. The exception in Section 61-4-580(3) merely allows contests, games of chance, or sweepstakes that require no cost to a customer but instead can be played or entered into free of charge as the result of making an ordinary purchase of an item or service. In such instances, the customer would have received the purchased item or service in exchange for the purchase price, regardless of receiving the free contest, game of chance, or sweepstakes; thus, there would be no gambling or chance involved in the underlying transaction. These contests, games of chance, or sweepstakes would normally be considered impermissible forms of gambling or chance, but are excepted under Section 61-4-580(3) for the beer or wine permit

holder, because these contests, games of chance, or sweepstakes, either themselves or through their underlying transactions, required no purchase payment, entry fee, or proof of purchase, thus satisfying subpart b, and satisfied subparts a and c.

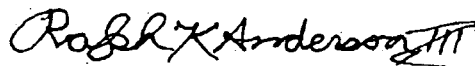
In this case, as discussed above, the underlying transaction involves gambling or games of chance that require an entry fee or payment of value to play. The degree of participation in the “sweepstakes” is dependent on the degree of success in these illegal games of chance and therefore becomes an extension of the games themselves. Because the underlying transaction (playing one of the games of chance on the Seized Machines) is an impermissible form of gambling under Sections 61-4-580(3) and 12-21-2710/12-21-580(5), and the “sweepstakes” in this case is dependent on performance on the underlying impermissible games of chance, then the “sweepstakes,” too, are impermissible games of chance under Section 61-4-580(3).<sup>7</sup>

**ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law,

**IT IS HEREBY ORDERED** that Respondent’s beer and wine permit be suspended for one hundred twenty (120) days beginning February 1, 2013.

**AND IT IS SO ORDERED.**



Ralph King Anderson, III  
Chief Administrative Law Judge

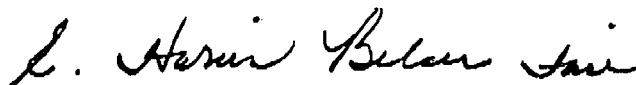
January 4, 2013  
Columbia, South Carolina

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<sup>7</sup> Respondent makes reference to a circuit court opinion and several magistrate opinions that had a different interpretation of the statutes at issue in this case. However, this Court is neither bound by their decisions nor finds them unpersuasive. The Court, instead, renders this Opinion based on the facts of this case and in accordance with its view of the South Carolina Supreme Court’s precedents.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



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E. Harvin Belser Fair  
Judicial Law Clerk

January 4, 2013  
Columbia, South Carolina

# EXHIBIT 1

STATE OF SOUTH CAROLINA )

COUNTY OF Kershaw )

Kershaw County Sheriff's Office )

PLAINTIFF(S) )

vs. )

*John Markette*

*2105 Hwy # 1 South*

Lugoff SC 29278 DEFENDANT(S) )

IN THE MAGISTRATES COURT

ORDER OF DESTRUCTION/  
NOTICE OF POST SEIZURE  
HEARING

CIVIL CASE NUMBER

Pursuant to S.C. Code Ann. §12-21-2712, the above listed machine(s) were seized on November 1, 2007 from Robert Lee (business) at 4110 Hard Scrabble Rd., Columbia, SC 29223 (address) by the Plaintiff and brought before me on November 5, 2007 for examination to determine if the machine(s) are prohibited pursuant to S.C. Code Ann. § 12-21-2710.

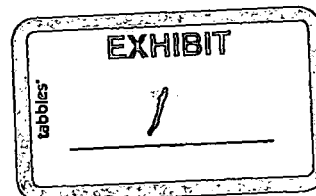
Upon careful examination of the machine(s), I find the machine(s) to be: a vending or slot machine, or a video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to S.C. Code Ann. § 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine.

I find that the Defendant's machine(s) are in violation of S.C. Code Ann. §12-21-2710 and do hereby order their destruction. **The Defendant has 15 days from the date of receipt of this Order to request a post seizure hearing to contest the illegality of the machine(s).**

**Otherwise, the machine(s) will be destroyed.**

Pursuant to state law, the State Law Enforcement Division is authorized to retain, expend, and carry forward all monies associated with illegal gaming devises seized by the Division, once orders of destruction and awarding of these monies have been received from a court of

SCCA 690 (2006)



competent jurisdiction. I find that \$1078.<sup>00</sup> was seized by the Division and shall be retained for  
the purposes provided by law. (1078.<sup>00</sup>)

**AND IT IS SO ORDERED.**

January 26, 2012



(MAGISTRATE)

# EXHIBIT 2

STATE OF SOUTH CAROLINA  
COUNTY OF KERSHAW

Kershaw County )  
Sheriff's Office )  
 )  
v. )  
 )  
C & M Markette )  
 )  
 )  
 )  
 )

IN THE MAGISTRATE'S COURT

BRIEF IN SUPPORT OF LEGALITY OF

SEIZED VENDING MACHINES

Defendant C & M Markette hereby submits this Brief in support of the legality of the vending machines.

**A. SEIZED VENDING MACHINES**

Deputies from the Kershaw County Sheriff's Department seized two Magic Minute vending machines which sold telephone access at commercially reasonable rates from Defendant's convenience store. The vending machines promote the sale of their products through an electronic sweepstakes.

The sweepstakes promotions operate in the same manner as product sweepstakes that have gain widespread acceptance in the retail marketplace. These types of sweepstakes are used to promote the sale of food and beverage items, innumerable consumer products and magazines and to enhance a brand image of a retail merchant. Many sweepstakes promotions of nationally recognized brand named products are sold through vending machines throughout South Carolina. For example, the sale Pepsi and Coca Cola products are often promoted through product sweepstakes. A customer can simply place their money into a slot at a vending machine, receive

the Pepsi or Coke product, open the top and underneath one will find the outcome of their sweepstakes. The vending machines seized and presented to this Court are no different.

The principle feature of a lawful sweepstakes is that there is no requirement that a person purchase the product before participating in the sweepstakes promotion. This is also true with the Magic Minute product sweepstakes. The sweepstakes rules which are prominently posted within the location explicitly provide that there is no purchase necessary to a win and there are easy to follow instructions explaining how to obtain free sweepstakes entries.

### **1. Sweepstakes Product Promotion Does Not Violate South Carolina Law**

Sweepstakes schemes that promote the sale of a product through the chance to win a prize are legal. In *Darlington Theaters v. Coker*, 190 S.C. 282, 2 S.E.2d 782 (1939), the Supreme Court of South Carolina concluded that such schemes do not involve gambling since the element of consideration is lacking, meaning that the person is not paying for the chance to win a prize but instead is being given that chance and is rather paying for a product. The promotion at issue involved a drawing held weekly at the Theatre where cash prizes were given. Under the rules of the promotion, no purchase was necessary to enter the drawing and attendance was not required. However, a person had to claim the prize within 10 minutes from the announcement of a winner. The Court concluding that the traditional definition of a lottery required three elements, prize, chance and consideration, determined that the first two elements - prize and chance - were easily present. The Court then ruled that there was no consideration involved in the *Darlington Theatres* promotion. The Court explained:

[t]he case is only one step removed from a situation in which a theater might on a given occasion, without previous notice, give away to some person, in or out of the theater, some sum of money, solely for the purpose of getting the theater talked about. It could hardly be material whether that person is selected from a telephone

book, a city directory, a publisher's mailing list, or a list arbitrarily made up by the theater management. Such a case could hardly be said to come within the statutory prohibition.

2 S.E.2d at 785.

The Court contrasted the situation before it with others where a lottery would be involved because consideration is given, reasoning:

[w]here no price is paid for tickets, but in order to win a person must purchase something else, this would be included in the definition of a nature of a lottery. For instance, where the winner must have purchased a ticket to the theater on the day of the drawing or on some other day that would be a monetary consideration and such scheme would be in the nature of a lottery. However, under the plan adopted by this theater, there is absolutely no direct or indirect consideration passing from the winner or other person whose name has been enrolled, and if the theater derives any benefit through advertising it is too remote to be called a consideration.

2 S.E.2d 785

*Darlington Theaters v. Coker* has remained the law since 1939. Unlike many States, South Carolina has not enacted a comprehensive sweepstakes statute. The South Carolina Legislature has enacted a statute that protects businesses that are licensed to sell beer and wine from administrative action against their license for permitting games of chance that specifically permits the conduct of a sweepstakes. Under S.C. Code § 61-4-580 the holder of a beer and wine permit is prohibited from allowing games of chance to be played in their establishments. However, the General Assembly recognizing the legality of sweepstakes promotions, created an exemption from the ban against the operation of games of chance that allows beer and wine permit holders to conduct product sweepstakes

“... in which the elements of chance and prize are present and which comply with the following: a) the game promotion is conducted or offered in connection with the sale, promotion, or

advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services; b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.”

In *Sun Light Prepaid Phonecard Co., Inc. v. State*, 360 S.C. 49, 600 S.E.2d 61 (2004), the Court considered whether a dispenser of prepaid phone cards that contained an attached sweepstakes promotion was an illegal gaming device under the South Carolina gambling device contraband statute, S.C. Code Section 12-21-2710. The sweepstakes promotion at issue was set to run for 22 months, but the long distance service on the phone cards was valid only for six months from the time the *first* phone card pin number was used. Based upon this and other evidence, the Supreme Court determined that the product was a mere subterfuge for gambling and that the consideration paid by the customer was for the chance to win a prize. The Court therefore affirmed the trial court’s ruling that the phone card dispenser as well as the phone cards themselves were illegal “pull tab” devices that violated S.C. Code Section 12-21-2710.

In contrast to the phone cards at issue in *Sun Light Prepaid Phonecard Co., Inc. v. State*, the phone time here is valid at the time of purchase and does not expire. As a result, the customer is always purchasing valid product and not paying consideration for the chance to win a prize, as was the case with the Sun Light pre-paid phone card. A sweepstakes promotion that does not involve consideration is legal.

Prior to the “video poker” hysteria of the late 90s, the South Carolina Attorney General, Daniel McLeod issued a formal opinion concluding that a Pepsi Cola sales promotion scheme did not violate the State’s gambling and lottery laws. *S.C. Op. Atty. Gen. 103, 1966 S.C. Op. Atty. Gen. No. 2031, 1966 WL 8502 (S.C.A.G.)*. The promotion was described as follows:

The Pepsi Cola Company is running a contest whereby various letters of 'Pepsi Cola' are placed under the crowns that cap individual bottles of Pepsi. When a participant is able to spell out the word Pepsi Cola with 9 crowns, he is in position to win a prize or a series of prizes. Of course, various bottles of Pepsi Cola that are purchased have one letter of Pepsi Cola stamped in the crown. In addition to the caps that are sold on the various bottles of Pepsi Cola, an individual may go to one of the four Pepsi Cola plants and secure a crown free which may or may not have a letter out of the words Pepsi Cola under the cork. Also, an individual may request a crown from the various cooperating radio stations or from one of the Pepsi route salesmen.

The Attorney General concluded that "the better reason cases hold, generally, that if the participant has an opportunity to participate free without the requirement that he purchase something or pay a consideration, then the lottery statute is not violated. The fact that the participant does not avail himself of the opportunity to participate free is of no consequence in the better reasoned cases. Based on these authorities, it appears that the Pepsi Cola scheme or plan does not violate our lottery statutes, for the reason that the element of consideration is lacking."

In 2005, the North Carolina Court of Appeals in *American Treasures, Inc. et. al. v. State of North Carolina* 617 SE2d 346 (2005) concluded that a sweepstake promotion that accompanied the sale of prepaid long distance phone cards were not illegal gambling devices. The Court described the promotion as follows:

Attached to each phone card is a free promotional game piece in which the consumer may win a prize based on what is revealed under a scratch-off area. Plaintiff included this with the purchase of the phone card at the recommendation of a national advertising consulting firm in order to facilitate their entry into the market. In appearance, plaintiff's product consists of a larger card perforated into a phone card portion and a game portion. Multiple versions of the phone card and promotion exist, but generally speaking, the following observations can be made: the phone card portion includes representations that plaintiff is "one of the nation's largest pre-paid phone companies[.]" the card is a pre-paid phone card and entitles the consumer to two minutes for one dollar, and the card encourages the consumer to "save cash on long distance calls[.]" The game portion varies with the prize that can be won but generally provides two chances for the purchaser to win monetary amounts up to \$50,000

(along with smaller increments) or prizes such as a Corvette. If customers wish to participate in the game promotion without actually purchasing a pre-paid phone card, they may do so by sending a written request and a stamped self-addressed envelope to plaintiff's designated address. Each written request entitles the sender to one game piece, and the number of requests for a free game piece is not limited.

Recently, in *Georgetown County Sheriff's Office v. 20 Murrells Inlet Sweepstakes HEST Sweepstakes Management System Machines*, Case No. 2011-CV-221051092 (December 6, 2011)(Attachment 1) the Court considered the legality of a sweepstakes system which promoted charitable donations as well as in-store merchandise. The Court relying upon the *Darlington Theatres* decision concluded that the sweepstakes machines were not used for gambling, because the element of consideration (i.e. payment) was lacking, and therefore were lawful to operate.

**2. SWEEPSTAKES VENDING MACHINES WHEN USED IN A PREMISES LICENSED TO SELL BEER OR WINE ARE NOT SUBJECT TO S.C CODE SECTION 12-21-2710, PROHIBITING THE POSSESSION OF DEVICES PERTAINING TO GAMES OF CHANCE**

S.C. Code § 12-21-2712 prohibiting the possession of gambling devices, states:

“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 or any machine or device licensed pursuant to § 12-21-2720 and used for gambling or any punch board, pool board or other device pertaining to games of chance of whatever name or kind, including those machines, boards or other devices that display different pictures, words or symbols at different plays or different numbers, whether in words or figures or which deposit tokens or coins at regular intervals or in varying numbers to the players or in the machine.”

The holder of a beer and wine permit is prohibited from allowing games of chance to be played in their establishments. However, the General Assembly recognizing the legality of sweepstakes promotions, created an exemption from the ban against the operation of games of

chance that allows for the possession and operation of devices pertaining to games of chance in conjunction with a product sweepstakes

“... in which the elements of chance and prize are present and which comply with the following: a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services; b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.”

S.C. Code § 61-4-580.

The premises located at C & M Markette is licensed by the South Carolina Department of Revenue to sell beer and wine for off premises consumption. In addition, the advertising materials located within the premises clearly disclosed that no purchase or payment is necessary to enter and provided details on the free method of participation.

On January 27, 2012, in the South Carolina Court of Common Pleas, Circuit Court Judge Hill ruled that the exemption in S.C. Code § 61-4-580(3) excluded electronic sweepstakes machines from the prohibitions of Section 12-21-2710, Greenville County Sheriff's Department v. Sweepstakes Terminal No. 0399 (2011 CP-23-2657)(Attachment 2). In its well-reasoned opinion, the Court compared the language of both statutes, applied the applicable canons of statutory construction and examined the legislative history of the two. The Court then concluded that sweepstakes terminals that meet the criteria of Section 580(3) are exempted from Section 2710. Importantly, the Court also rejected the State's argument that possession of a sweepstakes vending machine by a holder of a beer and wine permit violated Section 580(5). The mere possession of a contraband machine is a criminal offense under S.C. Code § 12-21-2710. Section 580(5) provides that the holder of a beer or wine permit may not “permit any act, the commission

of which...constitutes a crime under the laws of this State.” The Court appropriately concluded that the possession of a sweepstakes vending machine that complies with Section 580(3) does not violate Section 2710 and therefore is not a crime.

