

**IN THE SUPREME COURT OF PENNSYLVANIA**

SANDS BETHWORKS GAMING, LLC	:	
	:	
<i>Petitioner,</i>	:	
	:	
v.	:	No. 216 MM 2017
	:	
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	:	
	:	
<i>Respondents.</i>	:	

**PETITIONER’S APPLICATION FOR LEAVE TO FILE A POST-SUBMISSION COMMUNICATION**

Pursuant to Pa.R.A.P. 2501(a), Petitioner Sands Bethworks Gaming, LLC (“Sands” or the “Petitioner”), by counsel, hereby moves for leave to file the attached post-submission communication seeking special relief in the form of a preliminary injunction to provide emergency and temporary relief as follows:

1. On December 28, 2017, Sands filed a Petition for Review challenging the constitutionality of the newly imposed tax on casinos called the “Supplemental Daily Assessment” (“Supplemental Assessment”) under the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. § 1101 *et seq.*, *as amended* (2017) (the “Amended Act”).

2. The Amended Act requires that the Supplemental Assessment be paid into a new, restricted fund called the “Casino Marketing and Capital Development Account” (“CMCD Account”) and further requires the Pennsylvania Gaming Control Board (“Gaming Board”) to redistribute the Supplemental Assessment receipts from the CMCD Account to a subset of the same casinos paying the tax.

3. One of the central issues in this case is whether, or under what circumstances, the Gaming Board can lawfully make payments out of the CMCD Account. *See generally* Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. §§ 1407(C.1), 1407.1, 1408(C.1) (2017).

4. The Gaming Board has made express commitments (described in the briefing and at oral argument) to the effect that it would take all necessary steps to return the Supplemental Assessment should the Court rule in Sands’ favor on the merits.

5. On July 20, 2018, however, Sands received a letter from the Pennsylvania Office of the Attorney General stating that the Gaming Board intends to make distributions from the CMCD Account beginning in September 2018 (no sooner than 45 days from the date of the letter).

6. The relief sought by this case would be materially impacted if the Board were now to carry through with the statements in the July 20 letter and make payments out of the CMCD Account before the Court issues its decision.

7. Therefore, Sands respectfully requests that it be permitted to make a post-submission communication in the form of the attached Application for Special Relief in the Nature of a Preliminary Injunction seeking an order pending final resolution of this action that enjoins the Respondents from distributing the funds in the CMCD Account pending this Court's ruling on the merits. Attached as Exhibit 1.

WHEREFORE, Petitioner respectfully requests that this Court grant the relief requested herein.

Respectfully submitted,

Dated: August 15, 2018

By: /s/ Adam A. DeSipio  
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Attorneys for Petitioner  
Sands Bethworks Gaming, LLC

# EXHIBIT 1



the Pennsylvania Race Horse Development and Gaming Act, 4 Pa. C.S. § 1101 *et seq.*, as amended (2017) (the “Amended Act”);<sup>1</sup>

### **Introduction**

Sands has argued in its filed briefs and at oral argument that the Amended Act establishes a tax scheme that violates the Uniformity Clause of the Pennsylvania Constitution, the Special Laws Clause of the Pennsylvania Constitution, and the equal protection and due process guarantees of the Constitution of the United States. Sands has sought a permanent injunction to enjoin collection of this unconstitutional tax and distribution of the tax proceeds to other casinos under the Amended Act. The case is fully briefed and oral argument was held on May 17, 2018. The matter is accordingly ripe for decision.

Notwithstanding the fact that the Court will imminently issue its decision in this matter, Respondents have given Sands written notice that they intend to distribute funds out of the CMCD Account in September 2018. Such action, on the eve of the resolution of this case, would materially impact the ultimate relief

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<sup>1</sup> On January 16, 2018, Sands made a prior request for a preliminary injunction, which sought broader relief. On February 28, 2018, the parties submitted a Joint Stipulation and Order, which largely resolved issues presented by Sands’ preliminary injunction motion. The Court’s March 5, 2018 order denied the preliminary injunction and the parties’ request for an order approving the Joint Stipulation, but it did so without prejudice to the parties’ arguments regarding possible remedies. The Court did grant the parties’ request to expedite the case. The only relief sought now is to prevent distribution from the CMCD Account until the Court’s decision on the merits of this matter.

sought by Sands and would prejudice the very issues pending decision before this Court. Between January 1, 2018 and June 30, 2018, Sands has paid over \$750,000 into the CMCD Account. Those funds are currently being held in the CMCD Account. Should the Respondents be permitted to distribute those funds, Sands would suffer irreparable harm through the distribution to competitor casinos of funds collected through an unconstitutional tax regime.

Moreover, “[o]nce distributions are made from the CMCD Account,” the Respondents now assert that “it may not be feasible for the Respondents to refund” the Supplemental Assessment proceeds collected to date. (See Respondent’s Answer to Petitioner’s Application for Leave to File a Post-Submission Communication ¶ 6 (Aug. 7, 2018).) In other words, if the Respondents make the CMCD Account distributions in September — on the eve of this Court’s decision — the substantial sum that Sands paid pursuant to this unconstitutional tax scheme will be distributed to Sands’ competitors without any guarantee of a refund in the event that Sands prevails in this litigation. To preserve the status quo for the short interval between this application and the Court’s decision in this matter, Sands renews its request for preliminary injunction—limited only to prohibiting distributions out of the CMCD Account.

