Filed 3/20/2018 12:43:00 PM Supreme Court Middle District
216 MM 2017

IN THE SUPREME COURT OF PENNSYLVANIA

No. 216 MM 2017

SANDS BETHWORKS GAMING, LLC

Petitioner,

v.

PENNSYLVANIA DEPARTMENT OF REVENUE; C. DANIEL HASSELL IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF REVENUE; and THE PENNSYLVANIA GAMING CONTROL BOARD

Respondents.

APPLICATION FOR LEAVE TO INTERVENE

Greenwood Gaming and Entertainment, Inc., d/b/a Parx Casino ("GGE"), submits this Application for Leave to Intervene pursuant to Pa.R.A.P. 1531(b) and, through Pa.R.A.P. 1517 and Pa.R.C.P. 2327-2329, seeking this Court's approval to intervene in the above-captioned proceeding.

GGE operates the Parx Casino under a Category 1 slot machine license. As a Category 1 licensee, GGE is subject to the requirements of the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. § 1101 et seq. ("Gaming

Act" or "Act"), as amended, including the comprehensive tax obligations in the Act.

This case raises issues relating to the constitutionality of a new tax scheme recently added to the Gaming Act. Specifically, the Act was amended to include new tax provisions whereby all licensed gaming entities are required to pay "Supplemental Daily Assessments" based upon their daily slot machine revenues, otherwise known as gross terminal revenue ("GTR"), into a newly created restricted fund called the "Casino Marketing and Capital Development" ("CMCD") Account, from which only a few select casinos will receive grants from the Gaming Control Board ("Board"). See 4 Pa.C.S. §§ 1407(c.1), 1407.1, and 1408(c.1).

Sands Bethworks Gaming, LLC ("Sands"), initiated this action challenging the constitutionality of the new tax scheme. Whether this action is successful will have a significant impact on the tax obligations of GGE and the other Pennsylvania licensed gaming entities. Despite all the licensed gaming entities having paid Supplemental Daily Assessments pursuant to the new tax scheme, Sands and the Respondents have sought this Court to approve a Joint Stipulation whereby only the monies paid into the CMCD Account by Sands would be returned if the action is successful. While this Court denied that proposed Joint Stipulation, it did so

without prejudice to the parties presenting arguments in their briefs regarding possible remedies.

GGE's right to intervene should be clear beyond any reasonable doubt. As a licensed gaming entity, GGE holds a substantial, direct, and immediate interest in the laws that govern its operations. The new tax scheme that is challenged in this action imposes a substantial, direct, and immediate burden on GGE, while only benefiting GGE's competitors. Moreover, as is made clear by Sands' proposed Joint Stipulation, neither Sands nor Respondents are seeking the return of the Assessments that have been paid by GGE; thus, GGE's interests are not being adequately represented by any party.

GGE now seeks to intervene in this action in order to establish that the new tax scheme is unconstitutional and to recover the funds that it paid into the CMCD Account. For these reasons and the other reasons stated in this Application, GGE respectfully requests that the Court grant this Application and permit its intervention as a party in this matter.

In specific support of its Application, GGE avers as follows:

1. GGE is a Delaware corporation that operates Parx Casino under a Category 1 license issued by the Board.

2. As a Category 1 license holder, GGE is subject to the requirements of the Gaming Act, including the tax obligations imposed in the Act.

3. The Gaming Act has recently been amended to add new tax provisions designed to benefit lower-revenue casinos to the detriment of higher-revenue casinos, such as GGE. See 4 Pa.C.S. §§ 1407(c.1), 1407(1), and 1408(c.1).

4. Specifically, this tax scheme establishes the new CMCD Account. 4 Pa. C.S. § 1407.1. All Category 1, 2, and 3 licensees are required to pay a "supplemental daily assessment" of 0.5% of their GTR into the CMCD Account. 4 Pa. C.S. § 1407(c.1). This supplemental daily assessment is synonymous with a tax based on daily slot machine revenues. Importantly, however, unlike general taxes, the funds from this new tax scheme go into a restricted account, rather than the Commonwealth's general fund. See 4 Pa. C.S. § 1407.1.

5. Under the tax scheme, the Board is required to redistribute the money in the form of "grants" from the CMCD Account back to a subset of the same casinos paying the tax. See 4 Pa. C.S. § 1407.1. The Board is directed to award mandatory "grants" to casinos based entirely on the casino's GTR revenue and license category, such that casinos with low revenues are entitled grants and casinos with higher revenues are not entitled to automatic grants. Id.

6. In sum, this tax scheme classifies licensed gaming entities based on their GTR revenue and license category, and treats them differently for tax purposes. This scheme is designed to take money from better performing casinos,

like GGE, and give that money to lesser performing casinos. It is essentially a redistribution of funds intended to benefit only a select subset of casinos in Pennsylvania and to burden other licensed gaming entities, such as GGE.

7. On or about December 28, 2017, Sands filed the instant action with this Court. This action seeks, inter alia, a declaration from the Court that the subject tax scheme is unconstitutional. Specifically, Sands' Petition for Review includes the following counts: Count I – Violation of the Uniformity Clause; Count II – Lack of Public Purpose; Count III – Violation of Special Law Restriction; Count IV – Violation of the Fourteenth Amendment of the U.S. Constitution; as well as a demand for injunctive and declaratory relief.

8. Subsequent to filing the Petition for Review, Sands filed an "Application for Special Relief in the Nature of a Preliminary Injunction; Application for Expedited Hearing Schedule," seeking a preliminary injunction and expedited consideration of the merits of the Petition for Review. Respondents answered the Applications, seeking denial of the requested relief. Thereafter, Sands and Respondents filed a proposed Joint Stipulation and Order, in which they agreed that if this Court grants the Petition for Review, Respondents will refund to Sands all money paid by Sands into the CMCD Account (but, by implication, will not refund such money paid into the CMCD Account by GGE or by other licensed gaming entities).

9. On March 5, 2018 this Court denied Sands' Application for Special Relief to the extent it sought a preliminary injunction, and denied the Joint Stipulation without prejudice to the parties presenting arguments in their briefs regarding possible remedies.

10. Thereafter, a briefing schedule was set requiring Sands to file its principal brief in the matter by March 20, 2018.

11. GGE now seeks to intervene in this action in order to establish that the subject new tax scheme in the Gaming Act is unconstitutional, and that the Assessments paid by GGE into the CMCD Account should be returned and refunded to GGE.

12. Under the Rules of Civil Procedure, a person should be permitted to intervene in an action if that "person could have joined as an original party in the action or could have been joined therein" or if the "determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action." Pa.R.C.P. 2327(3) and (4).