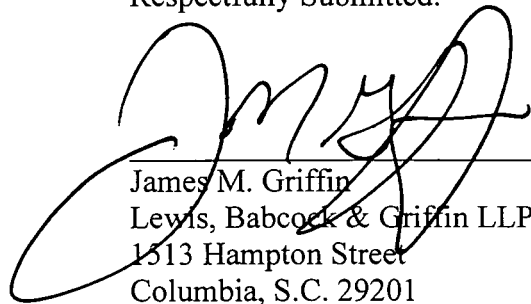
Judge Hill’s ruling is just the latest in a series of decisions issued in this State upholding the legality of similar sweepstakes vending machines including:

- a. City of Camden v. Magic Minutes LLC (Attachment 3);
- b. Oconee County Sheriff’s Department v. Ralph Alexander Amusement Co. (Attachment 4);
- c. State of SC v. Play 4 Fun, Inc. (Sweepstakes Terminal No.0399) (Attachment 5)
- d. Greenwood County Sheriff’s Office v. 6 Black Gaming Machines (Attachment 6)

#### CONCLUSION

The seized vending machines which promote the sale of a valid consumer product through a sweepstakes are lawful to possess and operate in South Carolina. As a result, the Defendant respectfully requests that this Court issue an order requiring the return of the machines.

Respectfully Submitted.



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March 5, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE MAGISTRATES COURT
COUNTY OF GEORGETOWN	)	
Georgetown County Sheriff's Office,	)	Case No. 2011-CV-221051092
	)	
Plaintiff,	)	
	)	
vs.	)	<u>ORDER</u>
	)	
20 Murrells Inlet Sweepstakes HEST	)	
Sweepstakes Management System	)	
machines,	)	
	)	
Defendant.	)	

The Defendant's HEST Sweepstakes Management System machines were seized on September 26, 2011 from Murrells Inlet Sweepstakes by the Plaintiff. After a hearing on December 6, 2011, in which documentary evidence and live testimony was presented, and after reviewing the applicable law, the Court finds that Defendant's machines DO NOT violate the laws of the State of South Carolina and therefore SHALL NOT be destroyed.

**FINDINGS OF FACT**

Based on the testimony and evidence presented, the Court finds as follows:

1. The Defendant operates a business that operates in Georgetown County. A primary component of the Defendant's business is the promotion of sweepstakes contests through the use of HEST Technologies' HEST Sweepstakes Management System machines. The sweepstakes are often used in conjunction with donations to nonprofit entities, such as the Skyward Bound Ranch, or the sales of products by retail establishments.



2. Consideration is never required to participate in any sweepstakes contests operated by the Defendant.

3. A participant can enter one of the Defendant's sweepstakes contest in any of four ways: (1) he may purchase goods or services that have been designated to qualify for the sweepstakes, (2) he may make a donation to a designated charitable organization, (3) he may request an entry on site of an establishment that is hosting one of the Defendant's sweepstakes contests, or (4) he may request an entry via mail. The latter two of these options do not require any purchase, donation, or other tender of consideration. The method by which a participant enters the sweepstakes does not impact his odds of winning a prize.

4. The Defendant's sweepstakes are operated through a series of terminals maintained on site at a location with which the Defendant has contracted to host a sweepstakes contest. The Defendant's HEST Sweepstakes Management System incorporates two types of terminals: a "point-of-sale" terminal, and a "player" terminal. Under this system, there are two methods of revealing a participant's sweepstakes entry. A participant may choose to reveal the results of his entry at a player terminal using a game theme of his choice to display his entry's content. The game themes are used as an entertaining method to reveal the prize values of a sweepstakes participant, but the type of game theme chosen does not impact the participant's odds of winning. In other words, the results of game play at the player terminal simply display the prize assigned to the sweepstakes entry when the pool was created. Alternatively, a participant may choose to reveal the prize amount corresponding to his entry at a point-of-sale terminal without utilizing a game theme. The method of revealing the prize value of an entry in no way

diminishes any goods or services that have been purchased or donations to charitable organizations, nor does it have any bearing on that participant's chance of winning.

5. Neither the point-of-sale terminals nor the player terminals are operated by a slot or by placing anything of value into them.

6. The odds of winning any sweepstakes prize remain the same regardless of how the participant obtained his entry into the sweepstakes and regardless of how the participant chooses to reveal the results of his entry because sweepstakes entries are drawn from the same pool of one million entries at the point of sale. The Defendant's system contains a finite set of entries, which is stored in the system's database. All entries into the sweepstakes are predetermined and created prior to the beginning of the sweepstakes.

7. Testimony was provided by Nick Farley of Nick Farley & Associates. Mr. Farley has previously performed work for various agencies in South Carolina, including the State Law Enforcement Division and the State Attorney General, and served as an expert witness on these issues for the defendant government agencies in *Castle King, LLC v. Hoisington*, Case No. 2002-CP-10-3182. The Court finds Mr. Farley's testimony persuasive and consistent with the evidence presented. Mr. Farley testified that he has examined and studied the software source code associated with the Defendant's HEST Sweepstakes Management System program. He testified that the finite pool of entries is not accessible to the operator or patron and cannot be altered. He testified that the system contains a file check signature of CRC32, and that the publication of this check signature is a critical tool for law enforcement in determining whether a lawful promotion has been altered. Mr. Farley testified that the Defendant's HEST Sweepstakes Management

System performs in a similar fashion as other permitted sweepstakes that are commercially offered to the public.

8. The system's player terminals are not designed to be used as gaming terminals or slot machines as: (a) there are no means to accept or dispense currency or tokens; (b) the software is not designed to determine a gaming outcome at the player terminal and (c) the program does not contain a random-number generator that determines the outcome of a video gaming machine.

#### CONCLUSIONS OF LAW

Article XVII, Section 7 of the South Carolina Constitution prohibits private lotteries in South Carolina:

Only the State may conduct lotteries, and these lotteries must be conducted in the manner that the General Assembly provides by law. The revenue derived from the lotteries must first be used to pay all operating expenses and prizes for the lotteries. The remaining lottery revenues must be credited to a separate fund in the state treasury styled the "Education Lottery Account," and the earnings on this account must be credited to it. Education Lottery Account proceeds may be used only for education purposes as the General Assembly provides by law.

The game of bingo, when conducted by charitable, religious, or fraternal organizations exempt from federal income taxation or when conducted at recognized annual state and county fairs, is not considered a lottery prohibited by this section.

Likewise, South Carolina Code § 12-21-2710 prohibits certain gambling devices:

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, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other

devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

In order for a machine to be prohibited under this section, the three elements of gambling must be present: (1) chance, (2) price, and (3) prize. *Ward v. West Oil Co.*, 387 S.C. 268, 278, 692 S.E.2d 516, 522 (2010). Based on the above-stated Findings of Fact, the Court finds that the Defendant's sweepstakes system and machines do not violate either the constitutional prohibition on lotteries or Section 12-21-2710 of the South Carolina Code.

A. **The Defendant's HEST Sweepstakes Management System does not involve gambling because there is no consideration required to participate in the sweepstakes.**

In South Carolina, an essential component to any illegal gambling device is that the player must be required to post some consideration in exchange for the opportunity to play a game of chance. This is a fundamental distinguishing point between the Plaintiff's system, which does not require consideration in return for an entry into the sweepstakes, and gaming that is illegal under South Carolina law. The case of *Darlington Theatres, Inc. v. Coker*, 190 S.C. 282, 2 S.E.2d 782 (1939), provides a ready example of this distinction.

There, a theater owner held a weekly drawing at the theater for a cash prize. Entries into the drawing were derived from a list of names maintained at the theater; however, no purchase was required to place one's name on the list. As the court put it:

“No one pays anything to get his or her name on the list. Any person, without purchasing a ticket, may ask that his name be added to the list.” 2 S.E.2d at 783.

The absence of consideration kept this scheme legal. The Court explained the governing standard as follows:

From all of the cases the principle is deduced that to constitute a lottery, or a scheme in the nature of a lottery, it is essential that three elements be present, to wit: (1) The giving of a prize, (2) by a method involving chance, (3) for a consideration paid by the contestant or participant. The concurrence of the first and second elements is not sufficient. The element of illegality is introduced only when the third element is present.

*Id.* at 786 (emphasis added). It then concluded that the scheme was legal because the testimony showed that “the distribution of money by the plaintiff involves no payment of money or the parting with any other consideration on the part of the participants.” *Id.* at 788.

As the evidence and testimony presented makes clear, the Defendant’s HEST Sweepstakes Management System does not require a participant to make a purchase, donate to a charity, or offer any consideration at all in order to enter the sweepstakes. Standing alone, this fact pushes the sweepstakes beyond the scope of South Carolina’s gaming laws under the *Darlington Theaters* analysis.

Additionally, to the extent a participant enters the sweepstakes in conjunction with a commercial or charitable transaction, the consideration paid by the participant would be for either (1) the purchase of the good or service or (2) a donation to a charitable organization, not for an entry into the sweepstakes. This stands in stark contrast to the factual background of the illegal game in *Sun Light Prepaid Phonecard Co. v. State*, 360 S.C. 49, 600 S.E.2d 61 (2004).

In *Sun Light Prepaid Phonecard*, a manufacturer attempted to sell phone cards that also had a pull-tab game imbedded in them. In a 3-2 decision, the Supreme Court held the phone cards to be illegal gambling devices because, according to the Court, "the phone portion of the cards is mere surplusage to the game piece." *Id.* at 55, 600 S.E.2d at 64. The majority reached this conclusion after a heavy examination of the factual record:

Further, although the sweepstakes promotion was set to run for 22 months, the long distance service on the phone cards was valid only for six months from the time the first phone card pin number was used. There was testimony that appellants, the manufacturers, and the distributor did not keep any records of the phone time used or what PIN numbers had been sold via the cards. Also, some stores contained more than one phone card dispenser. According to the lease and purchase agreements, Phonecards R Us, Sun Light, and another company not involved in this case were under contract to sell 117,360,000 cards a year in the state of South Carolina. The South Carolina population in early 2000, the time of the seizures, was only about three million people. A marketing study had not been conducted to determine whether there would be such a high demand for the phone cards. Finally, the phone company from which the long distance service was purchased could not legally provide intrastate service in South Carolina because it had not been licensed to do so.

*Id.* at 53, 600 S.E.2d at 63 (emphasis supplied by the Court). Based on these facts, the majority concluded that the phone cards were illusory goods and that, instead, the consideration paid was actually for the pull-tab game.

The concerns expressed by the *Sun Light Prepaid Phonecard* majority are not present under the Defendant's HEST Sweepstakes Management System, as it is not tied to the sale of a certain item. As the testimony and evidence demonstrated, a participant may enter the sweepstakes (1) after purchasing any of the goods regularly sold by a store hosting the sweepstakes (e.g., bread, milk, or soft drinks); (2) after making a donation to a charity; or (3) after requesting an entry without making a purchase or donation. Based

on these facts, the Court concludes that the Defendant's HEST Sweepstakes Management System is legal under existing South Carolina law.

**B. The Defendant's HEST Sweepstakes Management System's terminals are not operated by slots, nor do they contain any type of "lock-out" feature.**

South Carolina's prohibitions focus not only on the type of game at issue, but also on the physical attributes of the terminal that hosts a game. Under South Carolina Code § 12-21-2710, a key to illegality is whether the host terminal operates after receiving a coin or token through a slot. For instance, the statute bars:

1. "slot machines,"
2. "any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value," and
3. "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, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling."

S.C. Code Ann. § 12-21-2710 (emphasis added). Therefore, if a terminal is not operated by a slot, it is necessarily beyond the scope of Section 12-21-2710. *See State v. Four Video Slot Machs.*, 317 S.C. 397, 401, 453 S.E.2d 896, 898 (1995) (Finney, J., dissenting) (explaining that a machine is a "slot machine" when it is "a machine whose operation is begun by dropping a coin into a slot" (quoting *Webster's New Collegiate Dictionary* 1094 (5th ed. 1974), and citing other case law for this proposition)).

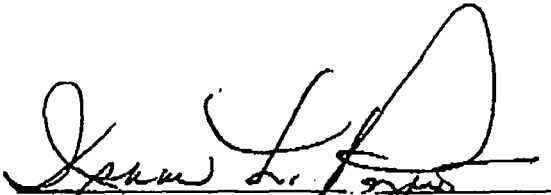
Additionally, the *Sun Light Prepaid Phonecard* court indicated that a terminal may be deemed an illegal gaming machine if it contains other indicia of gambling, such as "having a lock-out feature which freezes the operation of the machine when a predetermined level of prize money is reached." 360 S.C. at 55, 600 S.E.2d at 64.

Based on the evidence and testimony presented, the Court finds that neither the Defendant's HEST Sweepstakes Management System's point-of-sale terminal nor its player terminal is operated by depositing money, a token, or anything else of value into a slot. Nor do either of the terminals contain the type of "lock-out feature" criticized by the *Sun Light Prepaid Phonecard* court. Therefore, these terminals are legal under South Carolina law.

**CONCLUSION**

Based on the documentary evidence and testimony presented and the governing law, THE COURT HEREBY DECLARES that the HEST Sweepstakes Management System machines in question are legal and DO NOT violate the laws of the State of South Carolina and SHOULD NOT be destroyed. THE COURT FURTHER FINDS that the Defendant's sweepstakes contests and HEST Sweepstakes Management System in general under the circumstances described above, as well as the hardware and software that accompany the Defendant's HEST system, are in full compliance with and are legal under South Carolina law.

AND IT IS SO ORDERED.



The Honorable Isaac L. Pyatt  
Magistrate, Georgetown County

12-6-, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

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Greenville County Sheriff's Department,

Civil Action No.: 2011-CP-23-2657

Appellant,

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMMER

**ORDER**

v.

Sweepstakes Terminal No. 0399,

Respondent.

The Greenville County Sheriff's Department appeals the Order of Magistrate Charles R. Garrett dated April 7, 2011 ruling that Sweepstakes Terminal No. 0399 is legal under South Carolina law. For the reasons that follow, Judge Garrett's decision is affirmed.

#### FACTUAL AND PROCEDURAL HISTORY

Play4Fun owns Sweepstakes Terminal No. 0399 (the "Terminal") and placed it in a retail establishment in Greenville County for the purpose of conducting a sweepstakes promotion with Products Direct, LLC. Products Direct sells a variety of consumer products via its website at [www.redeemsite.com](http://www.redeemsite.com). In an attempt to increase sales and awareness of its website, Products Direct is running a sweepstakes promotion involving the sale of discount coupons. The sweepstakes promotion uses a video terminal which contains the sweepstakes games and dispenses discount coupons. The promotion operates as follows:

1. The sweepstakes terminal describes the promotion and the sweepstakes rules on the screen.
2. A customer inserts paper money into the terminal's bill acceptor. The terminal immediately prints out a discount coupon worth twice the amount inserted into the bill acceptor.

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3. The customer can go online to Products Direct's website (www.redeemsite.com) and use the discount coupon toward the purchase price of a variety of products, subject to a maximum discount of 30 percent.

4. In connection with the purchase of the discount coupon, the customer receives free entries into the sweepstakes, which is part of the terminal. The customer can play one of eight games to reveal whether he has won anything or choose to instantly reveal the results by selecting the "Reveal Instant Winners" button. Thus, the customer is not required to play the games to see if he has won.

5. In lieu of purchasing a discount coupon, a customer can follow the instructions on the terminal screen (or the posted written rules) and write in for a free sweepstakes entry code. Upon entering the code, the customer receives 100 free entries to play the sweepstakes.

