

March 25, 2019

**VIA U.S. MAIL and EMAIL**

Michael R. Pace  
President  
POM of Pennsylvania, LLC  
successor to POM, Inc  
3870 Peachtree Industrial Blvd  
Ste 340-194  
Duluth, Georgia 30096  
Michael.Pace@paceomatic.com

**RE:        Legality of Pennsylvania Skill™ Amusement Device**

Dear Mr. Pace:

You have requested that Kleinbard LLC provide a legal opinion concerning whether POM of Pennsylvania's (successor to Pace-O-Matic, Inc.) ("POM") skill game machine, the *Pennsylvania Skill™* Amusement Device ("Device"), is a gambling device under Pennsylvania law.

All assumptions, understandings and statements of reliance herein have been made with your permission and without any independent investigation, inquiry or verification on our part, and we express no opinion with respect to the subject matter or accuracy of such understandings or assumptions or items relied upon. We have not played the games on the Device. In connection with this letter, we have investigated such questions of law as we have deemed necessary or appropriate for the purposes hereof. We have examined certain documents that you have provided to us, which include a March 25, 2014 expert report by Nick Farley & Associates.

The relevant statutory provisions and case law, based on the factual information you have provided, are discussed below. In addition, our legal conclusions are set forth below. In summary, we conclude that the Device features games in which skill predominates over chance. Accordingly, the Device is not an illegal gaming machine subject to seizure and criminal penalties under Pennsylvania law.

### **A. The Device**

The Device is a coin-operated video machine. It offers a “Tic-Tac-Toe”-style puzzle that POM calls “Ate-Up,”<sup>1</sup> a potentially unlockable bonus session and a “Follow Me” colored dot-matching second phase of game play. The player cannot access the bonus session or Follow-Me™ feature on the Device without first playing the Tic-Tac-Toe game.

When the Tic-Tac-Toe game is initiated, nine reels arranged in a three-by-three grid are spun. When the wheels stop spinning, nine symbols based on the player’s chosen theme are displayed. The pattern that is displayed is selected from a finite pool of multiple tens of thousands of puzzles. The different game “themes” can have different “deals” which give rise to the finite pools of outcomes. The available possible puzzles are not pulled sequentially, but rather in a scrambled sequence that is different every cycle. Memorization of the sequence is not possible and individual game boards should not appear with sufficient frequency to be memorized.

Once the reels are spun, the player has 30 seconds to change one of the symbols to a “Wild” symbol in order to complete one or more lines in the grid. In addition to whether the “Wild” symbol completes one or more lines, the most advantageous spot in which to place the “Wild” symbol depends on the value of the symbols in the row or rows that were completed. However, failure to place the “Wild” symbol at all within the thirty-second time limit will result in a loss, because the Device generates no automatic wins.

Previous versions of the Device had a bonus shooting game that was triggered by successful completion of the “Tic-Tac-Toe game.”<sup>2</sup> Bonus gameplay is now treated somewhat differently. The bonus session differs among the various themes. The older themes, “Bombs and Bombshells,” “Cocktail Cove,” and “Pirate’s Prize,” still have skill-based bonus rounds (shooting for “Bombs and Bombshells” and “Pirate’s Prize,” picture-taking for “Cocktail Cove”), during which the player can earn less than the maximum bonus available, including zero, based on how well he or she performs during the bonus session. The bonus sessions for the newer themes, “Pirates,” “Lucky Fruit,” and “Living Large,” consist of non-skill interaction which delivers the bonus points that were already determined by the outcome of the “Ate-Up” game. For these themes, the bonus session simply is a mechanism to deliver to the player 100% of the reward already earned in the “Tic-Tac-Toe” phase of “Ate-Up.”

