

**IN THE SUPREME COURT OF PENNSYLVANIA**

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.

No. 216 MM 2017

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**INTERVENOR'S ANSWER TO PETITIONER'S APPLICATION FOR  
LEAVE TO FILE POST-SUBMISSION COMMUNICATION**

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Pursuant to the August 16, 2018, letter from the Office of the Prothonotary, Intervenor Greenwood Gaming and Entertainment, Inc. ("GGE"), submits this Answer to Petitioner Sands Bethworks Gaming, LLC's ("Sands") Application for Leave to File Post-Submission Communication, and states as follows:

1. GGE concurs in Sands' Application for Leave to seek a preliminary injunction in this action.

2. As Sands has stated in its Application for Leave, the underlying action is ripe for decision as it is fully briefed and was argued in May 2018. New

information has recently come to light, which has a direct and substantial impact on the case and would materially impact the ability of GGE and Sands to obtain the relief sought.

3. Despite a decision from this Court on the underlying action being imminent, the Respondents have sent a letter informing GGE and Sands that they plan to distribute the money in the restricted Casino Marketing and Capital Development (“CMCD”) Account that is being challenged as unconstitutional in this action. The Respondents’ distribution of the funds in the CMCD Account could occur as soon as September 3, 2018.

4. Although the Respondents had previously agreed in their briefs and at oral argument that they would voluntarily refund the money that GGE and Sands paid into this Account if the Court declares the challenged provisions of the Gaming Act unconstitutional, the Respondents now intend to distribute the money in that Account potentially before the Court renders a decision in this action.

5. The Gaming Control Board has taken steps to begin the process of distributing the money in the CMCD Account. Indeed, on August 15, 2018, the Gaming Control Board publicly voted to approve guidelines for the CMCD grant program, and the Board has published those program guidelines on its official website.

[https://gamingcontrolboard.pa.gov/files/grant\\_program/Casino\\_Marketing\\_and\\_Capital\\_Development\\_Grant\\_Program.pdf](https://gamingcontrolboard.pa.gov/files/grant_program/Casino_Marketing_and_Capital_Development_Grant_Program.pdf)

6. The Respondents admit that they will not be able to refund the money GGE and Sands paid into the CMCD once they distribute those funds to competitor casinos in September 2018. (Respondent's Answer to the Petitioner's Application for Leave to file A Post-Submission Communication, dated August 7, 2018 ("Once distributions are made from the CMCD Account based on gross terminal revenue levels for the previous year, it may not be feasible for the Respondents to refund the supplemental daily assessment payments to the Petitioners for payments made during that fiscal year.")).

7. As set forth in Sands' Application for Special Relief in the Nature of a Preliminary Injunction ("PI Application"), slot machine licensees, such as Sands and GGE, will be immediately and irreparably harmed by Respondents' planned actions.

8. Given the substantial impact that Respondent's current actions would have on the underlying action, and the immediate and irreparable harm that GGE and Sands would suffer as a result of the Respondents' planned actions, this Court should grant Sands' Application for Leave to seek preliminary injunctive relief in order to enjoin Respondents from distributing the funds in the CMCD Account before this Court rules on the merits of this matter.

9. If this Court grants Sands' application for leave, GGE would support entry of an injunction in this matter. GGE has attached hereto its Answer to Sands' application for preliminary injunctive relief, providing additional reasons why an injunction is warranted and necessary in this action.

WHEREFORE, Intervenor Greenwood Gaming and Entertainment, Inc., respectfully requests that this Court grant Petitioner Sands Bethworks Gaming, LLC's Application for Leave to File Post-Submission Communication in the Nature of a Preliminary Injunction.

Respectfully Submitted,



Date: August 20, 2018

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

## 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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**ATTACHMENT A**  
**TO INTERVENOR'S ANSWER TO PETITIONER'S APPLICATION FOR**  
**LEAVE TO FILE POST-SUBMISSION COMMUNICATION**

IN THE SUPREME COURT OF PENNSYLVANIA

SANDS BETHWORKS GAMING, LLC

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GAMING CONTROL BOARD

Respondents.

No. 216 MM 2017

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**ANSWER IN SUPPORT OF PETITIONER'S RENEWED APPLICATION  
FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY  
INJUNCTION**

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Pursuant to Pa.R.A.P. 123 and 1532, Intervenor Greenwood Gaming and Entertainment, Inc. ("GGE"), by and through its counsel Eckert Seamans Cherin & Mellott, LLC, submits this Answer in support of Petitioner Sands Bethworks Gaming, LLC's ("Sands") Application for Special Relief in the Form of a Preliminary Injunction, which requests this Court to enjoin Respondents from distributing the funds in the disputed Casino Marketing and Capital Development ("CMCD") Account, and states as follows:



## **INTRODUCTION**

1. GGE joins in Sands' Application for Special Relief, and seeks this Court to stop the Respondents from carrying through with their plan to distribute the money in the CMCD Account until this Court issues its decision in the underlying action ruling on the constitutionality of the taxes paid into the CMCD Account and the scheme for distributing the funds in that Account.