6. The games contained in the terminal include, but are not limited to, poker, keno and bingo.

7. If a customer wins cash in the sweepstakes, he may receive that cash from the store clerk.

8. A customer *cannot* replay his winnings (*i.e.*, there is no "free play feature"). The only way to obtain additional entries is to purchase an additional discount coupon or to write in for a free entry code.

9. Play4Fun places the terminals in legitimate businesses that possess beer or wine permits.

After the Terminal was seized, a post-seizure hearing was conducted before Judge Garrett on March 25, 2011. Following the hearing, the court accepted post-hearing briefs<sup>1</sup> and then entered a written order finding that "Section 61-4-580(3) is an exception to 12-21-2710." Order at 4. Accordingly, Judge Garrett ordered the Terminal returned to Play4Fun.

### STANDARD OF REVIEW

In considering an appeal from the decision of a magistrate court, the circuit court "may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact." S.C. Code Ann. § 18-7-170; *see Parks v. Characters Night Club*, 548 S.E.2d 605, 608 (S.C. Ct. App. 2001) (on appeal from magistrate court, the circuit court may make its own findings of fact). However, the court "cannot consider questions that have not

<sup>1</sup> At the hearing, Judge Garrett requested that legal briefs be submitted during or after the hearing. The Solicitor's office submitted its brief during the hearing and Play4Fun submitted its brief after the hearing.

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been presented to the magistrate,” and the parties “are restricted to the theory on which the case was tried in the magistrate court.” *Indigo Assocs. v. Ryan Inv. Co.*, 431 S.E.2d 271, 273-274 (S.C. Ct. App. 1993).

### BURDEN OF PROOF

At a post-seizure hearing, the burden is on the owner of the *res* to show why the seized property should not be forfeited and destroyed. *Union County Sheriff's Office v. Henderson*, --- S.E.2d ---, 2011 WL 6347850 (S.C. Sup. Ct. Op. No. 27077, filed December 19, 2011) (citing *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000)).

### DISCUSSION

This case involves the interaction between two statutes enacted within a month of each other in 1999. Section 12-21-2710 imposes a general prohibition on certain types of gaming machines:

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, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

Section 61-4-580(3) provides an exception for certain types of promotions conducted in businesses with beer or wine permits:

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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:

...

(3) permit gambling or games of chance **except** game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:

(a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;

(b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and

(c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

...

A violation of any provision of this section is a ground for the revocation or suspension of the holder's permit. (emphasis added).

**A. The Products Direct sweepstakes promotion and the Terminal are legal under § 61-4-580(3).**

Judge Garrett found as a fact that the sweepstakes promotion and the Terminal complied with the requirements of § 61-4-580(3) for the following reasons:

1. The location at which the seized sweepstakes terminal was placed has a permit authorizing the sale of beer or wine.
2. The promotion is conducted or offered in connection with the sale of discount coupons for the purchase of consumer products and to enhance the brand or image of Products Direct.
3. No purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize. As set forth in the sweepstakes rules which are on the terminal screen and in writing posted on the terminal, a customer may enter the sweepstakes without a purchase by sending a written request to Products Direct at the mailing address provided for free entries.
4. All materials advertising the Products Direct promotion clearly disclose that no purchase or payment is necessary to enter and provide details about the free method of participation.

Order at 3-4. Judge Garrett also found that "the purchaser of the discount coupon receives real

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value for it.” Order at 5. These findings are amply supported by the evidence presented to Judge Garrett, including the declaration of Michael Pace and the declaration of Earl Crawford.

The State waived any opportunity to challenge the promotion’s compliance with § 61-4-580(3). The circuit court, acting as an appellate court in a case heard by a magistrate, cannot consider questions that have not been presented to the magistrate. *See Indigo Assocs., supra*, 431 S.E.2d at 273. The State did not question the legitimacy of the Products Direct sweepstakes promotion or the Terminal’s compliance with § 580(3) in its memorandum to Judge Garrett, and the issue was neither raised nor discussed during the hearing. Accordingly, the State cannot now challenge the legitimacy of the promotion.

**B. Because the Terminal complies with § 580(3), it is exempt from the prohibition in § 12-21-2710.**

Judge Garrett correctly ruled that § 580(3) exempts the Terminal from the prohibition set forth in § 2710. Whether § 580(3) is an exemption from § 2710 is a question of statutory construction. In construing a statute, the court’s primary purpose “is to ascertain and effectuate the intent of the legislature.” *Denman v. City of Columbia*, 691 S.E.2d 465, 468 (S.C. 2010). The court must give the terms of a statute their plain and ordinary meaning “without resort to subtle or forced construction to limit or expand the statute’s operation.” *Ward v. West Oil Co.*, 692 S.E.2d 516, 519 (S.C. 2010).

Also, “[f]orfeitures are not favored in the law or equity.” *Ducworth v. Neely*, 459 S.E.2d 896, 899 (S.C. Ct. App. 1995). Because forfeiture is “by its nature” a penal action, laws providing for forfeiture must be strictly construed and are subject to the rule of lenity. *Allendale Cty. Sheriff’s Office v. Two Chess Challenge II*, 606 S.E.2d 471, 474 (S.C. 2004); *see also Berry v. State*, 675 S.E.2d 425, 426-27 (S.C. 2009) (“[I]n construing a criminal statute, we are guided by the rule of lenity—the principle that any ambiguity must be resolved in favor of the

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accused.”).

This is a pivotal point. The rule of lenity “ensures fair warning by so resolving ambiguity in a . . . statute as to apply it only to conduct clearly covered.” *United States v. Lanier*, 520 U.S. 259, 266 (1997) (emphasis added). To the extent there is some ambiguity in the language of either § 2710 or § 580(3) as to whether the machines should be forfeited, the rule of lenity requires a court to resolve the ambiguity in Respondent’s favor.

**1. The plain language and legislative history of § 580(3) make clear that it is an exemption from other prohibitions on gambling and games of chance, including § 2710.**

Section 2710 and § 580(3) both deal with the same subject matter, namely, games of chance or sweepstakes. Statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. *Joiner ex rel. Rivas v. Rivas*, 536 S.E.2d 372, 375 (S.C. 2000).

As a matter of the plain statutory language, § 580(3) is clearly an exemption from the general prohibition set forth in § 2710. Section 580(3) begins by reiterating the prohibition on “gambling and games of chance”—a category that includes machines outlawed by § 2710—but then goes on to state that the prohibition does not apply to promotions that meet the criteria listed in subsections (a), (b), and (c). These criteria do not restrict the method by which the games of chance or sweepstakes are delivered. Therefore, a sweepstakes terminal that meets the criteria is exempted from the general prohibition of § 2710.<sup>2</sup>

“Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose

<sup>2</sup> The State argues that § 580(3) does not apply to machines. The argument is unsupported by the statutory text, which makes no distinction among the various means by which a promotion may be operated. The State further asserts that § 2710 makes video gaming machines contraband per se, a contention that cannot overcome the plain language of § 580(3).

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another meaning.” *State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). The inquiry into the meaning of the Act ends where it begins: the language of the Act is plain, and therefore “the sole function for the courts is to enforce it according to its terms.” *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also Carcieri v. Salazar*, 129 S.Ct. 1058 (2009). Faithful to these principles, a court must presume that by carving out § 580(3) as an exemption from the general prohibition set forth in § 2710, the legislature meant what it said. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (“Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”).

The legislative history confirms the plain statutory text. The South Carolina Supreme Court has held that the title of an act is a proper source of legislative history. *See, e.g., Duvall v. S.C. Budget & Control Bd.*, 659 S.E.2d 125, 130 (S.C. 2008). The title of H.B. 3951, the Act which added subsection (3) to § 61-4-580, was:

An Act to amend Section 61-4-580, ... relating to prohibited acts in an establishment licensed to sell beer or wine, *so as to exempt from the prohibition on gambling or games of chance promotional games conducted in connection with the sale or promotion of a consumer product or service* in which no entry fee or purchase is required of a participant and this no fee or purchase requirement is clearly disclosed.

H.B. 3951 (all caps omitted; emphasis added). The title of the Act itself thus makes clear that the legislature intended § 580(3) to operate as an exemption from general prohibitions on gambling, including § 2710.

2. **Other rules of statutory construction indicate that § 580(3) is an exemption from § 2710.**
  - i. *If two statutes appear to conflict, the more specific statute should be considered an exception to the general statute.*

In *Denman*, the South Carolina Supreme Court restated the established rule that when “there is one statute addressing an issue in general terms and another statute dealing with the

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identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.” *Denman*, 691 S.E.2d at 468-69 (internal quotation marks omitted). Section 580(3) is more specific than § 2710 because it applies to a limited number of people (beer or wine permit holders) and is limited to a particular type of gaming (game promotions used to promote a product or service). Accordingly, the specific permission contained in § 580(3) operates as an exception to the general prohibition contained in § 2710.

***ii. If two statutes appear to conflict, the more specific statute should prevail over the later in time general statute.***

In *Denman*, the South Carolina Supreme Court restated the long standing presumption against repeal by implication. “Specific statutes are not to be considered repealed by a later general statute unless there is a *direct reference* to the earlier statute or the intent of the legislature to do so is *explicitly implied*. Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconciliation.” *Denman*, 691 S.E.2d at 469 (citations omitted) (emphasis added). The amendment to § 2710 that prohibited the possession or operation of video gaming machines was enacted during a special legislative session in June 1999. *Westside Quick Shop, Inc. v. Stewart*, 534 S.E.2d 270, 272 (S.C. 2000). Section 580(3) was enacted by the Legislature in late May of 1999. Both bills were introduced during April 1999. The South Carolina Legislature cannot have been unaware of § 580(3) when it approved the amendments to § 2710, yet § 2710 does not directly refer to § 580(3). Thus, § 580(3) survives the later effective date of § 2710.

The Legislature removed any lingering doubt concerning its intent in this regard with the following statement in Section 22(C) of Act No. 125 of 1999:

(C) It is the intent of the General Assembly that the provisions of this act shall not

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be construed to:

....

(2) affect any provision of current law, unless or until it is specifically modified or expressly repealed or provided in this act.

**3. The South Carolina Supreme Court's decision in *Sun Light Prepaid Phonocard* supports the conclusion that § 580(3) is an exemption from § 2710.**

In *Sun Light Prepaid Phonocard Co. v. State*, 600 S.E.2d 61 (S.C. 2004), the South Carolina Supreme Court considered a purported "promotion" involving the sale of prepaid long distance phone cards. The Court rejected on the merits the appellants' argument that the scheme was permitted under § 580(3), concluding that "the phone cards and dispensers do not meet the requirements of § 61-4-580 because the game pieces are not a legitimate promotion or sweepstakes." *Id.* at 65. The majority did not specifically refer to § 580(3) as an exemption from § 2710, but it did so implicitly by ruling that the requirements of § 580(3) had not been met, instead of finding that § 580(3) was not an exemption from § 2710. Justice Pleicones, in his dissenting opinion, specifically referred to § 580(3) as an "exception" to Section 12-21-2710. *Id.* at 65-66 (Pleicones, J., dissenting). Judge Pieper agreed with Justice Pleicones that § 580(3) is an exception to § 2710. *Id.* at 66 (Pieper, J., dissenting).

The Court revisited *Sun Light* in *Ward v. West Oil Co.*, 692 S.E.2d 516 (S.C. 2010), stating that in *Sun Light* it had "found the dispensers and phone cards *were not exempt* under section 61-4-580" because they were not a legitimate promotion or sweepstakes. *Id.* at 521 (emphasis added). Based on *Sun Light* and *Ward*, it is clear that the South Carolina Supreme Court recognizes § 580(3) as an exception to § 2710.

**C. The State's arguments lack merit.**

In the proceedings before Judge Garrett, the State offered three theories to support its

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position that the Terminal is prohibited by § 2710:<sup>3</sup> (1) A civil licensing statute cannot create an exemption from criminal liability; (2) assuming such an exemption is possible, the legislative history does not show an intent to create one; and (3) even if the Terminal satisfies the criteria of § 61-4-580(3), its operation is nevertheless illegal under § 61-4-580(5). All of these arguments are without merit.

**1. The State's civil licensing argument violates principals of statutory construction.**

The State's memorandum below cited no authority to support its argument that a civil licensing statute cannot create an exemption from a criminal prohibition. The State's position cannot be correct. If a sweepstakes terminal that fully complies with § 580(3) is nevertheless illegal under § 2710, the exemption has no effect. No rational business owner would operate a promotion under § 580(3) if doing so would subject him to criminal liability, even if the business could retain its beer or wine license. The State's reasoning also violates basic principles of statutory construction. A court must read a statute "so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." *CFRE, LLC v. Greenville County Assessor*, --- S.E.2d ---, 2011 WL 3804517 (S.C. Sup. Ct. Op. No. 27032, filed Aug. 29, 2011) (citations, internal quotation marks and alterations omitted); *see also Corley v. United States*, 129 S.Ct. 1558, 1566 (2009) ("[o]ne of the most basic interpretative cannons" requires that a "[a] statute should be construed so that effect is given to all its

<sup>3</sup> The applicable standard of review prohibits the State from raising any different theories on appeal to this Court. *Indigo Assocs.*, 431 S.E.2d at 273. Accordingly, the Court has not considered the arguments and theories newly raised by the State on appeal including, *inter alia*, the following: (1) that the business where Play4Fun placed the Terminal did not have a beer and wine permit; (2) that the Terminal and the promotion do not comply with the requirements of § 580(3); (3) that the purchaser of a discount coupon does not receive real value for it or that the sweepstakes is otherwise illegitimate; and (4) that the ability to play the sweepstakes game without making a purchase is irrelevant to the validity of the promotion.

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provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ”)

oting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp.181-186 (rev. 6th ed. 0)).

**2. Contrary to the State’s claim, the legislative history does indicate that § 580(3) is an exemption from § 2710.**

The State argued below that if the General Assembly had intended for § 580(3) to be an exemption from § 2710, it would have said so. As discussed above, the Legislature *did* say so, in the title of House Bill 3951, where it stated that § 580(3) is an exemption from the general prohibition on gambling or games of chance.

**3. Contrary to the State’s claim, Section 61-4-580(5) does not apply.**

Finally, the State argued that even if the Terminal is permitted by § 580(3), it is not exempted under § 61-4-580(5), which provides that the holder of a beer or wine permit may not engage in any act, the commission of which . . . constitutes a crime under the laws of this State.” The State’s argument violates the rule that a “statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect.”

*Ports Auth. v. Jasper County*, 629 S.E.2d 624, 629 (S.C. 2006).

**CONCLUSION**

For the reasons set forth above, Judge Garrett’s order is affirmed. The court is keenly aware of the checkered history of video gambling in our state, and the intense policy debate that has surrounded the issue since the 1990’s culminating in the passage of § 12-21-2710. The court is also mindful of the fact that the public may view this decision as letting the proverbial camel’s nose under the tent of the prohibition of video poker. Trial courts do not set policy; instead they attempt to apply the plain meaning of the statutory law to concrete disputes. This task entails discerning the intent of our legislature when it enacted the law—by using the words they carefully chose—to determine the legality of the conduct

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STATE OF SOUTH CAROLINA )

COUNTY OF KERSHAW )

CITY OF CAMDEN, )

v.

MAGIC MINUTES, LLC

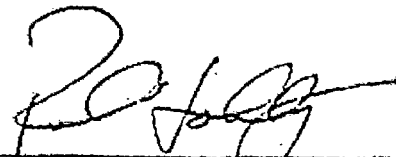
IN THE MAGISTRATE'S COURT

**ORDER**

A MAGIC MINUTES long distance air time vending machine #0034 was seized pursuant to S.C. Code Section 12-21-2712 on August 2, 2011 and brought before this Court for a determination of whether it violates Section 12-21-2710 or any other law of this State.