13. GGE is clearly such a person. As a licensed gaming entity that is governed and regulated by the Gaming Act, GGE has a direct interest in all of the provisions of the Act and in ensuring that the comprehensive tax obligations in the Act are not unconstitutional. The tax scheme at issue applies to GGE, substantially burdening GGE with a new tax but providing GGE with no benefit. As such, the

determination of whether this tax scheme is unconstitutional has a direct effect on GGE's interests and GGE will be bound by the Court's determination of constitutionality.

14. None of the grounds for refusing intervention under Rule 2329 are applicable in this instance. Although Sands, as a licensed gaming entity, also has an interest in ensuring the constitutionality of the Gaming Act's tax scheme, Sands is not adequately representing GGE's interest.

15. GGE routinely has the highest GTR revenue of any licensed gaming entity in Pennsylvania. This means that GGE has the most to lose through the new tax scheme. The tax scheme imposes the new Assessment on casinos as a percentage of their GTR; because GGE's GTR is higher than any other Pennsylvania casino's GTR, GGE will pay higher Assessments than any other casino. And, because GGE has the highest GTR revenue, it does not qualify for the mandatory "grants" created by the scheme. Thus, GGE bears a heavier burden imposed by the new tax scheme than Sands or any other entity.

16. Additionally, Sands is not seeking to have the Assessments paid by GGE into the CMCD Account returned to GGE. As is clear in the proposed Joint Stipulation filed by Sands and Respondents, Sands is only seeking the money it has paid into the CMCD Account to be refunded. This is important because in this Court's March 5, 2018, Order, the Court invited the parties to present arguments

on appropriate relief. Because GGE has paid significant amounts into the CMCD Account, and Sands is not concerned with return of those funds, GGE should be permitted to intervene in this action in order to adequately protect its interests.

17. Moreover, Sands has recently announced that it intends to sell its licensed casino to another entity. While this does not have an immediate impact because, to GGE's knowledge, the deal has not closed, the new licensee could choose to abandon this action. Hence, because GGE has a direct interest in ensuring that the tax scheme is not unconstitutional, it should be permitted to intervene to be sure that the action continues to a final adjudication.

18. GGE has not been dilatory in seeking intervention in this matter, nor would its intervention result in any undue delay in the disposition of this action. This action was only filed with this Court a short time ago, and this Court has only recently issued its March 5, 2018, Order, inviting the parties to present arguments on the relief available.

19. GGE is willing to accept the pleadings as they stand, and adopts by reference the Petition for Review filed by Sands. GGE is also willing to comply with the recently established briefing schedule. Indeed, GGE is seeking leave to intervene and filing its Intervenor's Brief by the deadline set for Petitioner Sands to file its brief. Thus, GGE's intervention will not duplicate proceedings nor will it cause any delays in this action's ultimate disposition.

20. While Pa.R.A.P. 1531(b) does not require a person seeking to intervene to attach a pleading that it intends to file if permitted to intervene, in order to move this action forward without delay and consistent with Pa.R.C.P. 2328(a), GGE attaches hereto as Attachment A its Intervenor's Brief. By doing this, GGE is complying with the Petitioner's briefing deadline and ensuring that this action is not delayed by its intervention.

21. GGE has a direct and legally enforceable interest in this action, and will be directly aggrieved by the decision in the case. GGE carries a heavy burden (the heaviest of any licensed gaming entity) imposed by the challenged tax scheme without any benefit whatsoever. GGE should be permitted to participate as a party in challenging the constitutionality of the tax scheme and to protect its significant interests at issue. Accordingly, intervention by GGE should be permitted.

WHEREFORE, for all of the foregoing reasons, Greenwood Gaming and Entertainment, Inc., d/b/a Parx Casino, respectfully requests this Court to grant this Application for Leave to Intervene, approving its intervention and full party status in this action.

Respectfully Submitted,

/s/ Mark S. Stewart

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Date: March 20, 2018

Attorneys for Intervenors Greenwood Gaming and Entertainment, Inc., d/b/a Parx Casino

VERIFICATION

I, Thomas Bonner, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to falsification to authorities.

Date: 3/20/18

Thomas Bonner

CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Mark S. Stewart

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Date: March 20, 2018

Received 3/20/2018 12:43:12 PM Supreme Court Middle District

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Respondents.

ORDER

AND NOW, this _____ day of _____, 2018, the Application for Leave to Intervene filed by Greenwood Gaming and Entertainment, Inc., d/b/a Parx Casino, is hereby GRANTED, and Greenwood Gaming and Entertainment, Inc., shall be permitted to intervene as a party in the above-captioned proceedings. The Prothonotary is DIRECTED to mark the Intervenor's Brief attached to the Application for Leave to Intervene as filed.

_____

Attachment A

IN THE SUPREME COURT OF PENNSYLVANIA

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Respondents.

INTERVENOR'S BRIEF IN SUPPORT OF PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT SEEKING A DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

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I. INTRODUCTION

Greenwood Gaming and Entertainment, Inc. ("GGE") files this Intervenor's Brief seeking this Court to declare unconstitutional the new Supplemental Daily Assessment imposed on licensed gaming entities and to return to GGE all monies that GGE has paid as part of that Assessment.[1]

GGE operates Parx Casino and is subject to the comprehensive tax obligations imposed in the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. § 1101 et. seq. ("Gaming Act"). Recently, the Gaming Act was amended to include new tax provisions whereby all licensed gaming entities, other than Category 4 licensees, are required to pay Supplemental Daily Assessments based upon their daily slot machine revenues, otherwise known as gross terminal revenue ("GTR"), into a newly created restricted fund called the "Casino Marketing and Capital Development" ("CMCD") Account, from which only a few select casinos will receive grants from the Gaming Control Board ("Board"). See 4 Pa. C.S. §§ 1407(c.1), 1407.1, and 1408(c.1).

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[1] GGE has contemporaneously filed an Application to Intervene in this action, which it respectfully seeks the Court to grant. If the Court denies that Application to Intervene, GGE requests that the Court treat this Brief as an Amicus Brief filed pursuant to Pa. R.A.P. 531. This brief was paid for solely by GGE, and no other person or entity other than GGE and its counsel authored any part of the brief. Pa. R.A.P. 531(b)(2).