In support of its application, Sands hereby incorporates the full record of these proceedings in which Sands and Intervenor Greenwood Gaming and

Entertainment, Inc. (“Greenwood” or “Intervenor”) have set forth their arguments, including (i) the verified Petition for Review Sands filed on December 28, 2017; (ii) the March 20, 2018 Brief and the April 10, 2018 Reply Brief of Sands; (iii) the April 12, 2018 Brief and Reply Brief, and the April 25, 2018 Supplemental Reply Brief, of Greenwood; and (iv) the oral arguments made to the Court at the May 17, 2018 hearing. For purposes of this request for preliminary injunction, these materials are hereafter referred to as the “Supporting Record.”

### **ARGUMENT**

1. During the merits briefing, the Gaming Board made express commitments (described in the parties’ Joint Stipulation, the parties’ merits briefing, and reaffirmed by Respondents at the May 17, 2018 oral argument) to take all necessary steps to refund the proceeds of the Supplemental Assessment to Sands should the Court rule in Sands’ favor on the merits.

2. On July 20, 2018, Sands nevertheless received a letter from the Pennsylvania Office of the Attorney General, stating that the Gaming Board intends to make distributions from the CMCD Account beginning as early as September 2018. A copy of this letter is attached as Exhibit A. The Board’s notice of intended distributions makes the timing of this matter acute.

3. On July 27, 2018 Sands sent a letter to the Prothonotary and on August 2, 2018, Sands filed an Application for Leave to File a Post-Submission



Communication in order to inform the Court of the Respondent's intent to distribute the Supplemental Daily Assessment funds out of the CMCD Account in September 2018. The respondents' response asserted that the Board is statutorily obligated to make the distributions. The respondents did not, however, provide any support for the proposition that the Board must distribute funds out of the CMCD Account before this Court issues its decision on the merits of this matter, much less in September of the calendar year.

4. As outlined in Sands' August 2, 2018 Application, the relief sought by this case would be materially impacted if the Board were to make distributions out of the CMCD Account before the Court has the opportunity to render its decision.

5. The Amended Act gives this Court exclusive jurisdiction to hear this challenge and also authorizes this Court "to take such action as it deems appropriate, consistent with the Supreme Court retaining jurisdiction over such a matter, to find facts or to expedite a final judgment in connection with such a challenge or request for declaratory relief." 4 Pa. C.S. § 1904. The Court has jurisdiction under that provision to issue the requested preliminary injunction.<sup>2</sup>

6. Pursuant to Pennsylvania Rule of Appellate Procedure 1532(a), this Court may order special relief, including a preliminary or special injunction, "in

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<sup>2</sup>The points substantiating this Court's authority to issue the requested relief have been more fully set forth in the Supporting Record. *See* Sands' March 20, 2018 Brief at 40-45 and Sands' April 10, 2018 Reply Brief at 18-21.

the interests of justice and consistent with the usages and principles of law.” The factors for a preliminary injunction are that: (a) the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (b) greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; (c) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (d) the activity it seeks to restrain is actionable, its right to relief is clear and the wrong is manifest, or, in other words, that it is likely to prevail on the merits; (e) the injunction it seeks is reasonably suited to abate the offending activity; and (f) a preliminary injunction will not adversely affect the public interest. *Warehime v. Warehime*, 860 A.2d 41 (Pa. 2004); *see Allegheny Cty. v. Com.*, 544 A.2d 1305, 1307 (Pa. 1988). Each of those elements is met here and a preliminary injunction requiring an immediate stay of distributions out of the CMCD Account is warranted.

**A. Irreparable Harm**

7. The Supplemental Assessment imposes a plainly unconstitutional and non-uniform tax on Sands. The sole purpose of the Supplemental Assessment is to redistribute the Supplemental Assessment proceeds from higher-revenue casinos to

lower-revenue casinos to fund the lower-revenue casinos' private marketing and capital improvement activities through the CMCD Account.

8. Any distribution out of the CMCD Account will irreparably affect Sands' financial and operational condition. The Supplemental Assessment is based on *daily* slot machine revenues. Between January 1, 2018 and June 30, 2018, the Supplemental Assessment has been assessed and remitted daily. Sands has already paid over \$750,000 into the CMCD Account.

9. Although the payment of the Supplemental Assessment is monetary in nature, this Court has held in two similar cases that a refund for the payment of unconstitutionally imposed taxes was not available. *See Mount Airy #1, LLC v. Pennsylvania Dep't of Revenue*, 154 A.3d 268, 380 n.11 (Pa. 2016) (denying the petitioner's request for a refund of unconstitutional gaming tax because "a decision of this Court invalidating a tax statute takes effect as of the date of the decision and is not to be applied retroactively") (quoting *Oz Gas, Ltd. v. Warren Area Sch. Dist.*, 938 A.2d 274, 285 (2007)); *see also Nextel Commc'ns of Mid-Atl., Inc. v. Commonwealth, Dep't of Revenue*, 171 A.3d 682, 705 (Pa. 2017) (same). And although the Respondents stipulated that they would take all necessary steps to secure a refund of accumulated CMCD Account funds, the Respondents now assert that, after they distribute the funds out of the CMCD Account, "it may not be

feasible for the Respondents to refund the supplemental daily assessment payments.” Aug. 8, 2017 Answer ¶¶ 6.