After examination of the statutory and case law from this State, this Court finds that the MAGIC MINUTES vending machine #0034 brought before this Court DOES NOT violate the laws of the State of South Carolina and therefore SHOULD NOT be destroyed.

**AND IT IS SO ORDERED.**



Roderick M. Todd Jr.  
Chief Magistrate Judge  
Kershaw County

August 2, 2011  
Kershaw, South Carolina



STATE OF SOUTH CAROLINA )

COUNTY OF KERSHAW )

CITY OF CAMDEN, )

v.

MAGIC MINUTES, LLC

IN THE MAGISTRATE'S COURT

**ORDER**

MAGIC MINUTES long distance air time vending machine #0034 was seized pursuant to S.C. Code Section 12-21-2712 on August 2, 2011 and brought before this Court for a determination of whether it violates Section 12-21-2710 or any other law of this State.

**BACKGROUND**

MAGIC MINUTES, LLC owns and operates the machine #0034 brought before this Court. An employee of MAGIC MINUTES attempted to place the machine within a retail establishment in Kershaw County. The MAGIC MINUTES vending machines sell long distance air time minutes. In order to promote and drive sales of minutes, MAGIC MINUTES is running a sweepstakes known as the Magic Minutes Sweepstakes Game. The sweepstakes promotion uses a video terminal that dispenses receipts with PIN numbers that give the customers access to long distance minutes and contains the sweepstakes game. The sweepstakes promotion operates as follows:

1. The vending machine has a prominently placed sticker on the front of the machine which describes the promotion and sweepstakes rules and the instructions for a customer to play for free.

2. To purchase minutes, a customer inserts dollar bills into the bill acceptor and receives a receipt containing PIN numbers, which are used to make long distance phone calls from any telephone land line.

3. In connection with the purchase of the long distance minutes, the customer is given an opportunity to play the sweepstakes game. The games which may be played include poker, blackjack, and keno. If the customer chooses not to play, the operator of the retail establishment clears the sweepstakes game credits.

4. If the customer wins cash in the sweepstakes, he or she may receive that cash from the operator of the retail establishment.

### **LEGAL ANALYSIS**

Regarding S.C. Code Section 12-21-2710, this Court finds that MAGIC MINUTES machine #0034 violates S.C. Code Section 12-21-2710.

However, S.C. Code Section 61-4-580 provides an exception to Section 12-21-2710, one recognized by the S.C. Supreme Court in Sun Light Prepaid Phonecard Co. In this case, Section 61-4-580 was recognized as a direct exception to Section 12-21-2710 by the dissenting opinions and implied by the majority opinion. Because the business in which the MAGIC MINUTES vending machine was located has a valid permit authorizing the sale of beer or wine, the MAGIC MINUTES vending machine #0034 fits within this exception. The MAGIC MINUTES sweepstakes game is a promotion connected to the sale of long-distance minutes, the rules to the MAGIC MINUTES sweepstakes game are clearly displayed on the machine, there is

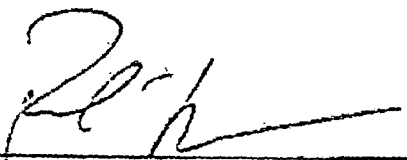
no purchase necessary to play the MAGIC MINUTES sweepstakes game, and the method by which a customer can play for free is also clearly displayed.

This decision is not an endorsement of video poker. This decision should not be interpreted as allowing games of chance to be played in general. This decision should not be interpreted as allowing sweepstakes rooms to operate, i.e., it does not allow sweepstakes promotions to operate as the primary business of an establishment. To the contrary, this decision is specifically limited to the operation of the particular MAGIC MINUTES vending machine #0034.

**CONCLUSION**

Based on the analysis above, this Court finds that the MAGIC MINUTES vending machine brought before this Court DOES NOT violate the laws of the State of South Carolina and therefore SHOULD NOT be destroyed.

**AND IT IS SO ORDERED.**

  
\_\_\_\_\_  
Roderick M. Todd Jr.  
Chief Magistrate Judge  
Kershaw County

August 2, 2011  
Kershaw, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF OCONEE )

2011CV3710100410  
CASE NUMBER

The State Of SC/ Oconee Sheriff's Dept )  
Plaintiff(s) )  
Vs )  
Ralph Alexander Amusement Co. )  
Defendant(s) )


IN THE MAGISTRATE COURT  
POST SEIZURE HEARING ORDER

This matter comes before the Court upon request for a Post-Seizure Hearing to determine whether the machine(s) in this case is an illegal gambling device(s) in violation of S.C. Code Ann. §12-21-2710 as previously ordered by this Court.

After examining the machine(s) and reviewing the evidence presented, **IT IS SO ORDERED** that the machine(s):

- Is an illegal gambling device(s) pursuant to S.C. Code Ann. §12-21-2710 and shall be destroyed.
- Is not an illegal gambling devices in violation of S.C. Code Ann. §12-21-2710 and shall be returned to the owner.

**AND IT IS SO ORDERED.**

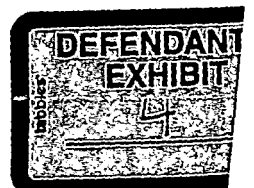
  
MAGISTRATE

October 6, 2011

*Order to follow.*

*MTS*  
*10/6/11*

**CERTIFIED TRUE COPY**  
**JUDGE M. TODD SIMMONS**



STATE OF SOUTH CAROLINA	)	
COUNTY OF OCONEE	)	IN THE MAGISTRATE'S COURT
	)	
STATE OF SOUTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
RALPH ALEXANDER, INC.	)	
	)	
	)	

**BACKGROUND**

Two machines belonging to the above-named Defendant were seized by the Oconee County Sheriff's Department pursuant to S.C. Code Section 12-21-2712 with the consent of the Defendant and brought before this Court for a determination as to whether they violate Section 12-21-2710 or any other law of the State. A hearing was held on October 7, 2011 and the parties submitted written arguments and exhibits.

Ralph Alexander, Inc. is the owner of sweepstakes terminal #110400014916 and sweepstakes terminal #000001. The Defendant places the terminals in retail establishments in Oconee County, SC for the purpose of conducting sweepstakes promotions with Products Direct, LLC and Gift Liquidations, LLC. Products Direct sells a variety of consumer products via its website at [www.redeemsite.com](http://www.redeemsite.com). Gift Liquidations sells a variety of consumer products via its website at [www.gift-surplus.com](http://www.gift-surplus.com). In order to jump start sales and increase awareness of the websites, Products Direct and Gift Liquidations run a sweepstakes promotion involving the sale of discount coupons. The sweepstakes promotions use a video terminal that dispenses coupons and contains the sweepstakes games. The sweepstakes promotions operate as follows:

- a. The sweepstakes terminal describes the promotion and the sweepstakes rules on the screen.

**CERTIFIED TRUE COPY**  
**JUDGE M. TODD SIMMONS**

MTP

- b. The customer walks up to the terminal, which is located in an establishment that has a beer or wine permit, and inserts paper money into the bill acceptor.
- c. The terminal prints out a discount coupon that is worth twice the value of the amount of money inserted into the terminal.
- d. The customer can go online and redeem the coupon(s) at [www.reddeemsite.com](http://www.reddeemsite.com) or [www.gift-surplus.com](http://www.gift-surplus.com) in connection with the purchase of consumer product(s) offered by Products Direct or Gift Liquidations.
- e. In connection with the purchase of the discount coupon, the customer receives free entries into the sweepstakes. The customer can play one of several games to reveal whether he has won anything or he can instantly find out by selecting the "Reveal Instant Winners" button. Thus, the customer is not required to play the games to see if he has won.
- f. Instead of purchasing a discount coupon, a customer can enter the sweepstakes without a purchase. A customer can follow the instructions on the terminal screen (or the posted written rules) and write in for a free entry code. Upon receipt of the free entry code, the customer may return to that terminal and enter the code. Upon entering the code, the customer receives free entries to play the sweepstakes.
- g. The games contained in the terminal include, but are not limited to, poker, keno, and bingo.
- h. If a customer wins cash in the sweepstakes, he may receive that cash from the store clerk.
- i. The terminal will not permit the customer to replay his winnings (i.e., there is no "free play feature"). The only way to obtain additional entries is to purchase additional discount coupons.

In 1999, the South Carolina legislature implemented a ban on video gambling devices and authorized the seizure of certain categories of machines. The crux of the ban is contained in Section 12-21-2710 of the South Carolina tax code and reads as follows:

**SECTION 12-21-2710. Types of machines and devices prohibited by law; penalties.**

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, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which

are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

Since the games contained in the sweepstakes terminal are games of chance, Section 12-21-2710 would likely prohibit those games absent an exception. The Defendant argues that there is an exception to Section 12-21-2710 that is found in S.C. Code Section 61-4-580(3). That section reads as follows:

SECTION 61-4-580. Prohibited acts.

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:

- (1) sell beer or wine to a person under twenty-one years of age;
- (2) sell beer or wine to an intoxicated person;
- (3) permit gambling or games of chance except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:
  - (a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;
  - (b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and
  - (c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.
- (4) permit lewd, immoral, or improper entertainment, conduct, or practices. This includes, but is not limited to, entertainment, conduct, or practices where a person is in a state of undress so as to expose the human male or female genitals, pubic area, or buttocks cavity with less than a full opaque covering;
- (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; or
- (6) sell, offer for sale, or possess any beverage or alcoholic liquors the sale or possession of which is prohibited on the licensed premises under the law of this State; or
- (7) conduct, operate, organize, promote, advertise, run, or participate in a "drinking contest" or "drinking game". For purposes of this item, "drinking contest" or "drinking game" includes, but is not limited to, a contest, game, event, or other endeavor which encourages or promotes the consumption of beer or wine by participants at extraordinary speed or in increased quantities or in more potent form. "Drinking contest" or "drinking game" does not include a contest, game, event, or endeavor in which beer or wine is not used or consumed by participants as part of the contest, game, event, or endeavor, but instead is used solely as a reward or prize. Selling beer or wine in the regular course of business is not considered a violation of this section.

A violation of any provision of this section is a ground for the revocation or suspension of the holder's permit.

The State argues that Section 61-4-580(3) does not provide an exception and that Sections 12-21-2710 and 12-21-2712 authorize the State to seize and destroy the terminal.

#### FINDINGS OF FACT

I find that the sweepstakes promotions operated by the Defendant and the specific terminals referenced above comply with the requirements of Section 61-4-580(3) for the following reasons:

1. The location at which the seized sweepstakes terminal is placed has a permit authorizing the sale of beer or wine.
2. The promotions are conducted or offered in connection with the sale of discount coupons for the purchase of consumer products and to enhance the brand or image of Products Direct and Gift Liquidations.
3. No purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize. As set forth in the sweepstakes rules which are on the terminal screen and in writing posted on the terminal, a customer may enter the sweepstakes without a purchase by sending a written request to Products Direct or Gift Liquidations at the mailing address provided for free entries.
4. All materials advertising the promotion clearly disclose that no purchase or payment is necessary to enter and provide details about the free method of participation.

#### FINDINGS OF LAW

The Court holds that Section 61-4-580(3) is an exception to Section 12-21-2710. The Court also holds that the operation of these particular sweepstakes promotions under the particular circumstances described above is legal under South Carolina law:

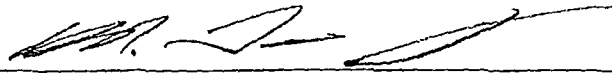
1. Statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result. Joiner ex rel. Rivas v. Rivas, 342 S.C. 102 (2000). Reading both statutes side by side leads me to the conclusion that 61-4-580(3) is an exception to 12-21-2710.
2. Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. Denman v. City of Columbia, 387 S.C. 131 (2010).
3. S.C. Code Section 61-4-580(3) became law in May 1999. Subsequently, S.C. Code Section 12-21-2710 became law. This later statute does not contain a direct

reference to the earlier one. Additionally, there is nothing to suggest that the later statute repealed the earlier one, either expressly, or through implication. Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconciliation. Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137 (2006). S.C. Code Section 61-4-580(3) can be reconciled as an exception to S.C. Code Section 12-21-2710. Therefore, as long as the machines belonging to the Defendant in this matter meet the requirements of the exception, there is no violation of South Carolina law.

The Court finds that all of the requirements of Section 61-4-580(3) have been met in this case, and the operation of these specific sweepstakes promotions, under the limited circumstances described above, is legal under South Carolina law. Thus, seizure and destruction of these terminals is not authorized.

This decision is specifically limited to the operation of the particular sweepstakes terminals in question as set forth above and is not to be construed in any way as an endorsement of video poker and/or other illegal gambling.

**IT IS SO ORDERED.**



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JUDGE M. TODD SIMMONS  
CHIEF MAGISTRATE

October 25, 2011  
Seneca, South Carolina

State of South Carolina )  
 County of Greenville )  
 STATE OF SOUTH CAROLINA )  
 v. )  
 PLAY 4 FUN, INC. (Sweepstakes )  
 Terminal No. 0399 )

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IN THE MAGISTRATE'S COURT

ORDER

**BACKGROUND**

This machine was seized pursuant to S.C. Code Section 12-21-2712 and brought before this Court for a determination of whether it violates Section 12-21-2710 or any other law of the State. A hearing was held on March 30, 2011 and the parties submitted written submissions and exhibits.

Play 4 Fun, Inc. is the owner of the sweepstakes terminal no. 0399. Play 4 Fun placed the terminal in a retail establishment in Greenville County, SC for the purpose of conducting a sweepstakes promotion with Products Direct, LLC. Products Direct sells a variety of consumer products via its website at [www.redeemsite.com](http://www.redeemsite.com). In order to jump start sales and increase awareness of its website, Products Direct is running a sweepstakes promotion involving the sale of discount coupons. The sweepstakes promotion uses a video terminal that dispenses the coupons and contains the sweepstakes games. The sweepstakes promotion operates as follows:

- a. The sweepstakes terminal describes the promotion and the sweepstakes rules on the screen.
- b. The customer walks up to the terminal, which is located in an establishment that has a beer or wine permit, and inserts paper money into the bill acceptor.
- c. The terminal prints out a discount coupon that is worth twice the value of the amount of money inserted into the terminal subject to a cap of 30% off of the consumer product(s) to be purchased from Products Direct.
- d. The customer can go online and redeem the coupon at [www.redeemsite.com](http://www.redeemsite.com) in connection with the purchase of consumer product(s) offered by Products Direct.
- e. In connection with the purchase of the discount coupon, the customer receives free entries into the sweepstakes. The customer can play one of eight games to reveal whether he has won anything or he can instantly find out by selecting the "Reveal Instant Winners" button. Thus, the customer is not required to play the games to see if he has won.



- f. Instead of purchasing a discount coupon, a customer can enter the sweepstakes without a purchase. A customer can follow the instructions on the terminal screen (or the posted written rules) and write in for a free entry code. Upon receipt of the free entry code, the customer may return to that terminal and enter the code. Upon entering the code, the customer receives 100 free entries to play the sweepstakes.
- g. The games contained in the terminal include poker, keno, and bingo.
- h. If a customer wins cash in the sweepstakes, he may receive that cash from the store clerk.
- i. The terminal will not permit the customer to replay his winnings (i.e., there is no "free play feature"). The only way to obtain additional entries is to purchase additional discount coupons.