The new tax scheme is not uniform as it has the effect of imposing disparate tax rates on licensed gaming entities depending on their revenue level. The scheme is designed to benefit only a few select casinos in violation of the Special Law Restriction of the Pennsylvania Constitution. The scheme also creates a variable rate tax that is plainly unconstitutional under the Uniformity Clause of the Pennsylvania Constitution. While all licensed gaming entities, other than Category 4 licensees, are required to pay the Supplemental Daily Assessments into the CMCD Account, this new scheme benefits only the lesser performing casinos. Stated another way, the better performing entities, such as GGE, are burdened with paying the new tax that only supports their competitors. This is nothing more than a redistribution of revenue in favor of a few select, privately-owned casinos. This scheme has no legitimate public purpose, and cannot withstand constitutional scrutiny.

Accordingly, this Court should: (1) find that the challenged provisions of the Gaming Act are unconstitutional on their face and as applied; (2) issue a permanent injunction enjoining the distribution of any funds that may be paid into the restricted CMCD Account; and (3) order the return of any such funds paid into the CMCD Account prior to the final order in this proceeding.

II. STATEMENT OF JURISDICTION

Pursuant to 4 Pa. C.S. § 1904, the Pennsylvania Supreme Court has exclusive jurisdiction to hear any challenge to or to render a declaratory judgment concerning the constitutionality of the Gaming Act.

III. STATEMENT OF SCOPE AND STANDARD OF REVIEW

The General Assembly has assigned this Court broad authority to adjudicate constitutional challenges to the Gaming Act. 4 Pa. C.S. § 1904 ("The Supreme Court is authorized to take such action as it deems appropriate [...] to find facts or to expedite a final judgment in connection with [a constitutional] challenge or request for declaratory relief."). When challenges to the Gaming Act are purely legal, this Court shall decide the case on its merits. Mount Airy #1, LLC v. Pennsylvania Dep't of Revenue & Eileen McNulty, 154 A.3d 268, 272 (Pa. 2016).

IV. STATEMENT OF THE QUESTIONS INVOLVED

A. Whether the Gaming Act establishes a tax scheme that treats licensed gaming entities differently based upon their slot machine revenue in violation of the Uniformity Clause of the Pennsylvania Constitution?

Suggested Answer: Yes.

B. Whether the tax scheme in the Gaming Act violates the Special Law Restrictions of the Pennsylvania Constitution by imposing a tax on all licensed gaming entities designed to benefit only a few select casinos?

Suggested Answer: Yes.

C. **Whether the legislature violated the well-settled principle that taxes may only be imposed for a public purpose by enacting a taxing scheme that benefits only a few select casinos?**

Suggested Answer: Yes.

D. **Whether the Gaming Act establishes a tax scheme that violates Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution?**

Suggested Answer: Yes.

E. **Whether the Court should return all monies that have been paid into the CMCD Account prior to the final Order in this proceeding?**

Suggested Answer: Yes.

V. STATEMENT OF THE CASE

A. Statement of Form of Action and Procedural History

This is an original jurisdiction action, in which licensed gaming entities challenge the constitutionality of a certain tax imposed upon them in recent amendments to the Gaming Act.

Sands Bethworks Gaming, LLC ("Sands") initiated this action by filing a Verified Petition in the Nature of a Complaint Seeking a Declaratory Judgment and Injunctive Relief, against the Pennsylvania Department of Revenue, C. Daniel Hassell in his official capacity as Secretary of the Pennsylvania Department of Revenue, and the Board (collectively, "Respondents"). Respondents have filed an Answer to the Petition for Review. GGE has filed an application to intervene in this action, and has contemporaneously filed this Intervener's Brief.

Subsequent to filing the Petition for Review, Sands filed an "Application for Special Relief in the Nature of a Preliminary Injunction; Application for Expedited Hearing Schedule," seeking a preliminary injunction and expedited consideration of the merits of the Petition for Review. Respondents answered the Applications, seeking denial of the requested relief. Thereafter, Sands and Respondents filed a Joint Stipulation and Order, in which they agreed that if this Court grants the Petition for Review, Respondents will refund to Sands all money paid by Sands

into the CMCD Account (but will not refund such money paid into the CMCD Account by GGE or by other licensed gaming entities).

On March 5, 2018, this Court denied Sands' Application for Special Relief to the extent it sought a preliminary injunction, and denied the Joint Stipulation without prejudice to the parties presenting arguments in their briefs regarding possible remedies.

Pursuant to the briefing schedule for Sand's brief, and without delaying the disposition of this action, GGE submits this Intervenor's Brief.

B. Statement of Facts

This case raises important considerations as to the constitutionality of a new tax scheme created by recent amendments to the Gaming Act. Specifically, this action challenges the tax scheme created under Sections 1407(c.1), 1407(l), and 1408(c.1) of the Gaming Act, 4 Pa. C.S. §§ 1407(c.1), 1407(l), 1408(c.1).

Any person or entity seeking to operate slot machines in Pennsylvania must obtain a license from the Board. 4 Pa. C.S. § 1301. There are currently four categories of slot machine licenses, which are categorized based on the number of slot machines and table games permitted in the licensed facility. See 4 Pa. C.S. §§ 1302-1305.1.

GGE is a Delaware corporation that operates Parx Casino under a Category 1 license issued by the Board. See 4 Pa. C.S. §§ 1302-1303 (related to Category 1

licenses and requirements). As a Category 1 license holder, GGE is subject to the regulatory oversight of the Board. In particular, GGE is subject to the Gaming Act, including the substantial taxes imposed by the Act.

The recent amendments to the Gaming Act establish the new CMCD Account. 4 Pa. C.S. § 1407.1. All Category 1, 2, and 3 licensees are required to pay a "supplemental daily assessment" of 0.5% of their GTR into the CMCD Account.[2] 4 Pa. C.S. § 1407(c.1). This Supplemental Daily Assessment is synonymous with a tax based on daily slot machine revenues.[3] See Mount Airy #1, LLC v. Pennsylvania Dep't of Revenue & Eileen McNulty, 154 A.3d 268, 279 (Pa. 2016). Importantly, however, unlike general taxes, the funds from this new tax scheme go into a restricted account, rather than the Commonwealth's general fund.

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[2] Specifically, Section 1407(c.1) provides, in pertinent part, "beginning January 1, 2018, each licensed gaming entity, other than a Category 4 slot machine licensee, shall pay a supplemental daily assessment of 0.5% of its gross terminal revenue to the Casino Marketing and Capital Development Account." 4 Pa. C.S. § 1407(c.1).

[3] In Mount Airy, this Court held that local share assessments were taxes. Mount Airy, 154 A.3d at 279. ("the General Assembly designed a tax scheme [...]. Together the two assessments form a comprehensive system of local taxation [...].").

