

**IN THE COURT OF COMMON PLEAS
WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION**

JANINE LITMAN and TIMOTHY
MASTROIANNI, individually and
jointly,

Plaintiffs,

v.

CANNERY CASINO RESORTS, LLC, a
Nevada limited liability company,
WASHINGTON TROTTING ASSOCIATION,
INC., a Delaware corporation, WTA
ACQUISITION CORP., a Delaware corporation,
CANNERY CASINO RESORTS, LLC,
CANNERY CASINO RESORTS and
WASHINGTON TROTTING ASSOCIATION,
INC., t/d/b/a THE MEADOWS RACETRACK
& CASINO, an unincorporated association,
CANNERY CASINO RESORTS, an
unincorporated association consisting of one
or more yet unidentified natural and/or legal
persons, individually and jointly,

Defendants.

CASE NO. 2012-8149

**MEMORANDUM OF LAW IN
SUPPORT OF DEFENDANTS'
MOTION FOR
RECONSIDERATION**

Filed on behalf of all Defendants,
Cannery Casino Resorts, LLC,
Washington Trotting Association,
Inc., WTA Acquisition Corp.,
Cannery Casino Resorts, LLC,
Cannery Casino Resorts and
Washington Trotting Association,
Inc. t/d/b/a The Meadows
Racetrack & Casino, and
Cannery Casino Resorts

Counsel of Record for these
parties:

Patrick L. Abramowich, Esquire
PA Id. No. 74494
Benjamin I. Feldman, Esquire
PA Id. No. 312683

FOX ROTHSCHILD LLP
625 Liberty Avenue, 29th Floor
Pittsburgh, PA 15222
(412) 391-1334
pabramowich@foxrothschild.com
bfeldman@foxrothschild.com

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Plaintiffs,

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CANNERY CASINO RESORTS, LLC, a
Nevada limited liability company,
WASHINGTON TROTTHING ASSOCIATION,
INC., a Delaware corporation, WTA
ACQUISITION CORP., a Delaware corporation,
CANNERY CASINO RESORTS, LLC, CANNERY
CASINO RESORTS and WASHINGTON TROTTHING
ASSOCIATION, INC. t/d/b/a THE MEADOWS
RACETRACK & CASINO, an unincorporated
association, CANNERY CASINO RESORTS, an
unincorporated association consisting of one
or more yet unidentified natural and/or legal
persons, individually and jointly,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
RECONSIDERATION OF THE COURT'S ORDER DENYING DEFENDANTS'
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

Defendants, Cannery Casino Resorts, LLC, a Nevada limited liability company,
Washington Trotting Association, Inc., a Delaware corporation, WTA Acquisition Corp., a
Delaware corporation, Cannery Casino Resorts, LLC, Cannery Casino Resorts and Washington
Trotting Association, Inc. t/d/b/a The Meadows Racetrack & Casino, an unincorporated

association, and Cannery Casino Resorts,¹ an unincorporated association consisting of one or more yet unidentified natural and/or legal persons, individually and jointly (collectively “Defendants”), by and through their counsel, Patrick L. Abramowich, Esquire, Benjamin I. Feldman, Esquire and Fox Rothschild LLP, file the following Memorandum of Law in Support of their Motion for Reconsideration of the Court’s Order dated October 7, 2013 denying Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction, stating as follows:

I. INTRODUCTION

On or about October 3, 2013, Defendants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction (“Motion to Dismiss”), asserting that all of the purported claims asserted by Plaintiffs Janine Litman and Timothy Mastroianni (collectively, “Plaintiffs”) in their Third Amended Complaint fall within the exclusive jurisdiction of the Pennsylvania Gaming Control Board. The Court denied the Motion to Dismiss after argument on October 7, 2013.

