STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS
Greenville County Sheriff's Department, Appellant, vs. Sweepstakes Terminal No. 0399, Respondent.	Case No. 2011-CP-23-2657 **MEMORANDUM IN SUPPORT OF AFFIRMANCE OF DECISION**

PLAY4FUN, INC. ("Play4Fun"), the owner of Sweepstakes Terminal No. 0399 ("the Terminal") submits this memorandum in support of affirmance of the Order of the magistrate court finding that the Terminal is not an illegal gaming device prohibited by S.C. Code Ann. § 12-21-2710 (2010).

INTRODUCTION

If a sweepstakes terminal complies with the requirements of S.C. Code Ann. § 61-4-580(3) ("§ 580(3)"), it is *exempt* from the prohibition found in S.C. Code Ann. § 12-21-2710 ("§ 2710"). This is clear from the plain language of § 580(3), which is confirmed by the legislative history. Section 580(3) was adopted as House Bill 3951, the title of which is:

> An Act to amend Section 61-4-580 … ***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 …

H.B. 3951, 113th Leg. (1999) (emphasis added). That § 580(3) is an exemption from § 2710 is further confirmed by application of established rules of statutory construction, all of which support the magistrate court's reasoning. The State's arguments to the contrary are without merit.

Accordingly, and as explained in more detail *infra*, this Court should affirm the Order of

the lower court.

BACKGROUND

Play4Fun owns Sweepstakes Terminal No. 0399 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. 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, much like "Groupon" and similar promotional websites.[1] The sweepstakes promotion uses a video terminal that dispenses the coupons and contains the sweepstakes games. 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.

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 maximum discount of 30 percent.[2]

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 amusing games to reveal whether he has won anything or 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.

---

[1] Groupon and promotional websites like it send e-mails with a promotional offer for a product or service. For example: A person can purchase a discount coupon worth twice the value paid. For example, a promotion for a local restaurant might offer $20 coupon that can be purchased for $10.

[2] Websites like Groupon also cap discounts, for example, by prohibiting subscribers from purchasing more than one discount coupon for each promotion.

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 more discount coupons or to write in for a free entry code.

Declaration of Michael R. Pace;[3] *see also* Order at 1-2.

The operators of the promotion, such as Play4Fun, purchase terminals and place them in legitimate businesses that possess beer or wine permits. Generally, no more than two or three terminals are placed in a single location, depending on the size of the retail location. Unlike some illegitimate sweepstakes promotions, Products Direct does not conduct its promotion by placing 50-60 terminals in a "sweepstakes café" or gaming room where there is no pre-existing, established business.

Mindful of its obligations under South Carolina law, Play4Fun contacted the Thirteenth Circuit Solicitor's Office regarding the Terminal, which was then inspected by an Assistant Solicitor and a SLED Agent. Following this examination, a post-seizure hearing was conducted in magistrate court on March 25, 2011. Following the hearing, the court entered a written order finding that "Section 12-21-2710 would likely prohibit [the Terminal] absent an exception" but that "Section 61-4-580(3) is an exception to 12-21-2710." Order at 2, 4. Accordingly, the magistrate court ordered the Terminal returned to Play4Fun.

[3] Mr. Pace's declaration was submitted to the magistrate court as an exhibit to Play4Fun's Memorandum opposing the seizure of the Terminal. For the Court's convenience, the Declaration is attached to this Memorandum as **Exhibit A.**

ARGUMENT

A. Standard of Review

On 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 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 (S.C. Ct. App. 1993).

Because this is a civil *in rem* action for forfeiture of property, it is the State's burden to prove, by a preponderance of the evidence, that the Terminal is illegal. *See State v. Petty*, 241 S.E.2d 561, 562 (S.C. 1978).[4] The State may claim otherwise based on *State v. 192 Coin-Operated Video Game Machines*, 525 S.E.2d 872 (S.C. 2000), in which the Court commented, "The most due process requires is a post-seizure opportunity for an innocent owner ... to come forward and show, if he can, why the *res* should not be forfeited." *Id.* at 883; *see Moore v. Timmerman*, 276 S.E.2d 290, 293 (S.C. 1981). However, the issue in those cases was not the burden of proof but rather whether due process entitled the owner of a machine to a pre-seizure hearing. Those cases thus are not applicable to the issue of burden of proof.