If the player executes perfect skill and still fails to win at least 105% of the amount paid to play the Tic-Tac-Toe game, the player is given the option of selecting the “Follow Me™” game. The Follow Me game begins with a three-by-three grid of colored dots. The dots flash in a random sequence that the player must repeat. The player needs to follow the sequences for 25

---

<sup>1</sup> The Tic-Tac-Toe game features six different graphical themes. While the graphics and some payout amounts differ among the various themes, the gameplay is functionally equivalent in all themes.

<sup>2</sup> The Farley report covers machine version 402.44 PEN. The current version in the field is SKL 402.49 PEN. It is built off of version 402.44, with some enhancements such as 25 rounds per Follow Me session rather than 40 and other changes for marketability, such as new “Ate-Up” themes.

rounds of play, with each sequence adding another circle. If ultimately successful, the player is awarded with a combined total of 105% of the original amount spent to play. The combination of the Ate-Up puzzle and the Follow Me phase of play always presents the opportunity to win more than it cost to play the game, every time, at a minimum return of 105% and a maximum return of over 50,000%.

The operator has no access to the source code in order to change the way the games are played. The operator can adjust the speed with which the reels spin in the Tic-Tac-Toe game, but this is cosmetic only and has no effect on game outcome. There are no operator adjustable parameters on the Follow-Me game.

## **B. Legal Authority**

The relevant statute, 18 Pa. C.S. § 5513, provides:

Gambling devices, gambling, etc.

(a) Offense defined. --A person is guilty of a misdemeanor of the first degree if he:

(1) intentionally or knowingly makes, assembles, sets up, maintains, sells, lends, leases, gives away, or offers for sale, loan, lease or gift, any punch board, drawing card, slot machine or any device to be used for gambling purposes, except playing cards;

(2) allows persons to collect and assemble for the purpose of unlawful gambling at any place under his control;

(3) solicits or invites any person to visit any unlawful gambling place for the purpose of gambling; or

(4) being the owner, tenant, lessee or occupant of any premises, knowingly permits or suffers the same, or any part thereof, to be used for the purpose of unlawful gambling.

A “device to be used for gambling purposes” is not defined by the statute. It has been interpreted by the courts. A machine is a gambling device *per se* and subject to seizure if it can be used for no purpose other than gambling. *Commonwealth v. Two Electronic Poker Game Machines*, 502 Pa. 186, 465 A.2d 973 (1983). The proper inquiry is “whether the machine is so intrinsically connected with gambling as to constitute a gambling device *per se*.” *Id.* at 194, 465 A.2d at 977 (quoting *Nu-Ken Novelty, Inc. v. Heller*, 220 Pa.Super. 431, 433, 288 A.2d 919, 920 (1972)). The term “gambling” has been interpreted by Pennsylvania courts as requiring three elements: (1) consideration, (2) a result determined primarily by chance rather than skill, and (3) reward. If all three of these elements are not present in a device, then it is not a gambling device *per se*. *Commonwealth v. Irwin*, 636 A.2d 1106 (Pa. 1993). The Commonwealth has the burden of proving the *per se* nature of the accused machine. *Com. v. Irwin*, 636 A.2d at 1107.

### **C. Prior Decisions Regarding the Device**

There is one Pennsylvania court decision concerning the Device. On December 23, 2014, the Court of Common Pleas of Beaver County, in an opinion on POM's Petition for Return of Seized Property, reviewed the three games on the Device at that time<sup>3</sup> and held that they were not games of chance *per se* due to the predominant element of skill.

On December 3, 2015, the Office of District Attorney for Centre County opined that in light of the Beaver County opinion, the County would not confiscate POM's Devices. Additionally, on October 12, 2016, the District Attorney for Lawrence County issued a letter opining that for the reasons set forth in the Beaver County opinion, "the POM machine is not considered a game of chance under Pennsylvania gaming laws."

### **D. Analysis**

As noted above, in order to constitute gambling, a game must contain three elements: (1) consideration, (2) reward, and (3) a result determined primarily by chance rather than skill.