Defendants respectfully ask the Court to reconsider its Order denying Defendants’ Motion to Dismiss for the following reasons:

1. Any relief granted to Plaintiffs in response to the Third Amended Complaint would potentially conflict with the comprehensive regulatory scheme developed by the Pennsylvania Gaming Control Board (the “GCB”) pursuant to the Pennsylvania Race Horse Development and Gaming Act (the “Act”), which grants the Board “general and sole regulatory authority over the conduct of gaming or related activities” in the Commonwealth. 4 Pa.C.S.A. § 1202(a).
2. The Plaintiffs already have invoked the GCB’s patron complaint procedure. In response to that Complaint, (i) the GCB’s Bureau of Investigations and Enforcement investigated Plaintiffs’ allegations, which included meeting with Plaintiff Mastroianni; (ii) the GCB’s Office of Enforcement Counsel negotiated a

¹ It is denied that the Defendant identified as “Cannery Casino Resorts” exists as an entity separate and distinct from the Defendant identified as “Cannery Casino Resorts, LLC.” Further explanation concerning Plaintiffs’ mistaken identification of Defendants will be made subsequent to disposition of the pending Preliminary Objections.

Consent Agreement with Washington Trotting Association, Inc., the owner and operator of The Meadows; and (iii) the GCB instituted a proceeding to consider the Consent Agreement with Washington Trotting Association at Docket No. 3071-2013 (the “Proceeding”) and issued an Order on March 14, 2013 approving the Consent Order as a final resolution of the issues raised in the Plaintiffs’ patron complaint.

3. Plaintiffs could have sought leave to intervene in the Proceeding pursuant to the GCB’s regulations, 58 Pa. Code § 493a.12(b), but failed to do so. Had Plaintiffs intervened, they could have challenged the Consent Agreement in the Pennsylvania Commonwealth Court. If the GCB denied Plaintiff’s petition to intervene, that decision also would be subject to review by the Commonwealth Court.
4. **Critically, the Plaintiffs also can file a petition with the GCB pursuant to 58 Pa. Code § 493a.4,** and the GCB’s regulations also suggest that Plaintiffs could file a complaint pursuant to 1 Pa. Code § 35.9.
5. To the extent that Plaintiffs challenge the adequacy of the administrative procedures available before the GCB, Section 1904 of the Act, 4 Pa.C.S.A. §1904, provides that the Pennsylvania Supreme Court shall have exclusive jurisdiction to hear any challenge to the constitutionality of the Act.
6. Finally, even if this Court had jurisdiction to consider Plaintiffs’ due process challenges, the General Assembly did not offend due process by restricting Plaintiffs’ access to the Courts as a means to ensure uniform regulation of the gaming industry in Pennsylvania.

II. FACTUAL BACKGROUND

Plaintiffs have filed three amended complaints that allege that Defendants, as purported owners and operators of a gaming establishment known as “The Meadows” (i) engaged in improper and misleading advertising, (ii) failed to make proper registrations with the Commonwealth of Pennsylvania, and (iii) failed to comply with rules established for the operation of gambling establishments. As stated in Defendants’ Motion to Dismiss, all of Plaintiffs’ claims are fundamentally addressed by specific provisions of the Act, which grants the

GCB the “general and sole regulatory authority over the conduct of gaming or related activities” 4 Pa.C.S. § 1202.

Plaintiffs were clearly aware of the GCB’s exclusive jurisdiction over gaming-related complaints, as they filed a patron complaint with the GCB pursuant to the governing regulations. Plaintiffs’ complaint was investigated by the GCB’s Bureau of Investigations and Enforcement (“BIE”), the branch of the GCB entrusted with the duty to investigate casinos “for potential violations of the act, including potential violations referred to the Bureau by the Board or other persons.” 58 Pa.Code § 405a.1(2). As a consequence of the investigation, which included an interview with Plaintiff Mastroianni, the GCB’s Office of Enforcement Counsel (“OEC”) pursued a resolution of the complaint pursuant to 58 Pa.Code § 405a.3(5).