See 4 Pa. C.S. § 1407.1. Additional funds are transferred into the CMCD Account each year from the State Gaming Fund.[4] 4 Pa. C.S. § 1408(c.1); 4 Pa. C.S. § 1403.

Under the Gaming Act, the Board is required to redistribute the money in the form of "grants" from the CMCD Account back to a subset of the same casinos paying the tax.[5] See 4 Pa. C.S. § 1407.1. Certain casinos, however, are guaranteed

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[4] Specifically, Section 1408(c.1), titled "Transfer to the Casino Marketing and Capital Development Account," requires additional transfers from the State Gaming Fund to the CMCD Account, as follows:

> Beginning July 1, 2017, and each year thereafter, $2,000,000 shall be transferred to the Casino Marketing and Capital Development Account established in section 1407.1 (relating to Casino Marketing and Capital Development Account). Any money not committed for local law enforcement grants under subsection (c) on the effective date of this subsection shall be transferred to the Casino Marketing and Capital Development Account.

4 Pa. C.S. § 1408(c.1).

[5] Section 1407.1 provides, in pertinent part:

> (a) Establishment.--There is established in the Pennsylvania Gaming Economic Development and Tourism Fund a restricted account to be known as the Casino Marketing and Capital Development Account.
> (b) Administration and distribution.--The Casino Marketing and Capital Development Account shall be administered by the board. All money in the Casino Marketing and Capital Development Account shall be distributed as grants in accordance with this section. The Department of Community and Economic Development shall make payments to grant recipients as directed by the board.
> [...]

grants, and that guarantee is based entirely on the casino's slot machine revenue and license category. Id. Specifically, the Board is directed to issue "grants" from the CMCD Account as follows: $4,000,000 to Category 1 and 2 licensees with GTR of $150,000,000 or less; $2,500,000 to Category 1 and 2 licensees with GTR between $150,000,000 and $200,000,000; and $500,000 to Category 3 licensees

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> (d) Program guidelines.-- [...] Each grant awarded under this section shall be used by the slot machine licensee for marketing or capital development.
> (e) Distribution of grants.--
> (1) Each year, before the board awards a grant under this section, the following distributions shall be made:
> (i) Each Category 1 or Category 2 slot machine licensee with gross terminal revenues of $150,000,000 or less for the previous fiscal year shall receive $4,000,000.
> (ii) Each Category 1 or Category 2 slot machine licensee with gross terminal revenues of more than $150,000,000 but less than $200,000,000 for the previous fiscal year shall receive $2,500,000.
> (iii) Each Category 3 slot machine licensee with gross terminal revenue of less than $50,000,000 for the previous fiscal year shall receive $500,000.
> (iv) If there is insufficient money in the Casino Marketing and Capital Development Account to make the required distributions under subparagraphs (i), (ii) and (iii), distributions shall be made in the proportion of:
> (A) the eligible licensees under each subparagraph; to
> (B) the total amount of money in the Casino Marketing and Capital Development Account. [...].

4 Pa. C.S. § 1407(1).

with GTR of less than $50,000,000. Id. If there is insufficient money in the CMCD Account to make the required distributions, the Board is directed to distribute the money to the qualifying casinos proportionately. Id. If there is any money remaining after the Board makes these required distributions, non-qualifying Category 1, 2, and 3 licensees are then permitted to apply for grants from the remaining funds. As such, under this tax scheme, casinos with higher GTR, including GGE, are not guaranteed any grants from the CMCD Account.

VI. SUMMARY OF ARGUMENT

Sections 1407(c.1), 1407(1), and 1408(c.1) of the Gaming Act establish a tax scheme that is unconstitutional on its face and as applied. This tax scheme classifies licensed gaming entities based on their slot machine revenue and treats them differently for tax purposes. This scheme is designed to take money from better performing casinos and give that money to lesser performing casinos. It is essentially a redistribution of revenue intended to benefit only a select subset of casinos in Pennsylvania.

The tax scheme violates the Special Law Clause of the Pennsylvania Constitution. This scheme classifies licensed gaming entities and treats them differently for tax purposes. A classification of this sort is not reasonable, justified, or necessary in that it burdens all licensed gaming entities for the benefit of only a select few from that class. Therefore, it is a violation of the Special Law Restrictions.

This tax scheme also violates the Uniformity Clause of the Pennsylvania Constitution, because it is not uniform but instead treats licensed gaming entities differently for tax purposes based on their income level. In determining a statute's compliance with Uniformity Clause requirements, it is necessary to look to the net effect of the tax rate. Here, the tax grants issued from the CMCD Account to a

subset of casinos are equivalent to tax credits. The Uniformity Clause prohibits the imposition of such disparate taxes rates.

The tax scheme is also not a valid tax because it does not serve a public purpose. The public is not the "primary and paramount" beneficiary of the tax scheme. In fact, the tax scheme only benefits the subset of casinos that will receive automatic grants from the CMCD Account. Casinos that do not receive automatic grants from the CMCD Account will be burdened in terms of having to pay the tax as well as expenditures for marketing and capital development. Any public benefit that results from the tax grants being provided to the subset of casinos is offset by the burden placed on the casinos not eligible for grants. To the extent that some benefit to the public exists, said benefit would be of an extremely "limited and incidental nature." As such, the tax scheme is not valid.

Finally, the tax scheme also violates the equal protection and due process guarantees of the United States Constitution. The Gaming Act establishes a tax scheme that, in effect, imposes disparate tax rates upon casinos whose slot machine revenues exceed a particular threshold. Additionally, while all casinos holding a Category 1, 2, or 3 license are required to contribute to the CMCD Account, only a subset of those casinos benefit from the account. Such disparate treatment is unconstitutional and should not be permitted to stand.

Accordingly, this Court should issue a permanent injunction enjoining the distribution of any funds that may be paid into the restricted CMCD Account and order the return of any such funds paid into the CMCD Account prior to the final order in this proceeding. A refund of the Assessments paid into the CMCD Account is appropriate in this case, because a failure to refund money would result in a gross imbalance of equities, as well as moneys sitting in the CMCD Account, without any constitutional statutory guidance as to how to distribute those funds.

VII. ARGUMENT FOR INTERVENOR - GGE

A. The tax scheme in the Gaming Act violates the Special Law Restrictions of the Pennsylvania Constitution by imposing a tax on all licensed gaming entities for the benefit of only a few select casinos.

The tax scheme established under Sections 1407(c.1), 1407(1), and 1408(c.1) violates the Special Law Restrictions of the Pennsylvania Constitution because it creates a tax scheme that burdens all licensed gaming entities in Pennsylvania but produces a disproportionate benefit to only a small subset of those entities.