In 1999, the South Carolina legislature implemented a ban on video gambling devices and authorized the seizure of certain categories of machines. The crux of the ban is contained in Section 12-21-2710 of the South Carolina tax code and reads as follows:

**SECTION 12-21-2710. Types of machines and devices prohibited by law; penalties.**

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, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both.

Since the games contained in the sweepstakes terminal are games of chance, Section 12-21-2710 would likely prohibit those games absent an exception. Play 4 Fun / Products Direct argue that there is an exception to Section 12-21-2710 that is found in S.C. Code Section 61-4-580(3). That section reads in part as follows:

**SECTION 61-4-580. Prohibited acts.**

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:

(3) permit gambling or games of chance except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:

(a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;

(b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and

(c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

(underline and bold added).

4) permit lewd, immoral, or improper entertainment, conduct, or practices. This includes, but is not limited to, entertainment, conduct, or practices where a person is in a state of undress so as to expose the human male or female genitals, pubic area, or buttocks cavity with less than a full opaque covering;

(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; or

(6) sell, offer for sale, or possess any beverage or alcoholic liquors the sale or possession of which is prohibited on the licensed premises under the law of this State; or

(7) conduct, operate, organize, promote, advertise, run, or participate in a "drinking contest" or "drinking game". For purposes of this item, "drinking contest" or "drinking game" includes, but is not limited to, a contest, game, event, or other endeavor which encourages or promotes the consumption of beer or wine by participants at extraordinary speed or in increased quantities or in more potent form. "Drinking contest" or "drinking game" does not include a contest, game, event, or endeavor in which beer or wine is not used or consumed by participants as part of the contest, game, event, or endeavor, but instead is used solely as a reward or prize. Selling beer or wine in the regular course of business is not considered a violation of this section.

A violation of any provision of this section is a ground for the revocation or suspension of the holder's permit.

The State argues that Section 61-4-580(3) does not provide an exception and that Sections 12-21-2710 and 61-4-580(5) authorize the State to seize and destroy the terminal.

### FINDINGS OF FACT

I find that the Play 4 Fun / Products Direct Sweepstakes promotion and the specific terminal used in the promotion comply with the requirements of Section 61-4-580(3) for the following reasons:

1. The location at which the seized sweepstakes terminal was placed has a permit authorizing the sale of beer or wine.
2. The promotion is conducted or offered in connection with the sale of discount coupons for the purchase of consumer products and to enhance the brand or image of Products Direct.
3. No purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize. As set forth in the sweepstakes rules which are on the terminal screen and in writing posted on the terminal, a customer may enter the sweepstakes without a purchase by sending a written request to Products Direct at the mailing address provided for free entries.
4. All materials advertising the Products Direct promotion clearly disclose that no purchase or payment is necessary to enter and provide details about the free method of participation.

#### FINDINGS OF LAW

The Court holds that Section 61-4-580(3) is an exception to 12-21-2710. The Court also holds that the operation of this particular sweepstakes promotion under the particular circumstances described above is legal under South Carolina law:

1. It is well settled that statutes dealing with the same subject matter must be construed together and if possible produce harmonious result. Joiner ex rel. Rivas v. Rivas. Reading both statutes side by side leads me to the conclusion that 61-4-580(3) is an exception to 12-21-2710.
2. In Denman v. Columbia, the S.C. Supreme Court said that a more specific statute like 61-4-580(3) should be considered an exception to a more general statute like 12-21-2710.
3. Section 61-4-580(3) became law in 1999. Section 12-21-2710 became law in 2000. This later statute does not contain a direct reference to the earlier one. There is nothing to suggest that the later statute repealed the earlier one.
4. In the Sun Light Prepaid Phonecard Co. case, Justice Pleicones, in his dissenting opinion, specifically referred to Section 61-4-580(3) as an "exception" to Section 12-21-2710. Justice Pieper, in his dissenting opinion, agreed with Justice Pleicones' interpretation of the two statutes. The majority opinion did not specifically refer to 61-4-580(3) as an

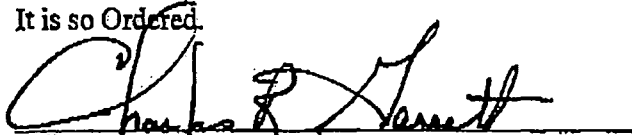
"exception", but it did so by implication by finding that this code section did not apply to the facts of the case on appeal. Later in 2010, the S.C. Supreme Court in Ward v. West Oil Co. discussed the Sun Light case and stated that the "...phone cards were not exempt under section 61-4-580 of the South Carolina Code." (underline added). It did not say that subsection (3) was not an exception.

5. Finally, based upon the exhibits provided by Play 4 Fun from the Products Direct website, it appears that the purchaser of the discount coupon receives real value for it. For example, if a customer inserts a \$10.00 bill, the customer receives a discount coupon worth \$20.00 which can be used toward the purchase of an item sold on [www.redeemsite.com](http://www.redeemsite.com).

Conclusion: The Court finds that (i) all of the requirements of Section 61-4-580(3) have been met in this case, and (ii) the operation of this one specific sweepstakes promotion, under the limited circumstances described above, is legal under South Carolina law. Thus, seizure and destruction of this terminal is not authorized.

This decision is not an endorsement of video poker. This decision should not be interpreted as allowing games of chance to be played in general. This decision should not be interpreted as allowing sweepstakes rooms to operate, i.e. it does not allow sweepstakes promotions to operate as the primary business of an establishment. To the contrary, this decision is specifically limited to the operations of the particular sweepstakes terminal in question in conjunction with Play 4 Fun / Products Direct.

It is so Ordered.



Magistrate Charles R. Garrett

April 7, 2011

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENWOOD )  
 )  
Greenwood County Sheriff's Office, )  
Plaintiff, )  
 )  
-vs.- )  
 )  
6 Black Gaming Machines, )  
Defendant )

IN THE MAGISTRATE COURT

ORDER

Case No. 2012CV2410100024

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On December 1, 2011, this Court was presented with 2 black gaming machines seized from 212 By-Pass 72 NW Greenwood, SC and 4 black gaming machines seized from 1137 Reynolds Avenue Greenwood, SC. After examination of the machines, the Court found the machines to be slot machines, in violation of SC Code § 12-21-2710, and ordered the machines destroyed. On December 22, 2012, attorney C. Rauch Wise, of Greenwood, and attorney James M. Griffin, of Columbia, requested a post-seizure hearing for the above-referenced machines. After a hearing on February 23, 2012, in which testimony and evidence were presented, the court finds four of the six machines DO NOT violate the laws of the State of South Carolina and therefore SHALL NOT be destroyed.

**Findings of Fact**

Based on the testimony and evidence presented, the Court finds as follows:



Exhibit 6

1. The six machines were seized from businesses operating in Greenwood County. Those businesses hold permits to and do sell beer and wine. Encore South Carolina, LLC (Encore), is the owner of four of the six machines seized. Encore leased the four machines to Mithun Patel, the operator of the businesses from which the machines were seized.

2. The six machines were labeled by the Court as "Machine 1" through "Machine 6." Encore is not the owner of "Machine 2" and "Machine 6." Therefore "Machine 2" and "Machine 6" are not subject to this order. "Machine 1" and "Machine 4" were developed by Primero Games, LLC (Primero). "Machine 3" and "Machine 5" were developed by Pace-O-Matic, Inc.

3. The Primero machines sell gift certificates for Gift Liquidations, LLC. The gift certificates are redeemable at either [giftliquidations.com](http://giftliquidations.com) or [gift-surplus.com](http://gift-surplus.com) and do not expire. Gift Liquidations sells a variety of consumer products. For every dollar put into the machine, the user receives a one dollar gift certificate. To promote and advertise the website and the products it sells, Gift Liquidations is running a sweepstakes promotion involving the sale of gift certificates. The sweepstakes promotion uses a video terminal which contains the sweepstakes games and dispenses the gift certificates. The promotion operates as follows:

- a. The sweepstake terminal describes the promotion and the sweepstakes rules on the screen.

- b. A customer inserts paper money into the terminal's bill acceptor. The terminal immediately prints out multiple one dollar gift certificates equal to the amount inserted into the bill acceptor.
- c. The customer can go online to Gift Liquidations' website and use the gift certificates toward the purchase of a variety of products, excluding shipping, handling, and processing fees.
- d. In connection with the purchase of the gift certificates, the customer receives free entries into the sweepstakes, which is part of the terminal. The customer can play one of several games to reveal whether she has won anything.
- e. Instead of purchasing a gift certificate, a customer can follow the instructions on the terminal screen and write in for a free sweepstakes entry code. Upon entering the code, the customer receives free entries to play the sweepstakes.
- f. The games included in the terminal include, but are not limited to, poker, keno, slots, and bingo.
- g. If a customer wins cash in the sweepstakes, she may receive that cash from the store clerk.
- h. A customer cannot replay her winnings. The only way to obtain additional entries is to purchase an additional gift certificate or write in for a free entry code.

- i. The sweepstakes is limited to each terminal and each game on the terminal has its own sweepstakes. There are a finite number of entries for each sweepstakes. Once all of the entries for a sweepstakes are used, the sweepstakes is over and another sweepstakes is started.
  - j. Once the customer selects a game, her sweepstakes entries are already predetermined to be either winners or losers. The game is fixed to either win or lose depending on the sweepstakes entry used. Nothing about the game determines if the customer wins or loses. The customer cannot turn a losing entry into a winner or a winning entry into a loser.
4. The Pace-O-Matic machines sell discount coupons for Products Direct, LLC. The discount coupons are redeemable at [redeemsite.com](http://redeemsite.com) and do not expire. Products Direct sells a variety of consumer products. To promote and advertise the website and the products it sells, Products Direct is running a sweepstakes promotion involving the sale of discount coupons. The sweepstakes promotion uses a video terminal which contains the sweepstakes games and dispenses the discount coupons. The promotion operates the same way as the Gift Liquidations sweepstakes except:
- a. A customer inserts paper money into the terminal's bill acceptor. The terminal immediately prints out a discount coupon worth twice the amount inserted into the bill acceptor.

- b. The customer can go online to Products Direct's website and use the discount coupon towards the purchase of a variety of products, subject to a maximum of 30 percent.
  - c. If the customer chooses not to play a reveal game, she can instantly reveal the results of the sweepstakes by selecting the "Reveal Instant Winners" button. Thus the customer is not required to play the games to see if she has won.
5. All four machines are housed within a standard slot machine cabinet. The machines contain a video screen that has a gambling theme, if the machine records a winning sweepstakes entry, celebration music is played, and although the machine accepts various denominations of paper money, it does not have a mechanism for returning change.

#### **Burden of Proof**

At a post-seizure hearing, the burden is on the owner of the *res* to show why the seized property should not be forfeited and destroyed. *Union County Sheriff's Office v. Henderson* 719 SE2d 665, 666 (SC 2011) (citing *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000)).

#### **Analysis of Law**

The Defendant contends that the machines should be returned under two theories of law. First, that the machines are vending machines and not slot or video gaming machines and therefore do not violate SC Code §12-21-2710.

Secondly, the defendant argues that any game of chance present in the machines is allowable under SC Code §61-4-580(3).

**A. All four machines are slot machines and video gaming machines in violation of §12-21-2710.**

On July 1, 2000, the State of South Carolina instituted a ban on video gambling devices and authorized the seizure of certain gaming machines. The essence of the ban is contained in SC Code §12-21-2710 which states:

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, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

From a reading of this section it is seen that, in order to escape the condemnation of the statute (1), the vending machine must give a certain uniform and fair return in value for each coin deposited therein, and (2) there must be no element of chance in the operation of the machine. The initial contention of the defendant is that his machine meets fully both of these requirements, and is not therefore, in contemplation of the statute, a gambling device. However, this argument has consistently failed.

In *Griste v. Burch*, 112 SC 369, 99 SE 703 (SC 1919), the South Carolina Supreme Court, in applying the predecessor to §12-21-2710, held that a slot machine, in which a customer deposits a nickel, pulls a lever, and automatically receives a package of chewing gum or after dinner mint and may also receive trade checks from 2 to 20, which are redeemable for merchandise, is an unlawful gaming machine because it does not give a certain and uniform return in value for each coin deposited. In *Harvie v. Heise*, 150 SC 277, 148 SE 66 (SC 1929), the Supreme Court found a slot machine to be a gambling device when applying the same predecessor to §12-21-2710 as in *Burch* to a slot machine which gave a package of mints and at irregular intervals issued tokens in varying amounts; even though the tokens issued had no trade value. The Supreme Court came to the same conclusion in *State v. One Coin-Operated Video Game Machine*, 321 SC 176, 467 SE2d 443 (SC 1996) when applying a similar statute to a video game machine designed to simulate a slot machine that gave free plays if images were displayed in certain combinations. When

addressing a similar promotion to the current version of §12-21-2710 in *Sun Light Prepaid Phonecard Co., Inc. v. State*, 360 SC 49, 600 SE2d 61 (SC 2004), the Supreme Court found that the machines were illegal gaming devices because the phone cards dispensed presented an element of chance even though the customer was guaranteed to receive a two minute prepaid phone card.

The four machines in question dispense either gift certificates or discount coupons for each dollar deposited, a uniform and fair return in value. However, the purchase of the cards also includes entries into a sweepstakes. Since some purchases contain winners and others losers, the return is no longer certain and uniform. The purchase contains an element of chance. Whether the value of the sweepstakes entry is predetermined or influenced by the customer's skill or game play, a uniform return is no longer present. Therefore, as in *Sun Light*, the machines are illegal gaming devices in violation of §12-21-2710.

**B. The Gift Liquidations sweepstakes promotion and the Products Direct sweepstakes promotion are legal under §61-4-580(3).**

This Court accepts the well reasoned opinion of Judge D. Garrison Hill in *Greenville County Sheriff's Department v. Sweepstakes Terminal No. 0399*, 2011CP232657 in the 13<sup>TH</sup> Circuit Court of Common Pleas (2012). In *Greenville County*, the Court finds §61-4-580(3) to be an exception to §12-21-2710. The *Greenville County* Court relies on the plain language and legislative history of §61-4-580(3), the rules of statutory construction, and the South Carolina

Supreme Court's findings in *Sun Light and Ward v. West Oil Co.*, 692 SE2d 516 (SC 2010) to determine the exemption. The *Greenville County* Court states:

In *Sun Light*..., the South Carolina Supreme Court considered a purported "promotion" involving the sale of prepaid long distance phone cards. The Court rejected on the merits the appellants' argument that the scheme was permitted under §580(3), concluding that "the phone cards and dispensers do not meet the requirements of §61-4-580 because the game pieces are not a legitimate promotion or sweepstakes." *Id.* at 65. The majority did not specifically refer to §580(3) as an exemption from §2720, but it did so implicitly by ruling that the requirements of §580(3) had not been met, instead of finding that §580(3) was not an exemption from §2710. Justice Pleicones, in his dissenting opinion, specifically referred to §580(3) as an "exception" to [§] 12-21-2710. *Id.* at 65-66 (Pleicones, J., dissenting). Judge Pieper agreed with Justice Pleicones that §580(3) is an exception to §2710. *Id.* at 66 (Pieper, J., dissenting).

The Court revisited *Sun Light* in [*Ward*], stating that in *Sun Light* it had "found the dispensers and phone cards were not exempt under [§]61-4-580" because they were not a legitimate promotion or sweepstakes. *Id.* at 521 (emphasis added). Based on *Sun Light* and *Ward*, it is clear that the South Carolina Supreme Court recognizes §580(3) as an exception to §2710.