The OEC and Washington Trotting Association, Inc. d/b/a The Meadows Racetrack and Casino, entered into a Consent Agreement and Stipulation of Settlement (“Consent Agreement”) on February 13, 2013. The Consent Agreement, which is attached to Plaintiffs’ Third Amended Complaint as Exhibit 12, is abundantly clear that any non-compliance by The Meadows with its rules submissions for craps, which formed the basis of Plaintiffs’ patron complaint, could not have harmed Plaintiffs. Specifically, the OEC alleged that The Meadows only collected a “vigorish” (a charge on certain types of craps bets) for winning bets, when it was authorized to charge a vigorish on all bets. Paragraphs 8 and 9 of the Consent Agreement state:

8. On May 5, 2011, The Meadows filed a second Rules Submission for Craps and Mini-Craps (“Second Rules Submission”). The Meadows’ Second Rules Submission included provisions requesting the Board’s approval for it: to offer players the option to place Buy Bets or Lay Bets; to collect a 5% vigorish in connection with such bets; and, to collect said vigorish at the time the player wagers on the Buy Bet or the Lay Bet, as opposed to collection of the vigorish only on a winning Buy Bet or a

winning Lay Bet. The Meadows' Second Rules Submission was approved for implementation on May 27, 2011.

9. From May 27, 2011, through August 27, 2012, The Meadows continued to operate [*sic*] its Craps games offering players the option of placing Buy Bets and Lay Bets and its dealers collected a vigorish of 5% of all Buy Bets and Lay Bets. However, during this period of time The Meadows Craps dealers (as instructed) were collecting the 5% vigorish on winning Buy Bets and Lay Bets rather than collecting it at the time the player wagers on the Buy Bet and Lay Bet as authorized by The Meadows' Second Rules Submission. The Meadows maintains that it did not collect vigorish on any losing Buy Bet or Lay Bet at any time.

According to the allegations in the Consent Agreement, The Meadows undercharged patrons by charging a vigorish on a subset of authorized bets. The only possible harm would be to the Commonwealth's tax revenues from the undercollection of vigorish.

The GCB instituted a proceeding to consider the Consent Agreement at Docket No. 3071-2013 (the "Proceeding") and issued an Order on March 14, 2013 approving the Consent Order as a final resolution of the issues raised in the Plaintiffs' patron complaint. Although the Plaintiffs had the opportunity to intervene in the Proceeding, they failed to seek leave from the GCB to do so. Thereafter, The Meadows submitted a revised set of rules stating that it will only collect vigorish on winning Buy and Lay Bets as it allegedly had been doing from May 27, 2011, through August 27, 2012.

III. LEGAL ARGUMENT

A. Plaintiffs Could Have Intervened in the Proceeding or, Alternatively, Filed an Original Proceeding with the GCB.

Plaintiffs' fundamental objection to Defendants' Motion to Dismiss was that litigating before the GCB would deprive them of due process. In reality, the GCB's procedures provide an

effective means of presenting patron complaints, including disputes regarding the payment of money, which includes the opportunity to intervene and/or initiate an original proceeding.

As set forth in Defendants' Motion to Dismiss, the Act provides the GCB with "sole regulatory authority over every aspect of the authorization, operation and play of slot machines and table games." 4 Pa.C.S. § 1202(a)(1); *see also* 58 Pa.Code § 401a.4(a) ("The Board will have exclusive jurisdiction over all matters within the scope of its powers under the act.").

According to the Pennsylvania Gaming Control Board's patron complaint form, "The Pennsylvania Race Horse Development and Gaming Act [] charges the Bureau of Investigations and Enforcement [] with the duty of investigating all potential non-criminal violations of the Act alleged by the Board or any other person, including complaints and disputes alleged by patrons. A complaint is a difference of opinion between the licensed gaming entity and the patron, which does not involve money or items of value. A dispute is a claim for a specific amount of cash or merchandise." Pennsylvania Gaming Control Board Patron Dispute/Complaint Form, *available at*, <http://gamingcontrolboard.pa.gov/?p=113> (October 31, 2012). Once the BIE has investigated a patron complaint, the OEC may initiate "proceedings for violations of the act or this part by filing a complaint or other pleading with the Board seeking civil fines or penalties, the imposition of conditions on a license, permit, certification or registration, or the suspension or revocation of a license, permit, certification or registration." 58 Pa. Code § 405a.3(3). The OEC may also "[s]eek a settlement that may include fines, penalties or other actions subject to approval by the Board." 58 Pa. Code § 405a.3(5).