Regarding Special Law Restrictions, the Pennsylvania Constitution provides, in pertinent part, that:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:

[...]

5. Remitting [...] moneys legally paid into the treasury:
6. Exempting property from taxation [...].

PA. Const. art. III, § 32.

A "special law," as compared to a "general law," is one that is not uniform throughout the state or as applied to a class. See Wings Field Preservation Associations, L.P. v. Comm., Dept. of Transp., 776 A.2d 311, 316 (Pa. Cmwlth. 2011) ("Wings Field"). Any legislation affecting a particular class, and no other, is generally unconstitutional, unless a necessity exists for the classification. See Commonwealth v. Gumbert, 256 Pa. 532, 534 (Pa. 1917); Allegheny County v. Monzo, 500 A.2d 1096, 1105 (Pa. 1985).

The purpose of the special law prohibition is "to ensure that the challenged legislation promotes a legitimate state interest, and that a classification is reasonable rather than arbitrary and 'rest[s] upon some ground of difference, which justifies the classification and has a fair and substantial relationship to the object of the legislation.'" Robinson Tp., Washington County v. Com., 83 A.3d 901, 987 (Pa. 2013); see also Wings Field, 776 A.2d at 316 (the purpose of the special law legislation "was to prevent the General Assembly from creating classifications in order to grant privileges to one person, one company or one county."); see also Haverford Tp. v. Siegle, 28 A.2d 786, 788 (Pa. 1942) (the special legislation

prohibition was adopted "to put an end to the flood of privileged legislation for particular localities.").

Specific to special tax laws, this Court has explained, "A special tax is one levied for a special local purpose for the benefit of a part of the body politic and which rests upon the supposition that a portion of the public is specially benefitted." Allegheny County v. Monzo, 500 A.2d 1096, 1105 (Pa. 1985) ("Allegheny County"), *citing* 84 C.J.S., Taxation, § 3. In Allegheny County, this Court considered the constitutionality of a county ordinance which imposed a 1% room rental tax on the consideration received by each operator of a hotel within the county from each transaction of renting rooms. Allegheny County, 500 A.2d at 1098. The Court recognized that, while the burden of the room rental tax was imposed on all hotels within the county, the benefit was only received by a select few. Allegheny County, 500 A.2d at 1105-06. Finding that there was no reason or particular need for the classification, this Court determined that the taxing statute "clearly falls within the category of special taxes prohibited by Pa. Const. Art. III § 32." Id., at 1106.

Here, the taxing scheme created under the Gaming Act classifies licensed gaming entities based on their slot machine revenues and license categories and treats them differently. Based solely on this classification, certain casinos are

guaranteed grants, others are guaranteed grants of a lesser-amount, and others are not guaranteed grants at all. Information regarding Pennsylvania casinos' GTR and GTR history is regularly publicized by the PGCB, and available and maintained on the Board's website.[6] As such, the casinos that would receive automatic grants were known to the General Assembly at the time it passed the amendments to the Gaming Act. Such classifications designed to grant privileges to one company over another are exactly the kind of legislation the Special Law Restrictions sought to protect against. See Wings Field, 776 A.2d at 316.

This Court has made it clear that a classification of this sort must be necessary or, at least, reasonable and justified in order to pass constitutional muster. See Gumbert, 256 Pa. at 534; see also Robinson, 83 A.3d at 987. Such a classification is not constitutional if it benefits only a select few. See Allegheny County, 500 A.2d at 1105-06. It is not necessary, reasonable, or justified to

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[6] The Pennsylvania Rules of Evidence allow a court to take judicial notice of an adjudicative fact that is not subject to reasonable dispute if it "is generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Pa. R.E. 201. Information on the Board's website can be accurately and readily determined and cannot be reasonably questioned, so this Court can take judicial notice of said information. Current information related to Pennsylvania casinos' GTR is available at the following website: https://gamingcontrolboard.pa.gov/files/revenue/Gaming_Revenue_Monthly_Slots_FY20172018.pdf.

impose disparate tax rates on casinos based on their revenue. Much like in Allegheny County, the tax scheme in this case burdens an entire class (Pennsylvania casinos), but benefits only the small subset of that class that is eligible to receive grants. Additionally, as discussed in more detail in Section VII(C), *supra*, there is no public benefit to this classification.

Indeed, this situation of granting privileges to certain companies at the expense of others is the very situation the Constitution sought to protect against. As such, Sections 1407(c.1), 1407(1), and 1408(c.1) of the Gaming Act establish a tax scheme that violates the Special Law Restrictions of the Pennsylvania Constitution and should be invalidated.

B. The Gaming Act establishes a tax scheme that treats licensed gaming entities differently based upon their slot machine revenue in violation of the Uniformity Clause of the Pennsylvania Constitution.

The tax scheme established under Sections 1407(c.1), 1407(1), and 1408(c.1) of the Gaming Act also violates the Uniformity Clause of the Pennsylvania Constitution because it imposes disparate tax rates upon casinos based upon the level of their slot machine revenue.

The Uniformity Clause provides that "[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." PA. Const. art. VIII, § 1.

This Clause requires that every tax "operate alike on the classes of things or property subject to it." Commonwealth v. Overholt & Co., 200 A. 849, 853 (Pa. 1938). "When a method or formula for computing a tax will, in its operation or effect, produce arbitrary, unjust, or unreasonably discriminatory results, the uniformity requirement is violated." Clifton v. Allegheny Cnty., 969 A.2d 1197, 1211 (Pa. 2009). To prevail in a Uniformity Clause challenge, a taxpayer must demonstrate that: (1) the enactment results in some form of classification; and (2) such classification is unreasonable and not rationally related to any legitimate state purpose." Id.

Under the Uniformity Clause, it is well-established that the General Assembly is prohibited from imposing disparate tax rates based on income level. See e.g. Mount Airy #1, LLC v. Pennsylvania Dep't of Revenue & Eileen McNulty, 154 A.3d 268, 276 (Pa. 2016) ("Mount Airy") ("the Uniformity Clause prohibits the General Assembly from imposing disparate tax rates upon income that exceeds a particular threshold."). This prohibition is applicable regardless of whether the taxpayer is an individual or an entity and regardless of whether the disparate tax treatment is obvious. See Mount Airy, 154 A.3d at 276-77; see also Nextel Comm. of Mid-Atl., Inc. v. Commonwealth, Dep't of Revenue, 171 A.3d 682, 698-99 (Pa. 2017) ("Nextel").