---

[4] The South Carolina Supreme Court distinguished *Petty*, but did not overrule it, in *Medlock v. One 1985 Jeep Cherokee*, 470 S.E.2d 373, 376 (S.C. 1996). In *Medlock*, the Court acknowledged the preponderance standard set by *Petty*, but concluded that it did not apply. This was because *Medlock* involved a different forfeiture statute that evinced clear legislative intent to lower the state's burden of proof. Thus, *Petty* is still the governing law in South Carolina on the issue of burden of proof under the circumstances of the case before this court.

B. The Statutory Scheme

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 and wine permits:

> 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.

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

The magistrate court found as fact that the sweepstakes promotion and the Terminal comply 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. The court also noted in its rulings of law that "the purchaser of a discount coupon receives real value for it." Order at 5. These findings are amply supported by the evidence presented to the court, including the Pace Declaration and the Declaration of Earl Crawford (a copy of which is attached hereto as **Exhibit B**). Also, the customer is not required to play the games to see if he has won. Instead, he or she may instantly reveal the entries on the terminal. Order at 1.

The State has waived any opportunity to challenge the promotion's compliance with § 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.*, 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 the magistrate court, and the

issue was neither raised nor discussed during the hearing. Accordingly, the State cannot now challenge the legitimacy of the promotion, and this Court should reject any attempts to do so.

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

Because the games on the Terminal are games of chance, § 2710 might apply to the Terminal absent an exemption. The magistrate court 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 force construction to limit or expand the statute's operation." *Ward v. West Oil Co.*, 692 S.E.2d 516, 519 (S.C. 2010).

"[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. *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 accused.").

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, game promotions including 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 unquestionably 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.

The legislative history confirms the plain statutory text. Our 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) (attached hereto as **Exhibit C**). 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. *See* BLACK'S LAW DICTIONARY 396 (6th ed. 1991) (defining "exempt" as "To relieve, excuse, or set free from a duty or service imposed upon the general class to which the individual exempted belongs.").

2. Other rules of statutory construction indicate that § 580(3) is an exemption from § 2710.

a. 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 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.

b. 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 reconcilement." *Denman*, 691 S.E.2d at 469 (citations omitted).

The amendment of § 2710 that criminalized the possession or operation of video gaming machines was adopted 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 approved 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.

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

In *Sun Light Prepaid Phonecard 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) ("The General Assembly has legalized games of chances 'in connection with the sale, promotion or advertisement of a consumer good or service ...' if conducted on premises licensed for the sale of beer or wine."). 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.

E. The State's arguments lack merit and should be rejected by this Court.

In the proceedings before the magistrate court, the State offered three theories to support its position that the Terminal is prohibited by § 2710:[5] (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 is illogical and violates principles 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. Retaining a beer and wine license is small comfort in the face of a criminal conviction.

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. Aug. 29, 2011) (citations, internal quotation marks & alterations omitted).

The State may attempt to rely on a recent Attorney General Opinion arguing that

[5] 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.

administrative licensing penalties and criminal penalties are totally separate and have no effect on each other. However, the earlier attorney general opinion, from which this language came, cited as its only authority a DUI case where the main issue was double jeopardy. See S.C. Atty. Gen. Op., January 8, 2001; and State v. Young, 530 N.W.2d 269 (Neb. App. 1995). That reasoning is wholly inapplicable to the issue before this Court. Here, we are not concerned with the dual application of an administrative penalty and a criminal penalty and how those penalties affect the protection against double jeopardy.

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.

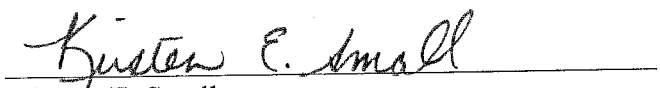
3. Section 61-4-580(5) does not apply.

Finally, the State argues that even if the Terminal is permitted by § 61-4-580(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." It is profoundly illogical for the State to argue that § 580(5) makes illegal the very same conduct made legal by § 580(3). Moreover, the 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, this court should affirm the order of the magistrate court.

Respectfully submitted,



Kirsten E. Small
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, SC 29603-0648
864.370.2211

S. Jahue ("Jake") Moore, Esq.
MOORE, TAYLOR & THOMAS, P.A.
P.O. Box 5709
West Columbia, SC 29171
803.796.9160

Attorneys for PLAY4FUN, INC.

October 21, 2011
Greenville, South Carolina