As set forth in the Factual Background, the Plaintiffs pursued this regulatory procedure by filing a patron complaint and meeting with the BIE during its investigation. (See, e.g., Plaintiffs' Third Amended Complaint, ¶ 69, "...Plaintiff Mastroianni being the or one of the

Complainants [*sic*] to the Pennsylvania Gaming Board...”) The OEC negotiated a resolution of the complaint and initiated the Proceeding to seek approval of the Consent Agreement.

If Plaintiffs were dissatisfied with the Consent Agreement, they had an opportunity to intervene in the Proceeding. The GCB’s regulations provide that “[a] person wishing to intervene in a proceeding may file a petition with the Clerk which shall be served on all named parties to the underlying proceeding. When a petition to intervene is filed with the Clerk, it will be referred to the Board which will issue a determination as soon as practicable.” 58 Pa. Code § 493a.12(b). The Board will grant a petition to intervene if: “(1) The Person has an interest in the proceeding which is substantial, direct and immediate. (2) The interest is not adequately represented by a party to the proceeding. (3) The person may be bound by the action of the Board in the proceeding.” 58 Pa. Code § 493a.12(c).

Plaintiffs did not file a petition to intervene. Had they done so, and their petition was granted, they would have been a party to the proceedings and could have challenged the Consent Agreement and the Board’s Order. If Plaintiffs disagreed with the GCB’s approval of the Consent Agreement, they could appeal that determination to the Commonwealth Court. 42 Pa.C.S.A. § 763(a)(1) (Commonwealth Court has exclusive jurisdiction over appeals from final orders of Commonwealth agencies).² Had the Board denied Plaintiffs’ petition to intervene, they could have appealed the Board’s denial to the Commonwealth Court. *See Eastern Pa. Citizens*

² The unreported and non-precedential ruling of *Collazo v. Pa. Gaming Control Board*, 2012 WL 8670193 (Pa. Commw. Ct. April 26, 2012), is distinguishable from the instant facts. In *Collazo*, the appellant asked the court to review the Gaming Control Board’s decision not to initiate proceedings against a casino after the BIE had investigated his complaints. The Commonwealth Court held that it did not have jurisdiction over the appeal because the Gaming Control Board had not made an adjudication, and hence there was no decision to review. By contrast, the Gaming Control Board here entered an Order adopting a Consent Agreement.

Against Gambling v. Pa. Gaming Control Bd., 2013 WL 3542685 (Pa. Commw. Ct. April 18, 2013) (reviewing, *inter alia*, denial of a petition to intervene before the GCB as untimely).

However, Plaintiffs' failure to file a petition to intervene strips them of standing to challenge the GCB's Order approving the Consent Agreement on appeal. *See Citizens Against Gambling Subsidies v. Pa. Gaming Control Bd.*, 916 A.2d 624, 628 (Pa. 2007) (under the Act, one's failure to intervene in the administrative proceedings before the Board prevents that person from challenging the Board's findings). Plaintiffs therefore should be precluded from revisiting the resolution of their claims in a collateral proceeding.

Finally, to the extent that Plaintiffs claim intervention would be inadequate, the GCB's regulations provide that petitions "may be filed by the Office of Enforcement Counsel, parties, applicants, licensees, permittees, persons registered or certified by the Board, and other persons authorized by the Board." 58 Pa. Code § 493a.4(a). "Petitions must be in writing, state clearly and concisely the grounds for the petition, the interest of the petitioner in the subject matter, the facts relied upon and the relief sought." 58 Pa. Code § 493a.4(b). Additionally, Section 493a.2(a) of the regulations generally provides for the initiation of a proceeding against a licensee by formal written complaint and specifically authorizes the OEC to file such complaints. 58 Pa. Code §§ 493a.2(a), 493a.2(b). Section 493a.2(d) states that the section supplements, *inter alia*, 1 Pa. Code § 35.9, which provides that "[a] person complaining of anything done or omitted to be done by a person subject to the jurisdiction of an agency, in violation of a statute or regulation administered or issued by the agency may file a complaint with the agency." 58 Pa. Code § 493a.2(d); 1 Pa. Code § 35.9. If the agency sets the matter for a formal hearing, "the complainant automatically shall be a party thereto and need not file a petition for leave to