Therefore, the four machines, while in violation of §12-21-2710, may still be possessed lawfully if the machines satisfy §61-4-580(3). In pertinent part, §61-4-580 state:

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:

(3) permit gambling or games of chance except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:

(a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;

(b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and

(c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

From a reading of this section it is seen that, in order to operate a sweepstakes machine in which there is chance and prize, 4 elements must be present: (1) the game must be located on a premises licensed to sell beer or wine; (2) the game promotion is offered in connection with the sale, promotion, or advertisement of a consumer product or service or to enhance the brand image of a supplier of consumer products or services; (3) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and (4) all materials advertising the game

promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

In the present case, the four machines were all located on the premises where beer and wine are licensed to be sold. The sweepstakes is intended to promote the sale of consumer products sold by Gift Liquidations and Products Direct. No purchase is necessary to participate in the sweepstakes. A consumer can write in to receive free entries into the sweepstakes. All of the literature provided clearly discloses that no purchase or payment is necessary to enter. It is clearly labeled on the video screen, "No purchase necessary. Purchase will not improve chances of winning." Therefore, because the sweepstakes on each machine satisfies the elements of §61-4-580(3), they are allowable under the law and not subject to seizure.<sup>FNI</sup>

### Conclusion

Based on the evidence and testimony presented and the governing law, the Court finds that four machines are in violation of §12-21-2710; however all of the requirements of §61-4-580(3) have been met. The operation of these sweepstakes promotion machines, under the limited circumstances as described above, is legal under South Carolina law. Thus the seizure and destruction of these four machines is not warranted. The four machines are to be returned to Encore. The Court will relinquish custody of the machines after the time to file for appeal

has expired. In the event of appeal, the machines will be returned to the custody of the Greenwood County Sheriff's Office for safekeeping while awaiting the finality of the appeal.

IT IS SO ORDERED.

February 27<sup>th</sup>, 2012  
Greenwood, South Carolina

  
C. Ryan Johnson, Magistrate

FN1 "In no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter but to do violence to the spirit and thwart the beneficent objects and purposes of the laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified and cunning mechanical inventions." *Harvie v. Heise*, at 69 (quoting *Moberly v. Deskin*, 169 Mo. App. 672, 155 S. W. 842).

position that the Terminal is prohibited by § 2710:<sup>3</sup> (1) A civil licensing statute cannot create an exemption from criminal liability; (2) assuming such an exemption is possible, the legislative history does not show an intent to create one; and (3) even if the Terminal satisfies the criteria of § 61-4-580(3), its operation is nevertheless illegal under § 61-4-580(5). All of these arguments are without merit.

**1. The State's civil licensing argument violates principals of statutory construction.**

The State's memorandum below cited no authority to support its argument that a civil licensing statute cannot create an exemption from a criminal prohibition. The State's position cannot be correct. If a sweepstakes terminal that fully complies with § 580(3) is nevertheless illegal under § 2710, the exemption has no effect. No rational business owner would operate a promotion under § 580(3) if doing so would subject him to criminal liability, even if the business could retain its beer or wine license. The State's reasoning also violates basic principles of statutory construction. A court must read a statute "so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." *CFRE, LLC v. Greenville County Assessor*, --- S.E.2d ----, 2011 WL 3804517 (S.C. Sup. Ct. Op. No. 27032, filed Aug. 29, 2011) (citations, internal quotation marks and alterations omitted); *see also Corley v. United States*, 129 S.Ct. 1558, 1566 (2009) ("[o]ne of the most basic interpretative canons" requires that a "[a] statute should be construed so that effect is given to all its

<sup>3</sup> The applicable standard of review prohibits the State from raising any different theories on appeal to this Court. *Indigo Assocs.*, 431 S.E.2d at 273. Accordingly, the Court has not considered the arguments and theories newly raised by the State on appeal including, *inter alia*, the following: (1) that the business where Play4Fun placed the Terminal did not have a beer and wine permit; (2) that the Terminal and the promotion do not comply with the requirements of § 580(3); (3) that the purchaser of a discount coupon does not receive real value for it or that the sweepstakes is otherwise illegitimate; and (4) that the ability to play the sweepstakes game without making a purchase is irrelevant to the validity of the promotion.

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provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ”) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp.181-186 (rev. 6th ed. 2000)).

**2. Contrary to the State’s claim, the legislative history does indicate that § 580(3) is an exemption from § 2710.**

The State argued below that if the General Assembly had intended for § 580(3) to be an exemption from § 2710, it would have said so. As discussed above, the Legislature *did* say so, in the title of House Bill 3951, where it stated that § 580(3) is an exemption from the general prohibition on gambling or games of chance.

**3. Contrary to the State’s claim, Section 61-4-580(5) does not apply.**

Finally, the State argued that even if the Terminal is permitted by § 580(3), it is prohibited under § 61-4-580(5), which provides that the holder of a beer or wine permit may not “permit any act, the commission of which . . . constitutes a crime under the laws of this State.” This argument violates the rule that a “statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect.” *S.C. State Ports Auth. v. Jasper County*, 629 S.E.2d 624, 629 (S.C. 2006).

**CONCLUSION**

For the reasons set forth above, Judge Garrett’s order is affirmed. The court is keenly aware of the checkered history of video gambling in our state, and the intense policy debate that occurred in the 1990’s culminating in the passage of § 12-21-2710. The court is also mindful that some may view this decision as letting the proverbial camel’s nose under the tent of the prohibition of video poker. Trial courts do not set policy; instead they attempt to apply the plain language of statutory law to concrete disputes. This task entails discerning the intent of our Legislature—by using the words they carefully chose—to determine the legality of the conduct

of the parties. This court has concluded that the promotion at issue here constitutes legal conduct as authorized by § 61-4-580(3). Outside of an appeal, the remedy for any dissatisfaction with this conclusion is properly addressed to the Legislature, not this court. The Legislature may amend the statute; this court cannot.

IT IS SO ORDERED.



D. Garrison Hill  
Circuit Judge

January 27, 2012  
Greenville, South Carolina

# EXHIBIT 3

**STATE OF SOUTH CAROLINA  
ADMINISTRATIVE LAW COURT**

South Carolina Department of Revenue	)	Docket No. 12-ALJ-17-0298-CC
	)	
Petitioner,	)	
	)	
vs.	)	<b>ORDER</b>
	)	
C&M Market,	)	
	)	
Respondent.	)	
_____	)	

**APPEARANCES:** For the Petitioner: Kathryn R. Brown, Esq.  
For the Respondent: James M. Griffin, Esq.

This matter comes before the Administrative Law Court (ALC or Court) pursuant to a Motion to Stay Enforcement of Order filed by the Respondent on December 20, 2012, seeking to stay enforcement of Amended Order and Decision during the time period for any appeal of an adverse decision on the Motion for Reconsideration. In its Amended Final Order and Decision, this Court suspended Respondent’s beer and wine permit for one hundred twenty (120) days, beginning February 1, 2013. For the reasons set forth herein below, this Court denies Respondent’s Motion for Stay of this Court’s decision.

Respondent simply contends that “[u]nless a stay is granted, the suspension period will most likely expire prior to the time a decision is rendered on . . . any appeal from an adverse ruling, effectively rendering the controlling issue to be decided moot before a final decision can be made.” Here, Respondent has not presented sufficient reason as to why the harm of denying a stay outweighs the public’s interest in the enforcement of its regulatory laws.<sup>1</sup> Moreover,

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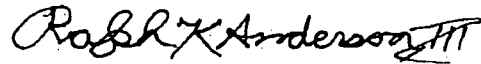
<sup>1</sup> “An equitable stay may be invoked if justified by circumstances which outweigh any potential harm to the party against whom it is operative. In making this determination, the court ‘must weigh competing interests and maintain an even balance.’” Merritt Bros., Inc. v. Marine Midland Realty Credit Corp., 307 S.C. 213, 213, 414 S.E.2d 167, 169 (1992). Also, “[a] party requesting a stay pending appeal must show [not only] that a stay will not substantially harm other interested parties [but also that a stay will not substantially harm] the public interest.” 4 C.J.S. Appeal and Error § 528. In this case, Respondent presented no argument as to how this case is distinct from most other appeals of beer and wine permit suspensions or how its prejudice outweighs the public’s interest.

**FILED**  
January 4, 2013  
SC ADMIN. LAW COURT

Respondent has not established a sufficient probability of success on the merits warranting the grant of a stay pending appeal.<sup>2</sup>

**ORDER**

**IT IS THEREFORE ORDERED** that the Appellant's Motion for Stay is **DENIED**.  
**AND IT IS SO ORDERED.**



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Ralph King Anderson, III  
Chief Administrative Law Judge

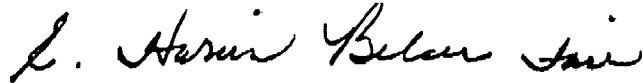
January 4, 2013  
Columbia, South Carolina

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<sup>2</sup> The movant need not always establish a high probability of success on the merits, but is always required to demonstrate more than a mere possibility of success. 4 C.J.S. Appeal and Error § 528. In this case, this Court finds that Respondent failed to demonstrate more than a mere possibility of success on the merits.

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



---

E. Harvin Belser Fair  
Judicial Law Clerk

January 4, 2013  
Columbia, South Carolina

# EXHIBIT 4

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

2012 JAN 27 P 4: 53.1

Greenville County Sheriff's Department,

Civil Action No.: 2011-CP-23-2657

Appellant,

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMMER

**ORDER**

v.

Sweepstakes Terminal No. 0399,

Respondent.

The Greenville County Sheriff's Department appeals the Order of Magistrate Charles R. Garrett dated April 7, 2011 ruling that Sweepstakes Terminal No. 0399 is legal under South Carolina law. For the reasons that follow, Judge Garrett's decision is affirmed.

#### **FACTUAL AND PROCEDURAL HISTORY**

Play4Fun owns Sweepstakes Terminal No. 0399 (the "Terminal") and placed it in a retail establishment in Greenville County for the purpose of conducting a sweepstakes promotion with Products Direct, LLC. Products Direct sells a variety of consumer products via its website at [www.redeemsite.com](http://www.redeemsite.com). In an attempt to increase sales and awareness of its website, Products Direct is running a sweepstakes promotion involving the sale of discount coupons. The sweepstakes promotion uses a video terminal which contains the sweepstakes games and dispenses discount coupons. The promotion operates as follows:

1. The sweepstakes terminal describes the promotion and the sweepstakes rules on the screen.
2. A customer inserts paper money into the terminal's bill acceptor. The terminal immediately prints out a discount coupon worth twice the amount inserted into the bill acceptor.

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3. The customer can go online to Products Direct's website (www.redeemsite.com) and use the discount coupon toward the purchase price of a variety of products, subject to a maximum discount of 30 percent.

4. In connection with the purchase of the discount coupon, the customer receives free entries into the sweepstakes, which is part of the terminal. The customer can play one of eight games to reveal whether he has won anything or choose to instantly reveal the results by selecting the "Reveal Instant Winners" button. Thus, the customer is not required to play the games to see if he has won.

5. In lieu of purchasing a discount coupon, a customer can follow the instructions on the terminal screen (or the posted written rules) and write in for a free sweepstakes entry code. Upon entering the code, the customer receives 100 free entries to play the sweepstakes.

6. The games contained in the terminal include, but are not limited to, poker, keno and bingo.

7. If a customer wins cash in the sweepstakes, he may receive that cash from the store clerk.

8. A customer *cannot* replay his winnings (*i.e.*, there is no "free play feature"). The only way to obtain additional entries is to purchase an additional discount coupon or to write in for a free entry code.

9. Play4Fun places the terminals in legitimate businesses that possess beer or wine permits.

After the Terminal was seized, a post-seizure hearing was conducted before Judge Garrett on March 25, 2011. Following the hearing, the court accepted post-hearing briefs<sup>1</sup> and then entered a written order finding that "Section 61-4-580(3) is an exception to 12-21-2710." Order at 4. Accordingly, Judge Garrett ordered the Terminal returned to Play4Fun.

#### STANDARD OF REVIEW

In considering an appeal from the decision of a magistrate court, the circuit court "may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact." S.C. Code Ann. § 18-7-170; *see Parks v. Characters Night Club*, 548 S.E.2d 605, 608 (S.C. Ct. App. 2001) (on appeal from magistrate court, the circuit court may make its own findings of fact). However, the court "cannot consider questions that have not

<sup>1</sup> At the hearing, Judge Garrett requested that legal briefs be submitted during or after the hearing. The Solicitor's office submitted its brief during the hearing and Play4Fun submitted its brief after the hearing.

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been presented to the magistrate,” and the parties “are restricted to the theory on which the case was tried in the magistrate court.” *Indigo Assocs. v. Ryan Inv. Co.*, 431 S.E.2d 271, 273-274 (S.C. Ct. App. 1993).

### **BURDEN OF PROOF**

At a post-seizure hearing, the burden is on the owner of the *res* to show why the seized property should not be forfeited and destroyed. *Union County Sheriff's Office v. Henderson*, --- S.E.2d ---, 2011 WL 6347850 (S.C. Sup. Ct. Op. No. 27077, filed December 19, 2011) (citing *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000)).

### **DISCUSSION**

This case involves the interaction between two statutes enacted within a month of each other in 1999. Section 12-21-2710 imposes a general prohibition on certain types of gaming machines:

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, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

Section 61-4-580(3) provides an exception for certain types of promotions conducted in businesses with beer or wine permits:

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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:

...

(3) permit gambling or games of chance **except** game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:

(a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;

(b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and

(c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.

...

A violation of any provision of this section is a ground for the revocation or suspension of the holder's permit. (emphasis added).

**A. The Products Direct sweepstakes promotion and the Terminal are legal under § 61-4-580(3).**

Judge Garrett found as a fact that the sweepstakes promotion and the Terminal complied with the requirements of § 61-4-580(3) for the following reasons:

1. The location at which the seized sweepstakes terminal was placed has a permit authorizing the sale of beer or wine.
2. The promotion is conducted or offered in connection with the sale of discount coupons for the purchase of consumer products and to enhance the brand or image of Products Direct.
3. No purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize. As set forth in the sweepstakes rules which are on the terminal screen and in writing posted on the terminal, a customer may enter the sweepstakes without a purchase by sending a written request to Products Direct at the mailing address provided for free entries.
4. All materials advertising the Products Direct promotion clearly disclose that no purchase or payment is necessary to enter and provide details about the free method of participation.

Order at 3-4. Judge Garrett also found that "the purchaser of the discount coupon receives real

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value for it.” Order at 5. These findings are amply supported by the evidence presented to Judge Garrett, including the declaration of Michael Pace and the declaration of Earl Crawford.

The State waived any opportunity to challenge the promotion’s compliance with § 61-4-580(3). The circuit court, acting as an appellate court in a case heard by a magistrate, cannot consider questions that have not been presented to the magistrate. *See Indigo Assocs., supra*, 431 S.E.2d at 273. The State did not question the legitimacy of the Products Direct sweepstakes promotion or the Terminal’s compliance with § 580(3) in its memorandum to Judge Garrett, and the issue was neither raised nor discussed during the hearing. Accordingly, the State cannot now challenge the legitimacy of the promotion.

**B. Because the Terminal complies with § 580(3), it is exempt from the prohibition in § 12-21-2710.**

Judge Garrett correctly ruled that § 580(3) exempts the Terminal from the prohibition set forth in § 2710. Whether § 580(3) is an exemption from § 2710 is a question of statutory construction. In construing a statute, the court’s primary purpose “is to ascertain and effectuate the intent of the legislature.” *Denman v. City of Columbia*, 691 S.E.2d 465, 468 (S.C. 2010). The court must give the terms of a statute their plain and ordinary meaning “without resort to subtle or forced construction to limit or expand the statute’s operation.” *Ward v. West Oil Co.*, 692 S.E.2d 516, 519 (S.C. 2010).