This Court has recently confirmed this prohibition. In Mount Airy, the Mount Airy casino challenged the section of the Gaming Act, 4 Pa.C.S. § 1403(c), that levied a "local share assessment" ("LSA") against all licensed casinos' GTR. Mount Airy argued, *inter alia*, that the LSA violated the Uniformity Clause because it subdivided non-Philadelphia casinos into two categories, those with GTR above $500 million and those with GTR below $500 million, and treated them differently.

This Court held that such quantitative distinctions lack uniformity and are unconstitutional, stating that "any classification that is based solely on a difference in quantity of precisely the same kind of property is necessarily unjust, arbitrary, and illegal." Mount Airy, 154 A.3d at 276; see also Cope's Estate, 43 A. 79 (Pa. 1899) (holding that inheritance tax statute that exempted first $5,000 of estate property from taxation violated Uniformity Clause because "[a] pretended classification that is based solely on a difference in quantity of precisely the same kind of property is necessarily unjust, arbitrary, and illegal."); Kelley v. Kalodner, 181 A. 598 (Pa. 1935) ("Kelley") (holding that graduated-rate income tax violated Uniformity Clause because the statute in question taxed income below $5,000 at a rate of 2%, income between $5,000 and $10,000 at a rate of 2.5%, and income between $10,000 and $25,000 at a rate of 3%).

This Court further explained that the General Assembly cannot rely on cleverly-crafted language to disguise disparate tax treatment. "The Pennsylvania Constitution prohibits any 'method or formula for computing a tax' that will, 'in its operation or effect, produce arbitrary, unjust, or unreasonably discriminatory results.'" Mount Airy, 154 A.3d at 276-77 (internal citations omitted). The patently discriminatory effect of a particular tax may not be overlooked merely because the General Assembly employed a formula that, at first blush, does not resemble a traditional variable-rate tax. Id. Regardless of the language used, where the tax creates the functional equivalent of a second tax bracket, that tax will violate the Uniformity Clause. Id., at 276. Specifically, in Mount Airy, this Court stated:

> To be sure, the municipal local share assessment's lack of uniformity is less conspicuous than that of the openly unequal graduated-rate tax at issue in [Kelley]. Instead of taxing some casinos at a rate of 2% and others at a rate of 3%, the General Assembly required that slot machine licensees pay the greater of $10 million or 2% of GTR. **Regardless of the language used, however, this is the functional equivalent of a second tax bracket** with a marginal rate of 2% for casinos with GTR greater than $500 million.

Id. (emphasis added); see also Amidon v. Kane, 279 A.2d 53 (Pa. 1971) (holding that a statute purporting to impose a flat 3.5% on taxable income, but which reflected federal personal exemptions and excluded from taxable income all

interest received on obligations of the Commonwealth or any of its political subdivisions, violated the Uniformity Clause).

This Court again confirmed these established principles in Nextel Comm. of Mid-Atl., Inc. v. Commonwealth, Dep't of Revenue, 171 A.3d 682 (Pa. 2017) ("Nextel"). There, the issue involved whether the "net loss carryover" provision of the Revenue Code ("NLC")[7] violated the Uniformity Clause by capping the amount of net loss deduction a corporation can take based on its income. This Court determined that even though the NLC did not explicitly exempt income below a certain threshold from taxation, its function when applied had the net effect of operating in a non-uniform manner. Nextel, 171 A.3d at 699.

Importantly, this Court held that a statute's language cannot be analyzed in a vacuum to determine whether the statute violates the Uniformity Clause; rather, the Court must "examine how it functions when applied to establish a corporation's net income tax liability." Nextel, 171 A.3d at 698. Thus, it is clear that this Court will look to the net effect of a statute's function in determining net tax liability in addressing its compliance with Uniformity Clause requirements. Id., at 698-99; see also Mount Airy, 154 A.3d 276, *citing* Amidon, 279 A.2d at 62 ("no two taxpayers are required to pay the same dollar amount of taxes, nor are any two taxpayers

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[7] Act of March 4, 1971, P.L. 6, as amended, 72 P.S. § 7401(3)4.(c)(1)(A)(ii).

required to pay the same effective percentage rate of taxation upon their respective total incomes."); see also Mount Airy, 154 A.3d at 281 (Chief Justice Saylor, concurring and dissenting) (noting that the tax scheme at issue required casinos to pay "different effective rates.").

Here, much like the statutes invalidated in Mount Airy and Nextel, the Gaming Act creates a tax scheme that, in effect, imposes disparate tax rates upon casinos whose slot machine revenues exceed a particular threshold. As discussed above, the Gaming Act requires each licensed gaming entity, other than a Category 4 slot machine licensee, to pay a supplemental daily assessment of 0.5% of its GTR to the restricted CMCD Account.[8] 4 Pa. C.S. § 1407(c.1). The Gaming Act further requires the Board to redistribute the money from the CMCD Account back to a subset of the same casinos paying the tax. See 4 Pa. C.S. § 1407.1. These redistributions (or "grants") are guaranteed only to a subset of casinos, based solely on a casino's slot machine revenue and license category. Specifically, the Board is directed to issue **automatic** grants, as follows: $4,000,000 to Category 1 and 2 licensees with GTR of $150,000,000 or less; $2,500,000 to Category 1 and 2 licensees with GTR between $150,000,000 and $200,000,000; and $500,000 to

[8] All Category 4 licenses are expected to be held by Category 1, 2, and 3 licensees. See 4 Pa. C.S. § 1305.2 (relating to the Category 4 auction process).

Category 3 licensees with GTR of less than $50,000,000. See 4 Pa. C.S. § 1407.1. As these grants are automatic, they are functionally equivalent to a tax credit. These grants operate in a manner that creates the very same type of disparity that would result if the same subset of casinos were given up-front tax credits. In essence, the casinos with less GTR are taxed at lower rates than casinos with a higher level of GTR, such as GGE.

The net effect of the tax scheme at issue is to create different categories of casinos based on the amount of their income, and to subject those categories to different tax rates. This tax scheme is in plain violation of the Uniformity Clause and should not be permitted to stand.

C. The Gaming Act imposes a tax scheme that does not serve a public purpose but instead benefits only a few select casinos.