intervene.” 1 Pa. Code § 35.9. Accordingly, it is reasonable to interpret Section 493a.2(d) as authorizing an aggrieved patron to file a complaint, as well as a petition.

In sum, the GCB regulations provided Plaintiffs avenues to become parties to the Proceeding that they initiated, which would have afforded them full due process rights and the ability to appeal determinations to the Commonwealth Court. Plaintiffs’ failure to avail themselves of those procedures is not a constitutional defect in the Act.

B. The Pennsylvania Supreme Court Has Exclusive Jurisdiction to Decide Challenges to the Constitutionality of the Act.

Plaintiffs’ due process arguments are further misguided because this Court lacks jurisdiction to even entertain them. Section 1904 of the Act provides that “[t]he Pennsylvania Supreme Court shall have exclusive jurisdiction to hear any challenge to or to render a declaratory judgment concerning the constitutionality of this part.” 4 Pa.C.S.A. § 1904. Accordingly, if Plaintiffs seek to challenge the Act’s grant of exclusive jurisdiction over gaming-related activities to the GCB as violating constitutional due process, it must bring an action within the Pennsylvania Supreme Court’s original jurisdiction.

C. The General Assembly May Constitutionally Limit Plaintiffs’ Access to the Courts.

Finally, assuming *arguendo* that this Court may entertain Plaintiffs’ due process challenges, the Pennsylvania General Assembly is constitutionally permitted to abrogate and/or limit causes of action at its discretion. This authority encompasses the legislature’s ability to direct particular causes of action to an administrative forum.

The Pennsylvania legislature may, in its discretion, substitute access to the courts with an administrative process without offending due process. For example, the Pennsylvania Worker’s Compensation Act provides the “exclusive means by which a covered employee can recover

against an employer for injury in the course of his employment.” *Kline v. Arden H. Verner Co.*, 469 A.2d 158, 159 (Pa. 1983). In *Kline*, the appellant was injured in the course of his employment and filed suit against his employer in the Court of Common Pleas. *Id.* The Supreme Court affirmed the Superior Court’s determination that the courts lack jurisdiction over the claim and stated:

To change, alter or abolish a remedy lies within the wisdom and power of the legislature and in some instances, the courts. Access to a tribunal is not denied when the tribunal has no jurisdiction to entertain the claim or the remedy. Time and circumstances require new remedies to adjust to new and unforeseen losses and conditions. To do so, facets of the society often require new immunities or larger responsibility, as the legislature may determine. The workmen’s compensation law has deprived some of rights in exchange for surer benefits, immunized some, to make possible resources to benefit many, who were heretofore without possible or practical remedies.

Id. at 160. The reasoning in *Kline* applies here, where the General Assembly legalized gambling, created a comprehensive regulatory scheme for the industry, and decided to “change, alter [and] abolish” certain remedies to ensure that the scheme is applied uniformly by the agency with subject matter expertise.

Indeed, the legislature may abrogate entire causes of action without creating other avenues of relief. In *Freezer Storage, Inc. v. Armstrong Cork Co.*, the appellant challenged the constitutionality of a statute limiting the liability of contractors and subcontractors to improvements of real property. 382 A.2d 715 (Pa. 1978). In response to appellant’s claim that the statute was unconstitutional, the Pennsylvania Supreme Court opined, “We have in the past upheld . . . a statute which abolished a common law cause of action without providing a substitute.” *Id.* at 720; *see also Fadgen v. Lenkner*, 365 A.2d 147 (Pa. 1976) (abolishing civil cause of action). The Court continued, “Indeed we have long explicitly recognized that societal

conditions occasionally require the law to change in a way that denies a plaintiff a cause of action available in an earlier day.” *Id.* Ultimately, the Court held that to second guess the legislature’s shaping of various causes of action over time would stagnate the law, and, more importantly, would undo the foundational checks and balances of our branches of government.