Also, “[f]orfeitures are not favored in the law or equity.” *Ducworth v. Neely*, 459 S.E.2d 896, 899 (S.C. Ct. App. 1995). Because forfeiture is “by its nature” a penal action, laws providing for forfeiture must be strictly construed and are subject to the rule of lenity. *Allendale Cty. Sheriff’s Office v. Two Chess Challenge II*, 606 S.E.2d 471, 474 (S.C. 2004); *see also Berry v. State*, 675 S.E.2d 425, 426-27 (S.C. 2009) (“[I]n construing a criminal statute, we are guided by the rule of lenity—the principle that any ambiguity must be resolved in favor of the

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accused.”).

This is a pivotal point. The rule of lenity “ensures fair warning by so resolving ambiguity in a . . . statute as to apply it only to conduct clearly covered.” *United States v. Lanier*, 520 U.S. 259, 266 (1997) (emphasis added). To the extent there is some ambiguity in the language of either § 2710 or § 580(3) as to whether the machines should be forfeited, the rule of lenity requires a court to resolve the ambiguity in Respondent’s favor.

- 1. The plain language and legislative history of § 580(3) make clear that it is an exemption from other prohibitions on gambling and games of chance, including § 2710.**

Section 2710 and § 580(3) both deal with the same subject matter, namely, games of chance or sweepstakes. Statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. *Joiner ex rel. Rivas v. Rivas*, 536 S.E.2d 372, 375 (S.C. 2000).

As a matter of the plain statutory language, § 580(3) is clearly an exemption from the general prohibition set forth in § 2710. Section 580(3) begins by reiterating the prohibition on “gambling and games of chance”—a category that includes machines outlawed by § 2710—but then goes on to state that the prohibition does not apply to promotions that meet the criteria listed in subsections (a), (b), and (c). These criteria do not restrict the method by which the games of chance or sweepstakes are delivered. Therefore, a sweepstakes terminal that meets the criteria is exempted from the general prohibition of § 2710.<sup>2</sup>

“Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose

<sup>2</sup> The State argues that § 580(3) does not apply to machines. The argument is unsupported by the statutory text, which makes no distinction among the various means by which a promotion may be operated. The State further asserts that § 2710 makes video gaming machines contraband per se, a contention that cannot overcome the plain language of § 580(3).

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another meaning.” *State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). The inquiry into the meaning of the Act ends where it begins: the language of the Act is plain, and therefore “the sole function for the courts is to enforce it according to its terms.” *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also Carcieri v. Salazar*, 129 S.Ct. 1058 (2009). Faithful to these principles, a court must presume that by carving out § 580(3) as an exemption from the general prohibition set forth in § 2710, the legislature meant what it said. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (“Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”).

The legislative history confirms the plain statutory text. The South Carolina Supreme Court has held that the title of an act is a proper source of legislative history. *See, e.g., Duvall v. S.C. Budget & Control Bd.*, 659 S.E.2d 125, 130 (S.C. 2008). The title of H.B. 3951, the Act which added subsection (3) to § 61-4-580, was:

An Act to amend Section 61-4-580, ... relating to prohibited acts in an establishment licensed to sell beer or wine, *so as to exempt from the prohibition on gambling or games of chance promotional games conducted in connection with the sale or promotion of a consumer product or service* in which no entry fee or purchase is required of a participant and this no fee or purchase requirement is clearly disclosed.

H.B. 3951 (all caps omitted; emphasis added). The title of the Act itself thus makes clear that the legislature intended § 580(3) to operate as an exemption from general prohibitions on gambling, including § 2710.

2. **Other rules of statutory construction indicate that § 580(3) is an exemption from § 2710.**
  - i. *If two statutes appear to conflict, the more specific statute should be considered an exception to the general statute.*

In *Denman*, the South Carolina Supreme Court restated the established rule that when “there is one statute addressing an issue in general terms and another statute dealing with the

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identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." *Denman*, 691 S.E.2d at 468-69 (internal quotation marks omitted). Section 580(3) is more specific than § 2710 because it applies to a limited number of people (beer or wine permit holders) and is limited to a particular type of gaming (game promotions used to promote a product or service). Accordingly, the specific permission contained in § 580(3) operates as an exception to the general prohibition contained in § 2710.

*ii. If two statutes appear to conflict, the more specific statute should prevail over the later in time general statute.*

In *Denman*, the South Carolina Supreme Court restated the long standing presumption against repeal by implication. "Specific statutes are not to be considered repealed by a later general statute unless there is a *direct reference* to the earlier statute or the intent of the legislature to do so is *explicitly implied*. Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconciliation." *Denman*, 691 S.E.2d at 469 (citations omitted) (emphasis added). The amendment to § 2710 that prohibited the possession or operation of video gaming machines was enacted during a special legislative session in June 1999. *Westside Quick Shop, Inc. v. Stewart*, 534 S.E.2d 270, 272 (S.C. 2000). Section 580(3) was enacted by the Legislature in late May of 1999. Both bills were introduced during April 1999. The South Carolina Legislature cannot have been unaware of § 580(3) when it approved the amendments to § 2710, yet § 2710 does not directly refer to § 580(3). Thus, § 580(3) survives the later effective date of § 2710.

The Legislature removed any lingering doubt concerning its intent in this regard with the following statement in Section 22(C) of Act No. 125 of 1999:

(C) It is the intent of the General Assembly that the provisions of this act shall not

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be construed to:

....

(2) affect any provision of current law, unless or until it is specifically modified or expressly repealed or provided in this act.

**3. The South Carolina Supreme Court's decision in *Sun Light Prepaid Phonocard* supports the conclusion that § 580(3) is an exemption from § 2710.**

In *Sun Light Prepaid Phonocard Co. v. State*, 600 S.E.2d 61 (S.C. 2004), the South Carolina Supreme Court considered a purported "promotion" involving the sale of prepaid long distance phone cards. The Court rejected on the merits the appellants' argument that the scheme was permitted under § 580(3), concluding that "the phone cards and dispensers do not meet the requirements of § 61-4-580 because the game pieces are not a legitimate promotion or sweepstakes." *Id.* at 65. The majority did not specifically refer to § 580(3) as an exemption from § 2710, but it did so implicitly by ruling that the requirements of § 580(3) had not been met, instead of finding that § 580(3) was not an exemption from § 2710. Justice Pleicones, in his dissenting opinion, specifically referred to § 580(3) as an "exception" to Section 12-21-2710. *Id.* at 65-66 (Pleicones, J., dissenting). Judge Pieper agreed with Justice Pleicones that § 580(3) is an exception to § 2710. *Id.* at 66 (Pieper, J., dissenting).

The Court revisited *Sun Light* in *Ward v. West Oil Co.*, 692 S.E.2d 516 (S.C. 2010), stating that in *Sun Light* it had "found the dispensers and phone cards *were not exempt* under section 61-4-580" because they were not a legitimate promotion or sweepstakes. *Id.* at 521 (emphasis added). Based on *Sun Light* and *Ward*, it is clear that the South Carolina Supreme Court recognizes § 580(3) as an exception to § 2710.

**C. The State's arguments lack merit.**

In the proceedings before Judge Garrett, the State offered three theories to support its

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position that the Terminal is prohibited by § 2710:<sup>3</sup> (1) A civil licensing statute cannot create an exemption from criminal liability; (2) assuming such an exemption is possible, the legislative history does not show an intent to create one; and (3) even if the Terminal satisfies the criteria of § 61-4-580(3), its operation is nevertheless illegal under § 61-4-580(5). All of these arguments are without merit.

**1. The State's civil licensing argument violates principals of statutory construction.**

The State's memorandum below cited no authority to support its argument that a civil licensing statute cannot create an exemption from a criminal prohibition. The State's position cannot be correct. If a sweepstakes terminal that fully complies with § 580(3) is nevertheless illegal under § 2710, the exemption has no effect. No rational business owner would operate a promotion under § 580(3) if doing so would subject him to criminal liability, even if the business could retain its beer or wine license. The State's reasoning also violates basic principles of statutory construction. A court must read a statute "so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." *CFRE, LLC v. Greenville County Assessor*, --- S.E.2d ----, 2011 WL 3804517 (S.C. Sup. Ct. Op. No. 27032, filed Aug. 29, 2011) (citations, internal quotation marks and alterations omitted); *see also Corley v. United States*, 129 S.Ct. 1558, 1566 (2009) ("[o]ne of the most basic interpretative cannons" requires that a "[a] statute should be construed so that effect is given to all its

<sup>3</sup> The applicable standard of review prohibits the State from raising any different theories on appeal to this Court. *Indigo Assocs.*, 431 S.E.2d at 273. Accordingly, the Court has not considered the arguments and theories newly raised by the State on appeal including, *inter alia*, the following: (1) that the business where Play4Fun placed the Terminal did not have a beer and wine permit; (2) that the Terminal and the promotion do not comply with the requirements of § 580(3); (3) that the purchaser of a discount coupon does not receive real value for it or that the sweepstakes is otherwise illegitimate; and (4) that the ability to play the sweepstakes game without making a purchase is irrelevant to the validity of the promotion.

#10812  
9/14

provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ”) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp.181-186 (rev. 6th ed. 2000)).

**2. Contrary to the State’s claim, the legislative history does indicate that § 580(3) is an exemption from § 2710.**

The State argued below that if the General Assembly had intended for § 580(3) to be an exemption from § 2710, it would have said so. As discussed above, the Legislature *did* say so, in the title of House Bill 3951, where it stated that § 580(3) is an exemption from the general prohibition on gambling or games of chance.

**3. Contrary to the State’s claim, Section 61-4-580(5) does not apply.**

Finally, the State argued that even if the Terminal is permitted by § 580(3), it is prohibited under § 61-4-580(5), which provides that the holder of a beer or wine permit may not “permit any act, the commission of which . . . constitutes a crime under the laws of this State.” This argument violates the rule that a “statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect.” *S.C. State Ports Auth. v. Jasper County*, 629 S.E.2d 624, 629 (S.C. 2006).

### CONCLUSION

For the reasons set forth above, Judge Garrett’s order is affirmed. The court is keenly aware of the checkered history of video gambling in our state, and the intense policy debate that occurred in the 1990’s culminating in the passage of § 12-21-2710. The court is also mindful that some may view this decision as letting the proverbial camel’s nose under the tent of the prohibition of video poker. Trial courts do not set policy; instead they attempt to apply the plain language of statutory law to concrete disputes. This task entails discerning the intent of our Legislature—by using the words they carefully chose—to determine the legality of the conduct

\*118/12  
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of the parties. This court has concluded that the promotion at issue here constitutes legal conduct as authorized by § 61-4-580(3). Outside of an appeal, the remedy for any dissatisfaction with this conclusion is properly addressed to the Legislature, not this court. The Legislature may amend the statute; this court cannot.

IT IS SO ORDERED.



D. Garrison Hill  
Circuit Judge

January 27, 2012  
Greenville, South Carolina

# EXHIBIT 5

STATE OF SOUTH CAROLINA )

COUNTY OF KERSHAW )

CITY OF CAMDEN, )

v.

MAGIC MINUTES, LLC

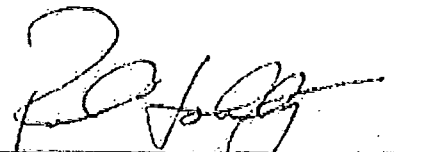
IN THE MAGISTRATE'S COURT

ORDER

A MAGIC MINUTES long distance air time vending machine #0034 was seized pursuant to S.C. Code Section 12-21-2712 on August 2, 2011 and brought before this Court for a determination of whether it violates Section 12-21-2710 or any other law of this State.

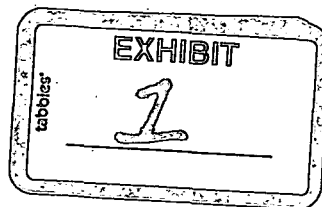
After examination of the statutory and case law from this State, this Court finds that the MAGIC MINUTES vending machine #0034 brought before this Court DOES NOT violate the laws of the State of South Carolina and therefore SHOULD NOT be destroyed.

AND IT IS SO ORDERED.



Roderick M. Todd Jr.  
Chief Magistrate Judge  
Kershaw County

August 2, 2011  
Kershaw, South Carolina



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF KERSHAW )  
  
CITY OF CAMDEN,  
  
v.  
  
MAGIC MINUTES, LLC

IN THE MAGISTRATE'S COURT

ORDER

MAGIC MINUTES long distance air time vending machine #0034 was seized pursuant to S.C. Code Section 12-21-2712 on August 2, 2011 and brought before this Court for a determination of whether it violates Section 12-21-2710 or any other law of this State.

**BACKGROUND**

MAGIC MINUTES, LLC owns and operates the machine #0034 brought before this Court. An employee of MAGIC MINUTES attempted to place the machine within a retail establishment in Kershaw County. The MAGIC MINUTES vending machines sell long distance air time minutes. In order to promote and drive sales of minutes, MAGIC MINUTES is running a sweepstakes known as the Magic Minutes Sweepstakes Game. The sweepstakes promotion uses a video terminal that dispenses receipts with PIN numbers that give the customers access to long distance minutes and contains the sweepstakes game. The sweepstakes promotion operates as follows:

1. The vending machine has a prominently placed sticker on the front of the machine which describes the promotion and sweepstakes rules and the instructions for a customer to play for free.

2. To purchase minutes, a customer inserts dollar bills into the bill acceptor and receives a receipt containing PIN numbers, which are used to make long distance phone calls from any telephone land line.
3. In connection with the purchase of the long distance minutes, the customer is given an opportunity to play the sweepstakes game. The games which may be played include poker, blackjack, and keno. If the customer chooses not to play, the operator of the retail establishment clears the sweepstakes game credits.
4. If the customer wins cash in the sweepstakes, he or she may receive that cash from the operator of the retail establishment.

### LEGAL ANALYSIS

Regarding S.C. Code Section 12-21-2710, this Court finds that MAGIC MINUTES machine #0034 violates S.C. Code Section 12-21-2710.

However, S.C. Code Section 61-4-580 provides an exception to Section 12-21-2710, one recognized by the S.C. Supreme Court in Sun Light Prepaid Phonecard Co. In this case, Section 61-4-580 was recognized as a direct exception to Section 12-21-2710 by the dissenting opinions and implied by the majority opinion. Because the business in which the MAGIC MINUTES vending machine was located has a valid permit authorizing the sale of beer or wine, the MAGIC MINUTES vending machine #0034 fits within this exception. The MAGIC MINUTES sweepstakes game is a promotion connected to the sale of long-distance minutes, the rules to the MAGIC MINUTES sweepstakes game are clearly displayed on the machine, there is

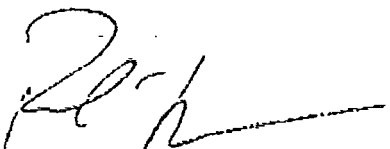
no purchase necessary to play the MAGIC MINUTES sweepstakes game, and the method by which a customer can play for free is also clearly displayed.

This decision is not an endorsement of video poker. This decision should not be interpreted as allowing games of chance to be played in general. This decision should not be interpreted as allowing sweepstakes rooms to operate, i.e., it does not allow sweepstakes promotions to operate as the primary business of an establishment. To the contrary, this decision is specifically limited to the operation of the particular MAGIC MINUTES vending machine #0034.