2. GGE submits this Answer to provide additional support to establish that the requested injunction is warranted and necessary to prevent the severe, immediate, and irreparable harm that GGE would suffer if the Respondents carry through with their current plan to distribute to GGE's competitor casinos the money collected from GGE through an unconstitutional tax scheme.

3. Based on Respondents' statements and the August 15, 2018, action of the Pennsylvania Gaming Control Board, this irreparable harm could occur as soon as September 3, 2018. (See, *infra*, Exhibits A and B).

## **BACKGROUND**

4. GGE operates Parx Casino under a Category 1 slot machine license, and this Court has granted it intervenor status in this action.

5. As a Category 1 slot machine 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 under the Act.

6. Through this action, GGE and Sands are challenging a new tax scheme recently added to the Gaming Act. Specifically, the Act was amended to include new tax provisions whereby GGE and all other licensed gaming entities are required to pay “Supplemental Daily Assessments” based upon their daily slot machine revenues, otherwise known as “GTR,” into the CMCD Account. The CMCD Account is a newly created restricted fund 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). This action challenges the constitutionality of this new tax scheme.

7. This action now is ripe for decision, as it is already fully briefed and this Court conducted oral argument on May 17, 2018.

8. As set forth in Respondents’ Application for Special Relief, Respondents have indicated that they would return the CMCD funds if the Court rules in favor of GGE and Sands. Indeed, the Respondents expressly stated in their Brief in Opposition to the Verified Petition that:

[T]he money deposited in the CMCD Account can only be spent on the very distributions and grants that are challenged by Sands in this case. 4 Pa. C.S. § 1407.1(b). For this reason, the Respondents have agreed to “take all steps necessary to ensure” that Sands receives a “full refund” of the supplemental daily assessment that it pays into the CMCD Account in the event that §§ 1407(c.1), 1407.1 and 1408(c.1) are invalidated. The Respondents will

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honor the terms of their agreement and voluntarily attempt to secure a refund for Sands and all similarly situated slot machine licensees if this Court determines that the challenged provisions of the Gaming Act are unconstitutional.

(Respondents' Brief In Opposition to the Verified Petition at 21-22 (emphasis added)).

9. Despite the imminence of the decision from this Court on the constitutionality of the new tax scheme, and the Respondents' agreement to refund the assessments paid into the CMCD Account if the scheme is unlawful, on July 20, 2018, Respondents sent a letter to GGE and Sands advising that the Gaming Control Board will begin making distributions from the CMCD Account to GGE's competitor casinos in September 2018. (See Exhibit A).

### **INJUNCTION**

10. Sands has now sought this Court to enjoin 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 of the underlying action. GGE joins in this request.

11. Sands has already satisfied the well-established elements necessary for the issuance of an injunction under Pennsylvania law. See Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003).

In addition to the reasons for the injunction set for in Sands' Application for Special Relief (which GGE incorporates into this Answer and will not repeat),

{L0773375.2}

GGE submits this Answer to provide further support that the requested injunction is warranted and necessary.

12. The immediate and irreparable harm that GGE would suffer if this Court refuses to issue an injunction is severe and indisputable.

13. Between January 1, 2018 and June 30, 2018, GGE paid in excess of \$1 million into the CMCD Account in the form of Supplemental Assessments required by the Gaming Act provisions that are being challenged in this action.

14. Respondents admit that if this Court does not issue an Order enjoining it from distributing the funds in the CMCD Account, it will distribute those funds in September 2018. (Exhibit A).

15. Significantly, the Respondents have already taken steps to begin the process of distributing the money in the CMCD Account. Indeed, at the Gaming Control Board's August 15, 2015, public meeting, the Board voted to approve guidelines for the CMCD grant program. See <https://gamingcontrolboard.pa.gov/?p=141>.

16. The Board has published those program guidelines on its official website. (See Exhibit B, and [https://gamingcontrolboard.pa.gov/files/grant\\_program/Casino\\_Marketing\\_and\\_Capital\\_Development\\_Grant\\_Program.pdf](https://gamingcontrolboard.pa.gov/files/grant_program/Casino_Marketing_and_Capital_Development_Grant_Program.pdf))

17. The Board's program guidelines dictate that in September, the Gaming Control Board will distribute the money that GGE paid into the CMCD Account to GGE's lesser performing competitor casinos, and that, only if funds remain in the Account, will the Board accept applications for grants for any remaining monies. (Exhibit B, at 2-5).