**Consideration.** It is beyond dispute that the Device satisfies the elements of consideration. Each player enters currency in order to play each round of Tic-Tac-Toe. This constitutes consideration. *See Commonwealth v. Two Electronic Poker Game Machines*, 465 A.2d at 977.

**Reward.** The element of reward is indisputably present in the Device. Under *Commonwealth v. Irwin*, free games do not constitute a reward. If the only prize a player can win is free games, then the incentive to play must be recreational. In order to constitute a reward, a player must be able to win more than the value of the initial consideration. Since the player can win in excess of 50,000% of the initial entry fee on the Device, there is plainly an element of reward associated with the Device.

**Chance vs. Skill.** The central question, then, is whether the games on the Device constitute games of chance or skill. Under Pennsylvania law, as noted above, a given game may feature both elements, but it is the element that predominates that determines whether a game is a game of chance and therefore an illegal gambling device. *Commonwealth v. Dent*, 992 A.2d 190, 193 (2010).

i. **Tic-Tac-Toe (Ate-Up).** There is no Pennsylvania case law discussing games similar to those on the Device other than the Beaver County decision. Pennsylvania courts have held that poker is a game of chance, not skill, because while there is undoubtedly an element of skill involved, the outcome is primarily determined by the turn of the cards. The analysis in these

---

<sup>3</sup> The Device version at the time of the Beaver County opinion, 402.44 included a bonus shooting game after completion of the Tic-Tac-Toe game. This was easily determined to be a game of skill.

decisions is helpful in consideration of whether the Device's Tic-Tac-Toe game is a game of chance.

In *Commonwealth v. Two Electronic Poker Game Machines*, 465 A.2d 973 (Pa. 1983), the Pennsylvania Supreme Court held that electronic draw poker machines were gambling devices *per se*. Reviewing previous Superior Court decisions, the Court stated:

[T]he cited cases do not stand for the proposition that success be *entirely* a matter of chance. Rather, they hold that the “mere fact that a machine involves a substantial element of chance is insufficient” to find the machine a gambling device *per se*. *Nu-Ken, supra*, 220 Pa.Super. at 433, 288 A.2d at 920, citing *In re Wigton, supra*. Thus a showing of a large element of chance, without more, is not sufficient. Nor must the outcome of a game be wholly determined by skill in order for the machine to fall outside the *per se* category. As Superior Court [sic] pointed out:

A peculiar combination of luck and skill is the *sine qua non* of almost all games common to modern life. It is hard to imagine a competition or a contest which does not depend in part on serendipity. It cannot be disputed that football, baseball and golf require substantial skill, training and finesse, yet the result of each game turns in part upon luck or chance.

*Electro-Sport, supra*, 297 Pa. at 60, 443 A.2d at 298. We are thus left with the task of determining in each case the relative amounts of skill and chance present in the play of each machine and the extent to which skill or chance determines the outcome. “in short, a large random element is always present.” *Id.*

465 A.2d at 977. In the draw poker game, both the initial deal and the cards that the player could draw were determined solely by chance. Accordingly, while the court acknowledged some degree of skill was present, it concluded that chance predominated. Due to the player's inability to control the cards dealt, “skill can improve the outcome . . . it cannot determine it.” *Id.* At 978.

In *Commonwealth v. Dent*, 992 A.2d 190 (Pa. Super. 2010), the Superior Court held that live Texas Draw Poker constituted illegal gambling. In addition to relying on *Commonwealth v. Two Electronic Poker Game Machines*, the Court quoted extensively with approval from a decision of the North Carolina Court of Appeals:

[W]hile all games have elements of chance, games which can be determined by superior skill are not games of chance. For example, bowling, chess, and billiards are games of skill because skill determines the outcome. The game itself is static and the only factor separating the players is their relative skill levels. In short, the instrumentality for victory is in each player's hands and his fortunes will be determined by how skillfully he use (sic) that instrumentality.