The Court stated:

This Court would encroach upon the Legislature’s ability to guide the development of the law if we invalidated legislation simply because the rule enacted by the Legislature rejects some cause of action currently preferred by the courts. To do so would be to place certain rules of the “common law” and certain non-constitutional decisions of courts above all change except by constitutional amendment. Such a result would offend our notion of the checks and balances between the various branches of government, and of the flexibility required for the healthy growth of the law.

Id. at 721.

The Pennsylvania Supreme Court’s jurisprudence is consistent with the United States Supreme Court’s landmark precedent holding that the legislature may abrogate or eliminate common law causes of action without violating due process. *Munn v. Illinois*, 94 U.S. 113 (1876); *see also Singer*, 346 A.2d at 903 (citing *Munn* for this proposition). As the Court reasoned in *Munn*:

A person has no property, no vested interest, in any rule of common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; But the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to changes of time and circumstances.

Id. at 134. The same rule applies to Plaintiffs' statutory claims, which – if they are authorized as private rights of action – arise from acts of the legislature. Indeed, the Commonwealth Court has held, “*A fortiori*, if actions which existed at common law may be abolished, so may statutory causes of action created by the legislature, and if they may be abolished, they may be limited. . . .” *Pennock v. Lenzi*, 882 A.2d 1057, 1064 (Pa. Commw. Ct. 2005) (citations omitted).

The legislature undoubtedly intended to alter the existing landscape of remedies available when gaming is involved and replace them with an administrative dispute resolution mechanism. A recent case, *Eastern Pennsylvania Citizens Against Gaming v. Pennsylvania Gaming Control Board*, clarifies the administrative dispute resolution process under the Gaming Act. 2013 WL 3542685 (Pa. Commw. Ct. April 18, 2013). The court in that case explained:

To carry out the administration of its duties, the Board has adopted rules of practice and procedure, which supplement the general rules of administrative practice and procedure. 4 Pa. C.S. § 1202(30); 58 Pa. Code § 491a.1. Pursuant to its regulations, the Board is authorized to delegate its authority to perform any of its functions to one of its members or to Board staff. 58 Pa. Code § 403a.6. Accordingly, the Board established the Office of Hearings and Appeals (OHA), and directed that, generally, all matters other than licensing hearings under 58 Pa. Code § 441a.7 (not applicable here) are assigned to the OHA. 58 Pa. Code § 491.8 In addition, the Board authorized presiding officers to conduct hearings and dispose of procedural matters. *Id.* at § 491a.7.

Id. at *2.

Since the gaming industry is highly specialized and heavily regulated, the Pennsylvania legislature created an administrative process for the GCB to promptly resolve gaming disputes consistent with the regulatory requirements. That administrative forum is fully consistent with the dictates of due process.

III. CONCLUSION

For the reasons set forth above, Defendants Motion for Reconsideration should be granted and Plaintiffs' Third Amended Complaint should be dismissed.

Respectfully submitted,

Date: November 7, 2013

FOX ROTHSCHILD LLP



Patrick L. Abramowich
Pa. ID No. 74494
Benjamin I. Feldman
Pa. ID No. 312683
625 Liberty Avenue, 29th Floor
Pittsburgh, PA 15222-3115
(412) 391-1334
pabramowich@foxrothschild.com
bfeldman@foxrothschild.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2013, a true and correct copy of the foregoing Memorandum of Law in Support of Defendants' Motion for Reconsideration was served by hand deliver upon the following counsel of record:

Gregg R. Zegerelli
Zegerelli Technology & Entrepreneurial Ventures Law Group, P.C.
2585 Washington Road, Suite 134
Summerfield Commons Office Park
Pittsburgh, PA 15241
Mailroom.grz@zegarelli.com