18. If the CMCD Account funds are given to other casinos, GGE will have no recourse to recover its money. Immunity will prevent an action against the Commonwealth to recover those funds, and the Respondents admit that if the distributions are made, the money would be gone forever and it would not be possible to refund the money that GGE and Sands paid into the CMCD Account. (Respondents' Answer to the Petitioner's Application for Leave to File a Post-Submission Communication, August 7, 2018, at ¶ 6 ("Once distributions are made from the CMCD Account based on gross terminal revenue levels for the previous fiscal year, it may not be feasible for the Respondents to refund the supplemental daily assessment payments to the Petitioners for payment made during that fiscal year.")).

19. Unless this Court enjoins Respondents' action pending its decision on the merits (or the Court issues its Opinion on the merits prior to September 2018), the over \$1,000,000 that GGE paid into the CMCD Account will never be repaid to GGE, even if this Court ultimately declares the new tax scheme unconstitutional.

20. There can be no doubt that GGE would suffer much greater injury from the refusal of an injunction than the Commonwealth would if an injunction would be granted. Indeed, the Commonwealth would not be substantially harmed at all by an injunction. The injunction sought by GGE would not impact the amount of money in the CMCD Account or the Commonwealth's ability to distribute that money if this Court declares that the challenged tax scheme is constitutional. Rather, the injunction would simply preserve the money in the Account until such time that the Court rules on the merits of action.

21. Ultimately, given that the CMCD Account is a restricted receipts account, the funds in which are dedicated to GGE's underperforming competitor casinos and do not inure to or benefit the Respondents, the Respondents would suffer no harm from waiting a short time until this Court rules on the merits.

22. Indeed, Respondents have confirmed that they will comply with the Court's directive on delaying the distribution of the funds in the CMCD Account without asserting they would be harmed in any way by delaying the distribution of the funds in the CMCD Account,. (Respondents' Answer to the Petitioner's Application for Leave to File a Post-Submission Communication, August 7, 2018, at ¶ 7).

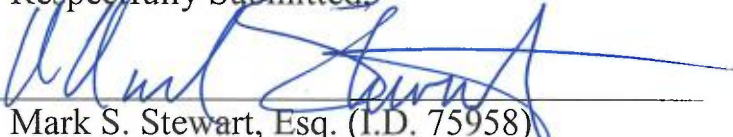


23. This Court has the jurisdiction over this matter and the legal and statutory authority to grant the requested special relief. (Intervenor's Reply Brief in Support of Petition for Review, April 10, 2018, at 14-19; Pa.R.A.P. 1532(a)).

24. Accordingly, for the reasons set forth in Sands' preliminary injunction application, and those reasons set forth herein, this Court should enjoin the Respondents.

WHEREFORE, Intervenor Greenwood Gaming and Entertainment, Inc., respectfully requests that this Court grant the requested 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 Gaming Act pending this Court's ruling on the merits and, thereafter, only as consistent with the Court's ruling.

Respectfully Submitted,



Date: August 20, 2018

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## **EXHIBIT A**





COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF ATTORNEY GENERAL

JOSH SHAPIRO  
ATTORNEY GENERAL

July 20, 2018

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Chicago, IL 60606

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

## **EXHIBIT B**



# Pennsylvania Gaming Control Board

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## Casino Marketing and Capital Development Grant Program

### Program Guidelines



Pennsylvania Gaming Control Board  
David M. Barasch, Chairman  
<http://gamingcontrolboard.pa.gov>

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## Section I – General Information

### A. Authority for Distributions and Grants

1. The Casino Marketing and Capital Development Account (the "Account") was established by the passage of Act 42 of 2017. See 4 Pa.C.S. §1407.1.
2. The Casino Marketing and Capital Development Account is administered by the Pennsylvania Gaming Control Board ("Board").
3. The Board is authorized to make distributions and issue grants from the Account to slot machine licensees that have been licensed for at least two years, other than a Category 4 licensee, for marketing or capital development.
4. Before the Board awards a grant, the Board is required to direct the following distributions from funds accumulated in the Account:
  - (a) 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.
  - (b) 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.
  - (c) 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.

Slot Machine Licensee	Prior Fiscal Year Gross Terminal Revenue	Distribution
Category 1 or Category 2	≤\$150,000,000	\$4,000,000
Category 1 or Category 2	>\$150,000,000 and <\$200,000,000	\$2,500,000
Category 3	<\$50,000,000	\$500,000

(d) If there are insufficient funds in the Casino Marketing and Capital Development Account, distributions shall be made in the proportion of:

- (i) the eligible licensees under each subparagraph; to
- (ii) the total amount of money in the Casino Marketing and Capital Development Account.