Poker, however, presents players with different hands, making the players unequal in the same game and subject to defeat at the turn of a card. Although skills such as knowledge of human psychology, bluffing, and the ability to analyze odds make it more likely for skilled players to defeat novices, novices may yet prevail with a simple run of luck. No amount of skill can change a deuce into an ace. Thus, the instrumentality for victory is not entirely in the player's hand. . . . In golf, as in bowling or billiards, the players are presented with an equal challenge, with each determining his fortune by his own skill. Although chance inevitably intervenes, it is not inherent in the game and does not overcome skill, and the player maintains the opportunity to defeat chance with superior skill. Whereas in poker, a skilled player may give himself a statistical advantage but is always subject to defeat at the turn of a card, an instrumentality beyond his control. We think that is a critical difference.

*Commonwealth v. Dent*, 992 A.2d at 196, *quoting Joker Club, L.L.C. v. Hardin*, 183 N.C. App. 92, 643 S.E.2d 626 (2007).

By contrast, in the Device's Tic-Tac-Toe game, chance determines the set-up of the initial grid. At that point, however, the outcome is entirely in the player's hand. Unlike poker, where the initial deal is largely determinative of the player's winning odds and where additional draws create an additional random element that is not in the player's control, in "Ate-Up," once the player places the "Wild" symbol, there are no additional spins of the reels, uncontrolled by the player, that can change the outcome. Thus, there is no further element of chance present, no additional random action by the Device that determines or even influences the outcome. Whether the player will win is determined solely by the player's ability to select a winning location in which to place the "Wild" symbol. How much the player will win depends upon the player's ability to determine the most advantageous spot in which to place the "Wild" symbol, at least on those boards in which it is possible to complete more than one line. If the player picks the right location, there is nothing the Device can do to deprive the player of a win, unlike poker, where no matter how skilled the player is, the Device can still draw better cards, which is purely a matter of chance.

ii. Ate-Up Bonus Session. As described, skill has to be used to solve the "Tic-Tac-Toe" puzzle and thus provide access to the bonus session. The post "Tic-Tac-Toe" bonus screen can consist of either skill-based gameplay (*e.g.*, the shooting or picture-taking game) or simply be an entertaining method of delivering a prize earned through skillful play in the Tic-Tac-Toe phase (*e.g.*, the non-skill interaction in the "Pirates" game). Thus, "Ate-Up" and its bonus session either require the application of skill in both phases (for older themes) or a single application of skill in the Tic-Tac-Toe phase (for newer themes). No aspect of the bonus session in any theme is chance-based. It should be noted that no additional consideration is required to enable the bonus session.

iii. Follow-Me. The “Follow-Me” dot-sequence game, appears clearly to be a game of skill. Success in this game is entirely dependent upon the ability of the player to memorize 25 increasingly complex sequences. While the sequences of dots may be randomly generated, success will be solely determined by the player’s application of memorization skill and speed.

#### **E. Conclusion**

For the foregoing reasons, it is our opinion that “Tic-Tac-Toe” phase of the “Ate-Up” game and “Follow Me” game on the Device likely constitute games in which skill predominates over chance. The “Ate-Up” bonus session is either skill-based or merely a method of delivering reward earned in the skill-based “Tic-Tac-Toe” phase in an entertaining way. Accordingly, in our opinion, the Device should not be considered an illegal gambling device that would be subject to seizure and criminal penalty under Pennsylvania law.

The analysis and conclusions in this letter are rendered on the date hereof and we have no continuing obligation hereunder to inform you of changes of law or fact subsequent to the date hereof or facts of which we have become aware after the date hereof. This letter is furnished to you only in connection with your current inquiry concerning the *Pennsylvania Skill*™ Amusement Device on behalf of POM. This letter may not be used, quoted from or relied upon by any person or entity other than POM without our prior written consent.

Sincerely,

Kleinbard LLC  
Matthew H. Haverstick, Esq., Partner