10. The monetary harm to Sands will be irreparable if Sands is not eligible for a refund of unconstitutional tax payments made while this case is pending. The requested preliminary injunction, which seeks only to stay any distribution out of the CMCD Account, is necessary to protect Sands from being unable to seek the return of funds paid pursuant to the unconstitutional tax scheme.

11. In addition, the distribution of the Supplemental Assessment proceeds to other private casinos through the CMCD Account will provide an unfair and unconstitutional advantage to Sands’ competitors. The CMCD Account payouts will allow Sands’ competitors to operate their casinos at a lower effective tax rate than Sands and to spend the redistributed Supplemental Assessment proceeds on marketing and capital improvements to attract Sands’ customers. A stay of the disbursement of CMCD Account funds is necessary to prevent irreparable harm to Sands’ competitive standing in the marketplace.

**B. No Greater Injury**

12. The balance of harms weighs wholly in favor of a preliminary injunction enjoining distributions from the CMCD Account pending the Court’s decision. Sands will be concretely and irreparably harmed by the payment of the unconstitutional tax. By contrast, the Supplemental Assessment serves no

identifiable public purpose. The only consequence of granting the requested injunctive relief would be to deprive certain private casinos of discriminatory distributions from the CMCD Account during the brief period pending this Court's decision. If the Court ultimately rules against Sands, the funds could then be distributed pursuant to the Act and the Court's interpretation of it. Any injunction will also be short-lived and last only until the Court issues its decision in this matter.

**C. Status Quo**

13. The requested injunctive relief preserves the status quo. The Supplemental Assessment and CMCD Account are newly established by the Amended Act. The Amended Act went into effect on January 1, 2018. Because the proceeds of the Supplemental Assessment are directly and entirely passed to private casinos, a preliminary injunction enjoining distributions from the CMCD Account would preserve the remainder of the Amended Act's tax rates and structure. By contrast, the Respondent's planned distribution of the CMCD Account proceeds in September 2018 will upend the status quo on the brink of a decision in this case.

**D. Likelihood of Success**

14. As argued in its merits briefs and at oral argument, Sands is likely to prevail on the merits of its underlying claim by establishing that the Supplemental

Assessment and CMCD Account scheme violates the Pennsylvania Constitution and federal due process and equal protection guarantees. See Sands' March 20, 2018 Brief at 20-34.

**E. A Preliminary Injunction Is Appropriate**

15. The requested injunctive relief is appropriate and well-suited to prevent irreparable harm to Sands. The constitutional harm would be abated by an order that enjoins any payouts from the CMCD Account pending this Court's decision.

**F. No Adverse Effect on the Public Interest**

16. The CMCD Account serves only to redistribute the Supplemental Assessment proceeds from higher-revenue to lower-revenue private casinos. The public will not be affected in any way by a preliminary injunction that stays its operation for the limited period required for this Court to render a decision in this matter.

**Timing of Preliminary Injunction**

17. Sands respectfully requests that the Court grant its request for a preliminary injunction to immediately enjoin the distribution of funds from the CMCD Account. Pa. Rule Civ. P. 1531.

18. The requested injunctive relief presents only a question of law. All material facts are undisputed. As such, there is no need for any evidentiary hearing.

19. Accordingly, Sands respectfully requests that this Court grant its request for a preliminary injunction.

WHEREFORE, for the foregoing reasons, Petitioners respectfully request that this Court grant its Application for Special Relief in the Nature of a Preliminary Injunction and enter an order pending final resolution of this action that enjoins the Respondents from distributing the funds in the CMCD Account to other casinos under the Amended Act pending this Court's ruling on the merits and thereafter only as consistent with the Court's ruling.

Dated: August 15, 2018

Respectfully submitted,

By: /s/ Adam A. DeSipio

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# EXHIBIT A



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July 20, 2018

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Re: Sands Bethworks Gaming, LLC v. Pennsylvania Dept. of Revenue, et al.  
Commonwealth Court No. 216 MM 2017

Dear Counsel:

I am providing this notice in accordance with the Joint Stipulation filed in this matter on February 28, 2018. Please be advised that the Pennsylvania Gaming Control Board intends to begin making distributions from the Casino Marketing and Capital Development Account in accordance with the provisions of 4 Pa. C.S. § 1407.1. The Board anticipates that it will begin making distributions in September 2018, but not sooner than 45-days from the date of this correspondence. Should you have any questions please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen M. Romano".

KAREN M. ROMANO  
Senior Deputy Attorney General

cc: Mark S. Stewart, Esquire  
Kevin M. Skjoldal, Esquire  
Kristine E. Marsilio, Esquire