**B. Eligible Applicants and Activities**

1. After the distributions in A, above, have been made and if funds remain in the Casino Marketing and Capital Development Account, the Board will accept applications for Casino Marketing and Capital Development grants. Eligible applicants include slot machine licensees, other than a Category 4 slot machine licensee or slot machine licensee which received a distribution under A(4) above, and which have been licensed for at least two years.
2. In accordance with 4 Pa.C.S. §1407.1(d), grants must be utilized by the slot machine licensee for marketing or capital development purposes or projects.

**C. Grant Allocation and Limitations**

1. No slot machine licensee may receive more than \$4,000,000 from the Casino Marketing and Capital Development Account in one year.
2. Upon application for a grant by the Board, the slot machine licensee shall provide the Board with a written statement of the specific proposed uses of the funds including the capital development or marketing initiatives for which the funds will be used.

3. The applicant shall agree that noncompliance with the conditions of this grant shall be grounds for the recapture of funds provided to the applicant. If the applicant fails to refund the monies, the Commonwealth, in addition to any rights or remedies it may have at law or in equity, reserves the right to offset the amount due against any existing or future sums of money owed the applicant by any Commonwealth agency or department, including the Board. The applicant, by accepting the grant, agrees to waive any immunities it may have from legal proceedings to recoup the grant monies, costs and charges should the Board resort to legal process to recapture the grant funds due to applicant's non-compliance with the conditions of the grant.
4. The applicant agrees to retain all cost supporting records and documentation for a period of three years from the date of distribution of funds.
5. Misuse of grant funds may lead to referral to the Office of Enforcement Counsel for investigation and evaluation of potential enforcement action based upon said misuse.

## **Section II – The Application Process**

### **A. General**

In September of each year, the Board shall calculate the amount of distribution due each slot machine licensee pursuant to the formula set forth in Section I, subsection A, above, and shall determine the amount of funds available for distribution as of June 30 of that year (i.e. the prior fiscal year). Thereafter, if monies remain in the Account, the Board will announce a date for accepting applications for grants for any remaining monies.



## **B. Application Requirements**

Applicants for grants shall complete the prescribed application form available from the Board, and shall describe the projects and/or uses for which the grant is sought. The description must clearly indicate that the requested funds will only be used for capital development or marketing projects to be completed no later than June 30<sup>th</sup> of the next calendar year.

## **Section III – Distribution and Grant Award and Reporting Procedures**

### **A. Distribution and Grant Award Notifications**

At the time grant recipients are notified of their award they will be presented with a grant agreement. This grant agreement will contain the details of the distribution or grant, including name of recipient, amount of award, project description and terms of the agreement. The grant agreement must be signed by an officer of the organization authorized to commit the recipient organization to the terms of the agreement and returned to the Board for execution by the Commonwealth before grant funds can be released.

### **B. Reporting Procedures**

1. The slot machine licensee will maintain full and accurate records with respect to the project and/or uses of the grant funds, and shall promptly furnish such to the Board upon request.
2. No later than August 1 of each year, the slot machine licensee shall file a Final Report with the Board in a manner setting forth all uses of the grant funds as prescribed by the Board. Any grant funds not expended by the slot machine licensee for capital development or marketing initiatives by June 30<sup>th</sup> of each year shall be returned to the Board prior to or with the filing of the Final Report. Failure to file a Final

Report will be grounds for the Board to refuse to accept future grant applications, and for referral to the Office of Enforcement Counsel.

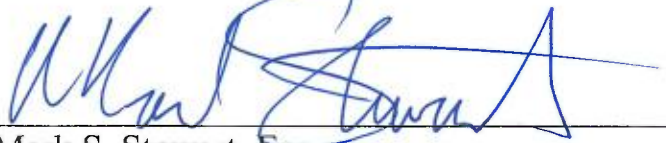
The Pennsylvania Gaming Control Board (PGCB) reserves the right to accept or reject any or all applications contingent upon available funding and respective applicant eligibility. The PGCB also reserves the right to reject incomplete applications:

Mail Completed Applications to:  
Pennsylvania Gaming Control Board  
Casino Marketing and Capital Development Grant Program  
303 Walnut Street  
P.O. Box 69060  
Harrisburg, PA 17106-9060

If you have any questions regarding this grant application, please call (717) 346-8300 or e-mail [PGCB@pa.gov](mailto:PGCB@pa.gov) and type "Casino Marketing and Capital Development Grants" in the subject line.

## 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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Date: August 20, 2018

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

## **CERTIFICATE OF SERVICE**

I hereby certify that on August 20, 2018, I served a copy of the foregoing Intervenor's Answer to Petitioner's Application for Leave to File Post-Submission Communication upon the following persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

### **Service by the Court's PACFile system as follows:**

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Date: August 20, 2018

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