The taxing scheme at issue violates the well-settled principle that taxes may only be imposed for a public purpose. Despite it being beyond argument that the legislature has no constitutional right to lay a tax to raise funds for a mere private purpose that is exactly what has been done here. See Jones v. Portland, 245 U.S. 217, 221 (1917) ("It is well settled that moneys for other than public purposes cannot be raised by taxation, and exertion of the taxing power for merely private purposes is beyond the authority of the state."); see also Totso v. Pennsylvania Nursing Home Loan Agency, 331 A.2d 198, 201-02 (Pa. 1975) (this Court

acknowledged the "well-settled for over a century" principle that the legislature does not have any constitutional right to lay a tax to raise funds for a "mere private purpose."); see also Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 148 (Pa. 1853) ("By taxation is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest. The right of a state to lay taxes has no greater extent than this."); see also Price v. Philadelphia Parking Authority, 221 A.2d 138, 147 (Pa. 1965) ("Price") (A public corporation may not "employ its resources for the primary and paramount benefit of a private endeavor.").[9]

In Price, taxpayers challenged the power of a public parking authority to enter into a sale and leaseback agreement with a private developer for construction of a public parking facility. This Court held that the Parking Authority, as a public corporation, is empowered to act only for the public benefit and that "[a]n engagement essentially private in nature may not be justified on the theory that the public will be incidentally benefitted." Id. at 147. In determining whether the interest at issue was public or private in nature, this Court looked to eminent domain proceedings for guidance, noting that in those proceedings, "power may not be employed for the purpose of devoting the property so acquired for merely a

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[9] GGE, as a taxpayer, has the right and standing to sue to enjoin public officials from the wrongful and unlawful expending of public money. Mayer v. Hemphill, 411 Pa. 1, 6 (Pa. 1963).

private benefit" and that the public must be the "primary and paramount beneficiary of its exercise." Price, 221 A.2d at 147. This Court found that the Parking Authority did not have the power to enter into the challenged agreement, because there was no "benefit to the public of more than a limited and incidental nature." Id. at 149; see also Belovsky v. Redevelopment Authority of Philadelphia, 54 A.2d 277, 282 (Pa. 1947) ("property cannot be taken by government without the owner's consent for the mere purpose of devoting it to the private use of another, even though there be involved in the transaction an incidental benefit to the public."); see also Reading Area Water Auth. v. Schuylkill River Greenway Ass'n, 627 Pa. 357, 368 (Pa. 2014) ("Land may be taken only to the extent reasonably required by the public purpose for which the power is exercised, else it will be overturned as excessive.").

Thus, it is clear from these proceedings that a "public purpose" requires that the public is the primary and paramount beneficiary, incidental benefits to the public do not meet this threshold, and legislation must be narrowly tailored so as not to exceed a public purpose. While this proceeding is not one of eminent domain, these same limitations apply. Price, 221 A.2d at 147.

Here, the casinos that will receive automatic grants from the CMCD Account are the "primary and paramount" beneficiaries of the tax scheme imposed

by the Gaming Act. Casinos who receive grants from the CMCD Account are permitted to use the grant money for their marketing and capital development.

Casinos who are not guaranteed automatic grants from the CMCD Account, including GGE, stand to realize no benefit at all from this tax. As is evident from a review of the Board's historic and current GTR data, the most likely scenario is that no funding will be available beyond the amounts needed for the guaranteed automatic grants – if there is even enough to pay those monies in full.[10] Even if some minimal funds were available after the guaranteed automatic grants, no assurance exists that all of the other casinos would receive a portion of the remainder and, indeed, any potential distributions would be *de minimis* in amount and dramatically below the guaranteed amounts received by their competitor casinos. Moreover, the casinos that do not receive automatic grants from the

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[10] Considering historic fiscal year (FY) GTR data, the current FY data and the GTR revenue trend for Pennsylvania casinos, all of which is available on the Board's website, the Special Assessment on the GTR of Pennsylvania casinos, combined with the annual $2 million transferred from the State Gaming Fund, will produce approximately $13 million of available funds in the CMCD Account. https://gamingcontrolboard.pa.gov/?p=284 Again, the Pennsylvania Rules of Evidence allow this Court to take judicial notice of the information available on the Board's website. See Pa.R.E. 201. Pursuant to the Board's FY 2016/17 data, Presque Isle Downs and Mount Airy Casino Resort would each be entitled to $4,000,000, SugarHouse Casino would receive $2,500,000 and Lady Luck Casino would receive $500,000. In addition, the Board's FY 2017/18 data confirms those automatic grants and indicates that Harrah's Philadelphia is highly likely to receive $2,500,000, as well – thereby consuming all CMCD Account funds.

CMCD Account will be burdened in terms of having to pay the tax as well as expenditures for marketing and capital improvements.

This reallocation of funds available for marketing and capital development provides no benefit to the public. Any purported public benefit that may result from the increase in marketing and capital development expenditures to the casinos who receive grants from the CMCD Account is offset by the loss to the casinos who do not receive grants. Moreover, assuming arguendo that some benefit to the public exists from this redistribution of wealth among private companies, said benefit would be so attenuated as to be of an extremely "limited and incidental nature." See Price, 221 A.2d at 147.

It is clear that the public is not the "paramount beneficiary" of this tax scheme. Rather, the paramount beneficiary of this scheme is the lesser performing casinos that qualify for the grants from the CMCD Accounts. The tax scheme established under the Amended Act, therefore, is not valid, because it does not serve a public purpose.

D. The Amended Act establishes a tax scheme which violates Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

The Fourteenth Amendment of the United States Constitution provides, in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws." U.S. Const. am. 14. The tax scheme imposed by the Gaming Act violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution.

In the exercise of its taxing power, the Legislature is subject to the equal protection requirements of the Fourteenth Amendment. Leventhal v. City of Philadelphia, 542 A.2d 1328, 1331 (Pa. 1988) ("Leventhal"). The analysis required to determine whether a tax violates the Equal Protection Clause is similar to the analysis required to determine whether the tax violates the Uniformity Clause of the Pennsylvania Constitution, although the Pennsylvania Constitution may impose more stringent requirements than the Fourteenth Amendment. See Mount Airy, 154 A.3d at 274.

This Court has found a violation of the Due Process Clause "where the tax benefit received and the burden imposed is palpably disproportionate." Allegheny County, 500 A.2d at 1102; Leventhal, 542 A.2d at 1332 ("Where the benefit received and the burden imposed is palpably disproportionate, a tax is not only a taking without due process under the Fourteenth Amendment to the United States Constitution, but also an arbitrary form of classification in violation of equal protection and state uniformity standards.").

Additionally, when a tax imposes burdens that have no reasonable relation to the benefits received, this Court has held that the tax is a violation of the Uniformity Clause of the Pennsylvania Constitution and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Allegheny County, 500 A.2d at 1106.