#### CONCLUSION

Based on the analysis above, this Court finds that the MAGIC MINUTES vending machine brought before this Court DOES NOT violate the laws of the State of South Carolina and therefore SHOULD NOT be destroyed.

AND IT IS SO ORDERED.

  
\_\_\_\_\_  
Roderick M. Todd Jr.  
Chief Magistrate Judge  
Kershaw County

August 2, 2011  
Kershaw, South Carolina

# EXHIBIT 6

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

IN THE MAGISTRATE'S COURT

COUNTY OF RICHLAND,

v.

MAGIC MINUTES, LLC

**ORDER**

MAGIC MINUTES long distance air time vending machines #0024, #0025 were seized pursuant to S.C. Code Section 12-21-2712 on August 11, 2011 and brought before this Court on August 12, 2011 for a determination of whether it violates Section 12-21-2710 or any other law of this State.

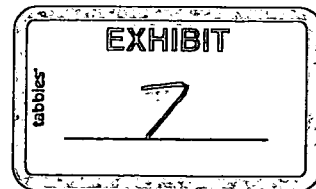
After examination of the statutory and case law from this State, this Court finds that the MAGIC MINUTES vending machine brought before this Court DOES NOT violate the laws of the State of South Carolina and therefore SHOULD NOT be destroyed.

**AND IT IS SO ORDERED.**



Michael R. Davis  
Magistrate Judge  
Richland County

August 31, 2011  
Columbia, South Carolina



# EXHIBIT 7

STATE OF SOUTH CAROLINA )  
COUNTY OF DARLINGTON )

IN THE MAGISTRATE'S COURT

TOWN OF SOCIETY HILL,

v.

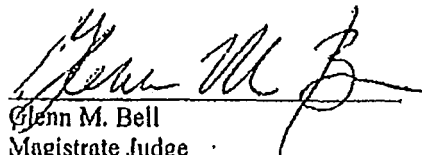
MAGIC MINUTES, LLC

**ORDER**

A MAGIC MINUTES long distance air time vending machine #0047 was seized pursuant to S.C. Code Section 12-21-2712 on July 27, 2011 and brought before this Court on July 28, 2011 for a determination of whether it violates Section 12-21-2710 or any other law of this State.

After examination of the statutory and case law from this State, this Court finds that the MAGIC MINUTES vending machine #0047 brought before this Court DOES NOT violate the laws of the State of South Carolina and therefore SHOULD NOT be destroyed.

**AND IT IS SO ORDERED.**

  
Glenn M. Bell  
Magistrate Judge  
Darlington County

July 29, 2011  
Darlington, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF DARLINGTON )

IN THE MAGISTRATE'S COURT

TOWN OF SOCIETY HILL,

v.

MAGIC MINUTES, LLC

ORDER

A MAGIC MINUTES long distance air time vending machine #0047 was seized pursuant to S.C. Code Section 12-21-2712 on July 27, 2011 and brought before this Court on July 28, 2011 for a determination of whether it violates Section 12-21-2710 or any other law of this State.

**BACKGROUND**

MAGIC MINUTES, LLC owns and operates MAGIC MINUTES machine #0047 brought before this Court. An employee of MAGIC MINUTES attempted to place the machine within a retail establishment in Darlington County. The MAGIC MINUTES vending machines sell long distance air time minutes. In order to promote and drive sales of minutes, MAGIC MINUTES is running a sweepstakes known as the Magic Minutes Sweepstakes Game. The sweepstakes promotion uses a video terminal that dispenses receipts with PIN numbers that give the customers access to long distance minutes and contains the sweepstakes game. The sweepstakes promotion operates as follows:

1. The vending machine has a clearly placed sticker on the front of the machine which describes the promotion and sweepstakes rules and the instructions for a customer to play for free.

2. To purchase minutes, a customer inserts dollar bills into the bill acceptor and receives a receipt containing PIN numbers, which are used to make long distance phone calls from any telephone land line.

3. In connection with the purchase of the long distance minutes, the customer is given an opportunity to play the sweepstakes game. The games which may be played include poker, blackjack, and keno. If the customer chooses not to play, the operator of the retail establishment clears the sweepstakes game credits.

4. If the customer wins cash in the sweepstakes, he or she may receive that cash from the operator of the retail establishment.

#### LEGAL ANALYSIS

The Court holds Magic Minutes machine 0047 violates S.C. Code Section 12-21-2710.

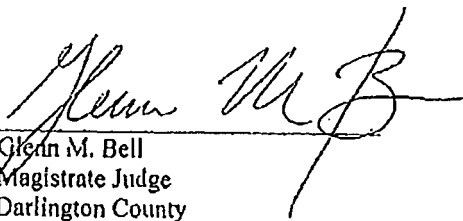
However, S.C. Code Section 61-4-580 provides an exception to Section 12-21-2710. This exception is recognized by the S.C. Supreme Court in Sun Light Prepaid Phonecard Co. In this case Section 61-4-580 was recognized as a direct exception to Section 12-21-2710 by the dissenting opinion and implied by the majority opinion. Because the business in which the MAGIC MINUTES vending machine was located has a valid permit authorizing the sale of beer or wine, the MAGIC MINUTES vending machine #0047 fits within this exception. The MAGIC MINUTES sweepstakes game is a promotion connected to the sale of long-distance minutes, the rules to the MAGIC MINUTES sweepstakes game are clearly displayed on the machine, there is no purchase necessary to play the MAGIC MINUTES sweepstakes game, and the method by which a customer can play for free is also clearly displayed.

This decision is not an endorsement of video poker. This decision should not be interpreted as allowing games of chance to be played in general. This decision should not be interpreted as allowing sweepstakes rooms to operate, i.e. it does not allow sweepstakes promotions to operate as the primary business of an establishment. To the contrary, this decision is specifically limited to the operations of the particular MAGIC MINUTES vending machine, machine number 0047.

CONCLUSION

Based on the analysis above, this Court finds that the MAGIC MINUTES vending machine #0047 brought before this Court DOES NOT violate the laws of the State of South Carolina and therefore SHOULD NOT be destroyed.

AND IT IS SO ORDERED.

  
Glenn M. Bell  
Magistrate Judge  
Darlington County

July 29, 2011  
Darlington, South Carolina

# EXHIBIT 8

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF OCONEE )

2011CV3710100410  
**CASE NUMBER**

The State Of SC/ Oconee Sheriff'S Dept )  
 )  
Plaintiff(s) )  
Vs )  
 )  
Ralph Alexander Amusement Co. )  
 )  
Defendant(s) )

IN THE MAGISTRATE COURT  
POST SEIZURE HEARING ORDER

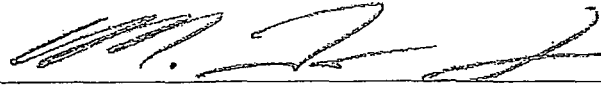
This matter comes before the Court upon request for a Post-Seizure Hearing to determine whether the machine(s) in this case is an illegal gambling device(s) in violation of S.C. Code Ann. §12-21-2710 as previously ordered by this Court.

After examining the machine(s) and reviewing the evidence presented, **IT IS SO ORDERED** that the machine(s):

Is an illegal gambling device(s) pursuant to S.C. Code Ann. §12-21-2710 and shall be destroyed.

Is not an illegal gambling devices in violation of S.C. Code Ann. §12-21-2710 and shall be returned to the owner.

**AND IT IS SO ORDERED.**

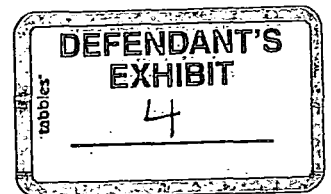
  
MAGISTRATE

October 6, 2011

*Order to follow.*

*M.T.S.*  
*10/6/11*

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**JUDGE M. TODD SIMMONS**



STATE OF SOUTH CAROLINA	)	
COUNTY OF OCONEE	)	IN THE MAGISTRATE'S COURT
	)	
STATE OF SOUTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
RALPH ALEXANDER, INC.	)	
	)	
	)	

---

**BACKGROUND**

Two machines belonging to the above-named Defendant were seized by the Oconee County Sheriff's Department pursuant to S.C. Code Section 12-21-2712 with the consent of the Defendant and brought before this Court for a determination as to whether they violate Section 12-21-2710 or any other law of the State. A hearing was held on October 7, 2011 and the parties submitted written arguments and exhibits.

Ralph Alexander, Inc. is the owner of sweepstakes terminal #110400014916 and sweepstakes terminal #000001. The Defendant places the terminals in retail establishments in Oconee County, SC for the purpose of conducting sweepstakes promotions with Products Direct, LLC and Gift Liquidations, LLC. Products Direct sells a variety of consumer products via its website at [www.redeemsite.com](http://www.redeemsite.com). Gift Liquidations sells a variety of consumer products via its website at [www.gift-surplus.com](http://www.gift-surplus.com). In order to jump start sales and increase awareness of the websites, Products Direct and Gift Liquidations run a sweepstakes promotion involving the sale of discount coupons. The sweepstakes promotions use a video terminal that dispenses coupons and contains the sweepstakes games. The sweepstakes promotions operate as follows:

- a. The sweepstakes terminal describes the promotion and the sweepstakes rules on the screen.

**CERTIFIED TRUE COPY**  
**JUDGE M. TODD SIMMONS**  
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- b. The customer walks up to the terminal, which is located in an establishment that has a beer or wine permit, and inserts paper money into the bill acceptor.
- c. The terminal prints out a discount coupon that is worth twice the value of the amount of money inserted into the terminal.
- d. The customer can go online and redeem the coupon(s) at [www.redeemsite.com](http://www.redeemsite.com) or [www.gift-surplus.com](http://www.gift-surplus.com) in connection with the purchase of consumer product(s) offered by Products Direct or Gift Liquidations.
- e. In connection with the purchase of the discount coupon, the customer receives free entries into the sweepstakes. The customer can play one of several games to reveal whether he has won anything or he can instantly find out by selecting the "Reveal Instant Winners" button. Thus, the customer is not required to play the games to see if he has won.
- f. Instead of purchasing a discount coupon, a customer can enter the sweepstakes without a purchase. A customer can follow the instructions on the terminal screen (or the posted written rules) and write in for a free entry code. Upon receipt of the free entry code, the customer may return to that terminal and enter the code. Upon entering the code, the customer receives free entries to play the sweepstakes.
- g. The games contained in the terminal include, but are not limited to, poker, keno, and bingo.
- h. If a customer wins cash in the sweepstakes, he may receive that cash from the store clerk.
- i. The terminal will not permit the customer to replay his winnings (i.e., there is no "free play feature"). The only way to obtain additional entries is to purchase additional discount coupons.

In 1999, the South Carolina legislature implemented a ban on video gambling devices and authorized the seizure of certain categories of machines. The crux of the ban is contained in Section 12-21-2710 of the South Carolina tax code and reads as follows:

SECTION 12-21-2710. Types of machines and devices prohibited by law; penalties.

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, or any machine or device licensed pursuant to Section 12-21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which

are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

Since the games contained in the sweepstakes terminal are games of chance, Section 12-21-2710 would likely prohibit those games absent an exception. The Defendant argues that there is an exception to Section 12-21-2710 that is found in S.C. Code Section 61-4-580(3). That section reads as follows:

SECTION 61-4-580. Prohibited acts.

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:

- (1) sell beer or wine to a person under twenty-one years of age;
- (2) sell beer or wine to an intoxicated person;
- (3) permit gambling or games of chance except game promotions including contests, games of chance, or sweepstakes in which the elements of chance and prize are present and which comply with the following:
  - (a) the game promotion is conducted or offered in connection with the sale, promotion, or advertisement of a consumer product or service, or to enhance the brand or image of a supplier of consumer products or services;
  - (b) no purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize; and
  - (c) all materials advertising the game promotion clearly disclose that no purchase or payment is necessary to enter and provide details on the free method of participation.
- (4) permit lewd, immoral, or improper entertainment, conduct, or practices. This includes, but is not limited to, entertainment, conduct, or practices where a person is in a state of undress so as to expose the human male or female genitals, pubic area, or buttocks cavity with less than a full opaque covering;
- (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; or
- (6) sell, offer for sale, or possess any beverage or alcoholic liquors the sale or possession of which is prohibited on the licensed premises under the law of this State; or
- (7) conduct, operate, organize, promote, advertise, run, or participate in a "drinking contest" or "drinking game". For purposes of this item, "drinking contest" or "drinking game" includes, but is not limited to, a contest, game, event, or other endeavor which encourages or promotes the consumption of beer or wine by participants at extraordinary speed or in increased quantities or in more potent form. "Drinking contest" or "drinking game" does not include a contest, game, event, or endeavor in which beer or wine is not used or consumed by participants as part of the contest, game, event, or endeavor, but instead is used solely as a reward or prize. Selling beer or wine in the regular course of business is not considered a violation of this section.

A violation of any provision of this section is a ground for the revocation or suspension of the holder's permit.

The State argues that Section 61-4-580(3) does not provide an exception and that Sections 12-21-2710 and 12-21-2712 authorize the State to seize and destroy the terminal.

#### FINDINGS OF FACT

I find that the sweepstakes promotions operated by the Defendant and the specific terminals referenced above comply with the requirements of Section 61-4-580(3) for the following reasons:

1. The location at which the seized sweepstakes terminal is placed has a permit authorizing the sale of beer or wine.
2. The promotions are conducted or offered in connection with the sale of discount coupons for the purchase of consumer products and to enhance the brand or image of Products Direct and Gift Liquidations.
3. No purchase payment, entry fee, or proof of purchase is required as a condition of entering the game promotion or receiving a prize. As set forth in the sweepstakes rules which are on the terminal screen and in writing posted on the terminal, a customer may enter the sweepstakes without a purchase by sending a written request to Products Direct or Gift Liquidations at the mailing address provided for free entries.
4. All materials advertising the promotion clearly disclose that no purchase or payment is necessary to enter and provide details about the free method of participation.

#### FINDINGS OF LAW

The Court holds that Section 61-4-580(3) is an exception to Section 12-21-2710. The Court also holds that the operation of these particular sweepstakes promotions under the particular circumstances described above is legal under South Carolina law:

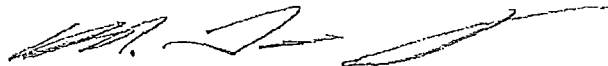
1. Statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result. Joiner ex rel. Rivas v. Rivas, 342 S.C. 102 (2000). Reading both statutes side by side leads me to the conclusion that 61-4-580(3) is an exception to 12-21-2710.
2. Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. Denman v. City of Columbia, 387 S.C. 131 (2010).
3. S.C. Code Section 61-4-580(3) became law in May 1999. Subsequently, S.C. Code Section 12-21-2710 became law. This later statute does not contain a direct

reference to the earlier one. Additionally, there is nothing to suggest that the later statute repealed the earlier one, either expressly, or through implication. Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconciliation. Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 137 (2006). S.C. Code Section 61-4-580(3) can be reconciled as an exception to S.C. Code Section 12-21-2710. Therefore, as long as the machines belonging to the Defendant in this matter meet the requirements of the exception, there is no violation of South Carolina law.

The Court finds that all of the requirements of Section 61-4-580(3) have been met in this case, and the operation of these specific sweepstakes promotions, under the limited circumstances described above, is legal under South Carolina law. Thus, seizure and destruction of these terminals is not authorized.

This decision is specifically limited to the operation of the particular sweepstakes terminals in question as set forth above and is not to be construed in any way as an endorsement of video poker and/or other illegal gambling.

**IT IS SO ORDERED.**



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JUDGE M. TODD SIMMONS  
CHIEF MAGISTRATE

October 25, 2011  
Seneca, South Carolina