Much as the tax scheme violates the Uniformity Clause of the Pennsylvania Constitution, it also violates the Due Process and Equal Protection Clauses of the United States Constitution. As discussed above, the Gaming Act establishes a tax scheme that, in effect, imposes disparate tax rates upon casinos whose slot machine revenues exceed a particular threshold. Additionally, the classification of Pennsylvania casinos for purposes of distributing grants from the CMCD Account imposes a burden that is palpably disproportionate to the benefit received. Such disparate treatment violates the Equal Protection and Due Process Clauses of the United States Constitution.

E. This Court should return all monies that have been paid into the CMCD Account prior to the final Order in this proceeding.

Once this Court finds that the new tax scheme is unconstitutional or otherwise invalid, all monies paid into the CMCD Account should be returned to the licensed gaming entity that paid them. Although Pennsylvania law generally does not provide monetary damages for violations of the Pennsylvania

Constitution, see Mount Airy, 154 A.3d at 280 n.11, a refund of the Assessments paid into the CMCD Account is appropriate under the unique circumstances here. Absent such a return of funds, there can be no other disposition of the monies paid by the casinos without further legislative enactments.

This matter does not present the same issues as a standard inquiry into the constitutionality of a tax. See Oz Gas, Ltd. v. Warren Area School Dist., 938 A.2d 274, 285 (Pa. 2007) ("To avoid the potentially devastating consequences to taxing entities, it is important that taxes collected pursuant to a valid statute remain valid unless and until otherwise determined by this Court."); American Trucking Associations, Inc. v. McNulty, 596 A.2d 784 (Pa. 1991). While typical taxes are usually paid into a general fund that a legislative body relies upon for budgeting, that is not the case here. Instead, here, the Supplemental Daily Assessments are paid into the CMCD Account, a restricted account whose sole purpose is to hold the Assessments until distributed to the few select casinos that are entitled to receive them pursuant to the Gaming Act. 4 Pa. C.S. § 1407(1). While the Board is charged with distributing grants from the CMCD Account, it does not rely on the funds in that Account for anything else, as it is only privately held casinos that benefit from those funds. This is simply not a case where there would be any

"devastating consequences" to a governmental entity if the Assessments are returned.

Moreover, the restrictions placed on the CMCD Account – dictating which casinos are entitled to distributions – make the return of the monies paid into the account the only appropriate remedy. If this Court would declare the tax scheme unconstitutional, it would be invalidating the distribution requirements for the CMCD Account and those provisions must be severed from the remainder of the Gaming Act. 4 Pa. C.S. § 1902; see also Mount Airy, 154 A.3d at 278. Clearly, the Assessments and the distribution requirements are so essentially and inseparably connected that is cannot be presumed that the legislature would have enacted grant provisions without the offending tax. See Mount Airy, 154 A.3d at 279-80 (citing 1 Pa.C.S. § 1925 ("[P]rovisions of every statute shall be severable ... unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one.")). This scenario would leave an account populated with money without directives for dispensing those funds.

Even if the distribution requirements would somehow remain intact, it would not be appropriate for this Court to allow the Account's funds to be distributed to

the privately held casinos that qualify for them under the unconstitutional tax scheme. Such a result would literally entail the taking of property from certain private businesses for the sole purpose of giving it to their competitors.

Further, allowing for such redistribution of revenues would only embolden future legislative bodies to create similar unconstitutional tax schemes with restricted accounts that disparately inure benefit private entities. By doing so, the legislative bodies could reward their friends unless and until their scheme is challenged and makes its way through the judicial process, which typically takes a significant amount of time.[11] This is precisely the conduct that the Uniformity Clause seeks to eradicate. See Mount Airy, 154 A.3d at 273.

Moreover, even if this issue were analyzed under the test for retroactivity under Chervon Oil Co. v. Huson, 404 U.S. 97 (1971), retroactive application of the finding of unconstitutionality would be warranted. The Chevron analysis examines: "(1) whether the decision established a new principle of law; (2) a balancing of the merits by looking at the history of the rule in question, its purpose and effect, and whether retroactive application will further retard its operation; and

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[11] The Gaming Act is unique in that it is a direct constitutional challenge to the Supreme Court. 4 Pa.C.S. § 1904.

(3) an evaluation of the equities involved." Oz Gas, Ltd. v. Warren Area School Dist., 938 A.2d 274, 279 (Pa. 2007).

While the tax scheme at issue is a brand new addition to the Gaming Act, the principles with which this Court would invalidate it are not. Indeed, the legal standards upon which GGE relies are both well-established and recently confirmed. Thus, all concerned parties should have reasonably been aware that the tax scheme would not withstand constitutional scrutiny. The tax scheme, has no history and is intended to redistribute gaming revenues to select casinos; this is precisely the type of favoritism that is forbidden by the Pennsylvania Constitution. See Mount Airy, 154 A.3d at 273.

The equities certainly would not favor precluding GGE from recovering the moneys it paid into the CMCD Account. **As set forth above, no government entity would be burdened by the return of the funds paid into the account.** GGE, on the other hand, would be burdened by having paid a significant tax which is solely designed to benefit its competitors. If this is not an imbalance of the equities, nothing is.

Accordingly, under the unique circumstances here, all moneys that GGE paid into the CMCD Account should be returned to GGE.

VIII. CONCLUSION

Sections 1407(c.1), 1407(1), and 1408(c.1) of the Gaming Act establish a tax scheme that is unconstitutional on its face and as applied to Greenwood Gaming and Entertainment, Inc. and should be invalidated. The Gaming Act imposes a disparate tax based solely on casinos' slot machine revenue and treats them differently for tax purposes. As such, the tax scheme violates: (1) the Special Law Clause of the Pennsylvania Constitution, PA. Const. art. III, § 32; (2) the Uniformity Clause of the Pennsylvania Constitution, PA. Const. art. VIII, § 1; and (3) the Equal Protection and Due Process guarantees of the Constitution of the United States, U.S. Const. am. 14. Additionally, the tax scheme is not a valid tax because it does not serve a public purpose.

For the reasons set forth herein, GGE requests this Court to:

(1) Find that the challenged provisions of the Gaming Act are unconstitutional on their face and as applied;

(2) Issue a permanent injunction enjoining the distribution of any funds that may be paid into the restricted CMCD Account; and

(3) Order the return of any such funds paid into the CMCD Account prior to the final order in this proceeding.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH PA. R.A.P. 2135

I hereby certify that the foregoing Brief complies with the word count limit in Pa.R.A.P. 2135 for a principal brief, and does not exceed 14,000 words based on the word count of the Microsoft Word processing system used to prepare the brief.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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I hereby certify that I am this day serving a copy of the foregoing Application for Leave to Intervene upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121:

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